MPI Discussion Paper No: 2017/04

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Legal Issues

1 There is a second set of comments addressing the questions put in the MPI Discussion Paper No. 2017/04. These comments, which replace the first comments forwarded earlier), address legal issues.

2 These issues are first, whether the Resource Management Act 1991 (RMA) enables regulations directing changes to the zoning and classes of activities in the Marlborough Sounds Resource Management Plan (MSRMP) ; second whether it enables regulations prohibiting marine farms and how far such a prohibition might extend; and third whether the Maori Commercial Aquaculture Settlement Act 2004 (MCASA) is being correctly interpreted.

Zoning change by regulation

3 One option put forward in the Discussion Paper is for the Crown to make regulations under s.360A RMA to create a new zone for salmon farms. In relation to this the draft regulation proposes to amend the Marlborough Sounds Resource Management Plan by:

- Identifying areas or zones to be collectively called CMZ4;
- Specifying, in terms of s.77A RMA, marine farms and marine farming of salmon as classes of activities to take place in those zones;
- Allowing activities that would otherwise be prohibited (by s.12 RMA); and
- Incorporating an allocation requirement.

4 The changes described in the first and second bullet points, do not fall within the scope of s.360A RMA as they do not relate to the management of aquacultural activities for the reasons following. If that proves to be the case, any other amendment is otiose, at least until there is a purpose and area to which it attaches.

5 Section 360A(1) empowers the Governor General, by Order in Council, to amend provisions in a Regional Coastal Plan "...that relate to the management of **aquacultural activities** in the coastal management area".

“Aquacultural activity” is defined in s.2 RMA as

> ...any activity described in s.12 for the purpose of the breeding, hatching, cultivating, rearing or ongrowing of fish, aquatic life,or seaweed for harvest if the breeding, hatching, cultivating, or rearing, or ongrowing involves the occupation of a coastal marine area;

Thus there must be an activity, for a purpose, in a place.

6 Section 12(1) describes the various activities as follows;

> **Restrictions on use of coastal marine area**
> (1) No person may, in the coastal marine area,—
> (a) reclaim or drain any foreshore or seabed; or
> (b) erect, reconstruct, place, alter, extend, remove, or demolish any structure or any part of a structure that is fixed in, on, under, or over any foreshore or seabed; or
> (c) disturb any foreshore or seabed (including by excavating, drilling, or tunneling) in a manner that has or is likely to have an adverse effect on the foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal); or
> (d) deposit in, on, or under any foreshore or seabed any substance in a manner that has or is likely to have an adverse effect on the foreshore or seabed; or
> (e) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on plants or animals or their habitat; or
> (f) introduce or plant any exotic or introduced plant in, on, or under the foreshore or seabed; or
> (g) destroy, damage, or disturb any foreshore or seabed (other than for the purpose of lawfully harvesting any plant or animal) in a manner that has or is likely to have an adverse effect on historic heritage—
> unless expressly allowed by a national environmental standard, a rule in a regional coastal plan as well as a rule in a proposed regional coastal plan for the same region (if there is one), or a resource consent.

7 None of the activities described in that sub-section embraces zoning (location) or the specifying of the class of activities (purpose) that may take place in a zone. Consequently s.12(1) does not bring those matters within the scope of the definition of aquacultural activities and accordingly they cannot be the subject of amending regulations.

(A contrary view might be that what is proposed could be described as permitting the (say) erection of a marine farm for a limited purpose (salmon farming) within a limited area and that would achieve the same result. However it would create neither a class of activity nor a zone. The existing zoning (CMZ1) would remain unchanged and there would still be neither purpose nor location in the MSRMP to which the activity could attach.)

8 Section 12(2) prohibits any person from occupying the common marine or coastal area without authorisation. While that provision may enable amendment by regulation to provide allocation rules, occupation that does not relate to an allowed activity is pointless.

9 Section 12(3) likewise does not help. This subsection provides;

> Without limiting subsection (1), no person may carry out any activity—
> (a) in, on, under, or over any coastal marine area; or
> (b) ....
> **in a manner** that contravenes a national environmental standard, a rule in a regional coastal plan, or a rule in a proposed regional coastal plan for the same region (if there is one) unless the activity is expressly allowed by a resource consent or allowed by section 20A (certain existing lawful activities allowed).

Section 12(3) does not prohibit or restrict "any activity"; it simply restricts the manner in which the activity may be conducted. As the activity itself is not restricted it falls outside section 12 and therefore beyond the scope of amendment by section 360A.

10 For completion, the interpretation section of the RMA opens with the words "In this Act, unless the context otherwise requires...". The context does not "otherwise require". There is no ambiguity in the words used; the limited application of the section is consistent with the subordinate nature of regulations; and if Parliament had intended a wider sphere of application for regulations it could easily have made that intention clear by, for example, omitting the word "activities" and using "enabling " instead of "managing " in s.360A. Furthermore the definition of "aquacultural activity" was amended, and s.360A inserted, by Resource Management Act (No 2) 2011 which points to there already being a common context. A wider interpretation would enable the transfer of significant powers from the local authority and community to the regulator - far more so than is generally the case with subordinate legislation - and this outcome requires a much clearer expression of such an intent than is found in s.360A.

11 So on the basis of statutory interpretation alone there is a problem - and not even the fullest compliance with s. 360B will mend it.

12 On a more general note the Resource Management Act 1991 provides for a system of decentralised decision-making. Working down through a frame- work of general policy, the formulation and implementation of plans devolves increasingly upon those most affected by them - and they are, of course, the communities within the bounds of those plans. In general, it is not for a Minister of the Crown to tell the local authority what to do. He may request but not require. Certainly there is power to make regulations, but the exercise of such power is to assist the purpose of the Act. To use it as the Discussion Paper suggests, and bypass important procedural

processes and protections on the way, is fundamentally inconsistent with that purpose.

Banning marine farms by regulation

13 The draft regulation proposes to include marine farms in the list of prohibited activities in 35.6 of the MSRMP on sites where consents have been surrendered in exchange for a resource consent in one of the newly created zones. A power to regulate is not usually construed to permit the prohibition of the very activity that is to be regulated. Nor is it an activity described in s.12(1) RMA.

14 There is also a practical issue I will be addressing in my second comments but which is also relevant here. The salmon farm in Waihinau Bay is currently fallow and the site has been used to assemble salmon farms that are then towed round to the more exposed sites (consented in 2012) in Waitata Reach. I do not know whether or not such off-site construction activity will fall within the proposed prohibition. That will depend on whether the off-site construction (and maintenance) of a farm is within the definition of "aquacultural activity"; or whether it is seen as a servicing operation that is a step removed. If the latter, there is a possibility this activity may be continued although a new resource consent would be needed (probably for a restricted discretionary activity in CMZ2 - so not too difficult to get). Should such activity continue in Waihinau Bay it would largely negate much of the benefit from any surrender of the current resource consent. Without certainty it is sensible to assume the worst.

Marine farms in CMZ4

15 The proposed amendment includes marine farms (other than salmon farms) as a class of activity in CMZ4 (Discussion Paper p.77 35.3.3). The case for this has not been put and is beyond the scope of the Discussion Paper. Activities within the proposed CMZ4 should be limited to salmon farming.

Maori Commercial Aquaculture Settlement Act 2004

16 I see from the Regulatory report and Cabinet documents that issues arising under the MCASA are being addressed. Just what is happening is a bit obscure because of all the redactions. What has piqued my interest is the reference both in the Regulatory and Cabinet Documents as well as p.6 of the Discussion Paper to the need to ensure there is no overall increase in the total surface structure area used for salmon farming. The area for which resource consent is granted in the

new zones must be matched by the surrender of resource consents for existing farms of like area. There is no explanation for this. It may be as simple as seeking to maintain a balance or to ring-fence how far the Government is prepared to assist. But the other possibility is that there is a belief that it will prevent a claim arising under the MCASA. It will not.

17 As I read the Act, a claim arises when “new space”, ie, space that first becomes subject to a coastal permit for aquacultural activity, is created (s.9). There is no set-off for space that ceases to be subject to a coastal permit.

18 I am sure my fear is groundless but thought I should raise the matter because otherwise the cost to Government could be seriously understated.

Tony Black
12 April 2017