10 February 2025

Environment Committee

By email: en@parliament.govt.nz

Submission of New Zealand Sport Fishing Council and LegaSea on the Resource Management (Consenting and Other System Changes) Amendment Bill

The submitters

1. The New Zealand Sport Fishing Council (**NZSFC**) and LegaSea (Collectively "**the Submitters**") appreciate the opportunity to submit on the Resource Management (Consenting and Other System Changes) Amendment Bill (**Bill**)

2. The NZSFC is a national sports organisation with over 37,000 affiliated members from 55 clubs nationwide. NZSFC supports the 750,000 New Zealanders that fish. A key role is to advocate for responsible and sustainable management of our marine environment to ensure future generations can enjoy the unique resource we have. The NZSFC conducts education programmes, commissions and funds fisheries research projects, and participates in fisheries management processes. Further information about NZSFC can be found on its website: https://www.nzsportfishing.co.nz/

3. LegaSea is a not for profit organisation established by the NZSFC in 2012. LegaSea's core roles are to elevate public awareness of the issues affecting our marine environment and to inspire public support to effect positive change. Further information about LegaSea can be found on its website: www.legasea.co.nz

Summary of submission

4. This submission concerns the extent to which the Bill proposes to continue to regulate under the Resource Management Act 1991 (**RMA**) fisheries resources controlled under the Fisheries Act 1996 (**FA**). In summary:

    a. The Bill proposes to amend elements of the way in which the RMA regulates fisheries, but fundamentally retains the overlapping jurisdiction with the FA. The Submitters say the Bill needs to go further and create a bright line between the RMA and the FA; removing entirely the regulatory duplication and overlap;

b. Alternatively, if the Committee decides to retain the overlap between the RMA and FA, then the Submitters say that providing only for regional councils to make proposals in this space, and removing rights for submitters to initiate proposals, is inequitable and should be removed from the Bill. The Submitters also comment on other elements of the detailed drafting.

5. This submission now addresses in detail the reasons for the opposition to the regulatory overlap, and the alternative relief sought if the regulatory overlap is retained.

Reasons for opposition to regulatory overlap

6. The Bill's explanatory text states that: *"The Bill clarifies the interface between the RMA and the Fisheries Act 1996, to balance marine protection with fishing rights."* However, the Bill fails to provide real clarity at the interface as it essentially preserves the *Motiti* precedent and associated regulatory overlap.

7. In *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors* [2019] NZCA 532, the Court of Appeal found regional councils have jurisdiction to control fisheries resources, provided that they do not do so for Fisheries Act purposes, which would contravene s 30(2) RMA[1].

8. The Court did not prescribe a test for determining when a RMA control on fisheries resources would contravene s 30(2) in any given factual setting. Instead, the Court endorsed the following "indicia" to provide objective guidance when assessing whether a given control is for a FA purpose:

a. *Necessity*: means whether the objective of the control is already being met through measures implemented under the FA;

b. *Type*: refers to the type of control. Controls that set catch limits or allocate fisheries resources among fishing sectors or establish sustainability measures for fish stocks would likely amount to fisheries management;

c. *Scope*: a control aimed at indigenous biodiversity is likely not to discriminate among forms or species;

d. *Scale*: the larger the scale of the control the more likely it is to amount to fisheries management; and

e. *Location*: the more specific the location and the more significant its biodiversity values, the less likely it is that a control will contravene s 30(2).

9. These "indicia" result in a substantial uncertainty as to when a RMA control on fishing will be lawful. This uncertainty is not remedied by the Bill, which continues to preserve this subjective case law test.

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[1] S 30(2) RMA: "A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996."

10. Moreover, the approach of regulating fisheries under the RMA fails to properly address the causes of the effects which it seeks to address i.e. the RMA is not a suitable tool to remedy the effects of overfishing. This point is illustrated by considering the factual backdrop to the *Motiti* decision and the subsequent findings of the High Court in relation to ministerial decision making concerning the crayfish stocks.

11. The Court of Appeal's decision in *Motiti* recorded:[2]

> ***There is undisputed evidence that overfishing of snapper and crayfish****, in particular, has allowed kina to flourish and destroy kelp forests that nurture other species, leaving near-monocultures that are known as kina barrens. [emphasis added]*

12. The ultimate outcomes in *Motiti* was a prohibition on fishing around particular reef systems. However, this does little to address the root cause. Effects on marine indigenous biodiversity are being caused by excessive extraction of fish biomass, which illustrates a failure to properly interpret and apply the FA and adhere to its *environmental bottom lines*.

13. This was subsequently confirmed by the High Court in *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969. The Court found that:

    a. The FA contains *mandatory environmental bottom lines* in its purpose of "ensuring sustainability" and in its "environmental principles";[3]

    b. The FA is to be interpreted and applied in a manner consistent with New Zealand's international law obligations relating to fishing, which imports both an "ecosystem approach" and a "precautionary approach"; and

    c. The Minister for Oceans and Fisheries had been misadvised by Fisheries New Zealand as to the best available information concerning the causes of kina barrens in the north-east of New Zealand and accordingly his decisions on the Total Allowable Catch ("**TAC**") for the CRA1 fishery did not comply with the mandatory environmental principles and were unlawful.

14. The significance of the High Court's decision cannot be overstated; it represents a paradigm shift in application of the FA. Adverse environmental effects of fishing activities on biodiversity can no longer be balanced or traded off against utilisation objectives; the FA contains environmental bottom lines for the maintenance of the biological diversity of the aquatic environment.

15. The undisputed evidence of overfishing in the *Motiti* decision can therefore only be seen as a failure in the application of the FA. The solution must lie with the Ministry for Primary Industries/Fisheries New Zealand changing its practices and the Minister for Oceans and Fisheries setting catch limits in a way that adheres to the environmental bottom lines in the FA and ensures abundance and diversity in the

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2 At para [5].

3 *The Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969, paragraphs [11], [108], [117].

marine environment. Any other solution (e.g. attempted regulation under the RMA) is misdirected. The Minister for Oceans and Fisheries is statutorily obliged, when making a TAC decision, to take into account the effects of fishing on both a fish stock and the aquatic environment. The High Court clarified 'effect' as meaning "the direct or indirect effect of fishing, including any positive, adverse, temporary, permanent, past, present, future and/or cumulative effect"[4] i.e. including Kina Barrens and similar ecosystem effects.

16. In this context, the essence of this submission is that:

    a. Management of fisheries resources and the effects of fishing should be the domain of the FA, given that this is the act which is regulating how much biomass is removed from the marine environment and by what methods. Area closures under resource management legislation are a band aid solution that does not address the root cause of the problem. In any event, area closures are available under sustainability provisions in the FA and have added benefit of being a more flexible and nimble tool (as compared to a rule in a regional plan).

    b. If, in practice, management of fisheries resources under the FA is not meeting the environmental bottom line of maintaining indigenous biodiversity, the remedy lies with institutional and/or legislative reform to ensure proper application and implementation of the FA.

    c. Regional councils lack the competency and capacity to administer fishing controls or the full effects of fishing. Such a role for regional councils is likely to prove inefficient or administratively unworkable. Regional councils are already struggling with the task of managing land-based pollution of the marine environment and should stick to this task which is their core business.

    d. *Ad hoc* marine protection under the RMA and the Bill is not a strategic or appropriate approach to creating a network of Marine Protected Areas (**MPA**) to protect examples of our rare, outstanding, and different marine habitats and ecosystems. That is a function of the Marine Reserves Act 1971 and Minister of Conservation. A strategic approach at a national level is required to achieve this.

    e. Because *Motiti* did not prescribe a certain test between the RMA or FA, practical application of this overlapping jurisdiction is already creating considerable complexity and cost. Now is the prime opportunity to revisit this issue through the Bill and draw a 'bright line' with the jurisdiction of the FA.

17. The submitters relief could probably be achieved by a simple amendment to section 30(2) RMA:

> "A regional council and the Minister of Conservation must not perform the functions specified in subsection (1)(d)(i), (ii), and (vii) to control the taking, allocation or enhancement of fisheries resources ~~for the purpose of managing fishing or fisheries resources~~ controlled under the Fisheries Act 1996."

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[4] At para [22]

18. This amendment makes it clear that the regional councils cannot control the taking, allocation or enhancement of fisheries resources controlled under the FA for *any purpose.*

Alternative relief

19. If, despite the above, the Committee decides to retain the *Motiti* precedent, then the submitters seek changes to the relevant clauses of the Bill as explained below.

Remove unjustified limitations on submissions and requirement for Director-General concurrence

20. Under new section 71(2) proposed by the Bill, a regional council must not include a rule that controls fishing in a regional coastal plan unless:

    a. the rule is in the plan when it is notified; or

    b. the rule applies within the same area as the rule that was notified.

21. New clause 4B proposed by the Bill prescribes requirements that apply to a regional council before it notifies a rule that controls fishing. The council must:

    a. complete an assessment required by new section 32(2A) (inserted by clause 8) of the impacts of the proposed rule on fishing and give it to the Director-General of the Ministry for Primary Industries; and

    b. not notify the rule until the Director-General concurs with the assessment after being satisfied of the matters set out in new clause 4B(2).

22. New clause 6B limits the kinds of submissions that may be made on a rule that controls fishing.

23. The collective effect of these provisions is to create a situation where only regional councils can propose controls under the RMA in their plans, and only once agreement has been given by the Director-General of the Ministry for Primary Industries. This is a **significant curtailment** of standard rights of submission which are afforded to people under the RMA in relation to planning documents. Such a limitation is not imposed in relation to any other type of resource, and is an unjustified limitation on democratic rights. The requirement for the Director-General's agreement before any rule on fishing in a regional plan can be notified appears to be a thinly veiled measure to protect commercial fishing interests.

Prohibited / Permitted dichotomy

24. Under new section 71(4) proposed by the Bill, a rule that controls fishing in a regional plan:

    a. must not classify fishing as a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity:

    b. may classify fishing as a prohibited activity in an area:

c. may classify fishing as a permitted activity in an area only if it is an exception to a rule that classifies fishing as a prohibited activity in the area.

25. The submitters do not support this binary permitted / prohibited activity approach. No clear rationale has been proposed for excluding the possibility of a being able to seek a resource consent to undertaking fishing activities in certain areas (rather than outright prohibition.

Conclusion

26. The Submitters maintain their overarching position that the Bill should create a bright line between the RMA and the FA; removing entirely the regulatory duplication and overlap.

27. The Submitters wish to be heard in support of this submission.

ENDS