

The Chair  
Cabinet Finance, Infrastructure and Environment Committee

## **AQUACULTURE REFORMS**

### **PAPER C: RECOGNITION OF EXISTING FISHERIES RIGHTS HOLDERS**

#### **Proposal**

1. This paper seeks the Committee's agreement to retain in fisheries legislation the existing undue adverse effect on fishing test. This test recognises the potential impact of aquaculture development on fisheries rights holders by ensuring that aquaculture development does not have an undue adverse effect on fishing. Where there are undue adverse effects on commercial fisheries, the paper considers two options. Retaining the status quo – where there is no express provision in law for commercial agreements and therefore development is precluded – or providing an alternative option which would allow development where agreement can be reached between aquaculture interests and commercial fisheries rights holders to address undue adverse effects.

#### **Executive Summary**

2. There has always been legislative recognition of the potential impact that aquaculture development can have on existing fisheries rights holders. This is reflected in the existing requirement under the Fisheries Act 1983 (FA83) that marine farming cannot proceed where it would have an undue adverse effect on fishing or the sustainability of any fisheries resource. To date there have been few instances of marine farm developments being declined because of the impact on fishing. Of those finally declined to date, none have been due to impacts on commercial fishing. However, the impact of aquaculture development on existing fishing rights holders is likely to rise as the cumulative effects of aquaculture development increase over time.
3. Failure to legislatively recognise legitimate rights holders under the aquaculture reforms would undermine the rights based fisheries management framework. This would not only have significant economic and environmental implications but could also create a Treaty grievance given the obligations in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Settlement Act). As noted in Paper A "Overview of the Proposed Aquaculture Reforms", any consideration of amendment to the existing recognition of use rights and the balance between different rights holders in the coastal marine area should be addressed as part of the wider Oceans Policy review that was initiated in June last year.
4. It is proposed under the general reforms that the planning process under the Resource Management Act 1991 (RMA) be the sole mechanism to approve aquaculture development. The RMA will be amended to require planning authorities to consider all effects of aquaculture

including impacts upon fishing and fisheries resources. The revised planning process under the RMA will encourage councils to locate an Aquaculture Management Area (AMA) in the area of maximum net benefit from aquaculture, based on its suitability for aquaculture and also recognising the negative effects on other users (including fishers). It is anticipated that this will minimise circumstances where aquaculture development is proposed in areas that would have an undue adverse effect on fishing.

5. However, on the occasions where concerns are raised about undue adverse effects on fishing following the identification of an AMA through the planning process, it is proposed that the Ministry of Fisheries (MFish) would undertake an assessment on undue adverse effects under the Fisheries Act 1996 (FA96). On the assumption that the test is to continue to apply, the alternative to having the undue adverse effects test under fisheries legislation is to include it under the RMA for assessment by the relevant planning authority. However, the nature of the RMA does not lend itself easily to inclusion of such a test within the planning framework. The RMA considers environmental effects and balances impacts of development on other users. The inclusion of specific protection for a particular right holding group is seen as being inconsistent with its current purpose. Where RMA decisions on net benefit impact unduly on individuals (for example, when a motorway development affects homes) the issues of remedying undue adverse effects are dealt with to one side of the RMA. Including the undue adverse effects test within fisheries legislation also addresses concerns expressed by Maori regarding the Crown retaining a role in ensuring the planning process is meeting the Crown's obligations to Maori under the Settlement Act.
6. If MFish deem a proposal has an undue adverse effect on recreational or customary fishing, the AMA would not be able to be used in its current form until these impacts had been mitigated. This is consistent with what happens currently. However, in relation to undue adverse effects upon commercial fishing, two options are recommended for consideration.
7. Option 1 [**supported by DoC**] retains the status quo whereby if an assessment states that aquaculture development in any area would have an undue adverse effect on commercial fishing then the aquaculture development would not proceed. Option 2 [**supported by Ministry for the Environment, the Ministry of Maori Development, MFish and The Treasury**] adds an additional legislative element whereby development could proceed in any area where there is an undue adverse effect on commercial fishing if aquaculture interests can negotiate with all unduly adversely affected commercial fisheries rights holders to obtain voluntary agreement to any development.
8. The advantage of Option 1 is that it retains the status quo and thereby addresses a DoC concern that specifically providing for agreements with individual fishers to address undue adverse effects on fishing (as provided for under Option 2) will strengthen quota rights and change the existing balance between rights and interests in the coastal marine area. The departments that support Option 2 consider that a disadvantage of Option 1 is that it will unnecessarily restrict aquaculture development. DoC considers that Option 1 will not restrict development as councils would be unlikely to locate an aquaculture management zone in an area where there is an undue adverse effect on fishing that would necessitate a voluntary agreement mechanism.
9. The primary advantage of Option 2 is that it provides a mechanism to allow aquaculture interests and unduly adversely affected commercial fishers to reach agreement to mitigate undue adverse effects and allow aquaculture to proceed without any involvement by the Crown. The departments that support Option 2 do not believe that providing for such trade-offs to occur in legislation would alter the existing recognition of use rights and the balance between different rights holders in the coastal marine area. A disadvantage of Option 2 is that there is potential for fisheries rights holders to display rent seeking behaviour or for a small number of

commercial fishers to restrict development. It may also be difficult for aquaculture interests to obtain the agreement of all unduly affected fisheries rights holders.

## **Background**

10. Background on the development of proposals contained in this paper is provided in Paper A: “Overview of the Proposed Aquaculture Reforms”.

## **Comment**

### *Problems associated with Interaction between aquaculture development and wild fisheries*

11. From the early stages of aquaculture development there has been recognition that the establishment of marine farms has the potential to have significant impacts upon existing fisheries resource users. Therefore, legislation governing aquaculture has included mechanisms to recognise and deal with these impacts.
12. The first comprehensive legislation governing the development of marine-based aquaculture in New Zealand was the Marine Farming Act 1971 (MFA). That legislation provided for aquaculture to be established in circumstances where, amongst other things, it did not interfere unduly with commercial fishing or recreational use of the sea. With the enactment of the RMA, new marine-based aquaculture requires a coastal permit issued under that Act, and a marine farm permit issued under the FA83, as amended in 1992. In issuing a marine farm permit the chief executive must be satisfied that, amongst other things, the activity will not have an undue adverse effect on fishing or the sustainability of any fisheries resource. If a proposed venture would exceed this limit, it cannot be authorised.
13. To date, there have been few instances of marine farm developments being declined because of the impact on fishing activity. However, the effect of aquaculture development on fishing will rise as the cumulative effects of aquaculture development increase over time. Managing the impacts of marine-based aquaculture on fishing under the current arrangements is already becoming increasingly resource intensive for local government, central government, applicants, fisheries stakeholders and other objectors as applications move closer to breaching limits. This is particularly the case around the top of the South Island. The processing of applications now routinely involves modification of the initial proposal within the permitting process, and detailed and extensive conditions being added to authorisations to address concerns.
14. Fishing interests are concerned to ensure that their rights continue to be appropriately recognised under any proposed reforms. Marine farming interests on the other hand have questioned the validity of retaining the existing specific recognition provided to fisheries rights holders in the coastal marine area (i.e. the existing undue adverse effects on fishing test). Marine farming interests consider that the current recognition provided to fishing interests unnecessarily restricts aquaculture development in the coastal marine area when such development could provide a greater return to the economy than wild fisheries.
15. Currently there is no clear process to allow trade-offs to occur between aquaculture developers and commercial fishing interests if planned development is deemed to have an undue adverse effect on commercial fishing.

### *Recognition of fisheries rights holders*

16. Any change to legislation that affects the operation of the existing undue adverse effect on fishing test (s67J of the FA83) has the potential for significant impacts on fisheries management. Removing the existing legislative recognition provided to existing fisheries rights holders has significant Treaty, economic and environmental implications. The need to recognise undue adverse effects on fisheries rights holders is recognised even in statutes that deal with removal of coastal space for the public good.

17. As noted in Paper A “Overview of the Proposed Aquaculture Reforms”, one of the primary constraints for the aquaculture reform process was that the reforms should not place the 1992 settlement with Maori and commercial fisheries claims at risk by creating a new grievance. Neither should the reform undermine the management regime that government has established for fisheries which is based on a system of individual fishing rights. The undue adverse effect on fishing test is a primary safeguard in this area. Any consideration of amendment to the existing balance between different rights holders in the coastal marine area should be addressed as part of the wider Oceans Policy review that was initiated in June last year.
18. We therefore propose that the existing legislative recognition of the potential undue adverse effects of aquaculture development on fishing, should be preserved. This is important if the integrity and benefits of the fisheries management frameworks are to be maintained. What is required in this aquaculture reform process is an efficient, effective, and fair process to deal with the existing recognition of the potential undue adverse effects on fishing from aquaculture development. Aligned with this objective is the desire to provide a clearer process for trade-offs to occur in circumstances where aquaculture development would otherwise have an undue adverse effect on commercial fishing.
19. In line with the intent to streamline most decisions for aquaculture approvals into one coastal permit process under the RMA, we propose to repeal the requirement for marine farms to obtain a marine farming permit under the FA83. In future, marine farms will only be required to be registered under the FA96 (see Paper D: “Improving the Fisheries Compliance Regime for Aquaculture”). The RMA will be amended to expand the role of regional councils to require consideration of the effect of aquaculture development on fishing and fisheries resources.
20. The new regional council responsibilities will require increased input from MFish and fishers early in the planning process to ensure councils are fully informed of impacts of aquaculture development on both fisheries and the aquatic environment. The new process should reduce the potential for aquaculture to be established directly over the most productive areas for fishing. However, unless there is a specific legislative test, as currently exists under the marine farm permit process pursuant to the FA83, there is still potential for councils to propose development in areas that would have an undue adverse effect on fishing. With the proposed removal of the marine farm permit requirement, there are two options for addressing such effects. Either the legislative test could be included within the RMA and considered by councils as part of the general planning process or the test could remain under fisheries legislation and any assessment undertaken by MFish folded into the planning processes under the RMA.
21. We propose that the undue adverse effects on fishing test should remain under fisheries legislation and be folded into the RMA planning process. The nature of the RMA does not lend itself easily to the inclusion of a specific undue adverse effects test within the planning framework. The RMA considers environmental effects and balances impacts of development on other users. The inclusion of specific protection for a particular group within the RMA is inconsistent with its current purpose. It is preferable to put any specific protection for fisheries rights holders under fisheries legislation. Having the undue adverse effects test within fisheries legislation also addresses Maori concerns regarding the Crown retaining a role in ensuring the planning process adequately addresses Crown obligations under the Settlement Act. The disadvantage of this option is that MFish’s role in assessing whether there are undue adverse effects on fishing could still be considered to provide a dual process. However, ensuring that any assessment is actually part of the planning process of the AMA and is recognised as such under the RMA would mitigate this.
22. Therefore, the proposed process is that the regional council could recommend aquaculture development for any area that was suitable for aquaculture and best mitigated effects on other interests. If fisheries rights holders had concerns that the aquaculture development would have

an undue adverse effect on fishing, then the proposal would be submitted to MFish for an evaluation. The intent would be to largely rely upon the RMA submissions provided on the initial proposed AMA but further specific fisheries rights holder submissions may be required. Submissions would need to set out the grounds for concern and the rationale for the extent of the impact. MFish, through a process set up under the FA96, would assess the actual effects. No further assessment would be done unless the AMA was significantly altered and further concerns were raised regarding the impacts of such changes.

23. While the process outlined above is the initial thinking in this area, it is important that this process runs as efficiently as possible and minimises any duplication of effort. Officials will continue to work through the drafting process to try and ensure that the undue adverse effects test is coordinated with the proposed RMA process in the most efficient and effective manner. This will include trying to ensure that advice on undue adverse effects is provided to regional councils at the earliest possible stage to allow councils to make informed decisions early in the AMA development process and also include consideration of possible time limits to ensure timely provision of advice.

#### *Trade-offs between aquaculture interests and commercial fishing rights holders*

24. If MFish assess that the establishment of an AMA, or part thereof, has an undue adverse effect on recreational or customary fishing then the relevant area would need to be removed from the AMA. This is consistent with the current situation. This means that undue adverse effects on customary or recreational fishing would restrict aquaculture development. With customary and recreational fishing interests there is no common currency or market that would allow trade-offs to occur between aquaculture interests and customary or recreational fishing interests to redress undue adverse effects of development. However, there is the potential for trade-offs to occur or agreements to be reached between aquaculture interests and commercial fisheries rights holders.
25. Excluding commercial fishing from an area to allow commercial aquaculture development is essentially an allocative issue between different commercial interests. In circumstances where there is an undue adverse effect on commercial fishing, the intent would be to provide a process to promote trade-offs to occur between these two competing interests with minimal Crown involvement. The objectives of any trade-off would be to minimise barriers to agreement, minimise bureaucratic processes, provide for allocative efficiency, minimise transaction costs and make no change to consideration of undue adverse effects on fishing.
26. We believe the only trade-off mechanism that would meet these objectives is to rely upon voluntary arrangements to be reached between aquaculture interests and all unduly adversely affected commercial fisheries rights holders in situations where there is an undue adverse effect on commercial fishing. However, departments currently have different views on whether such voluntary agreements or trade-offs should be explicitly provided for under legislation. The two primary options are considered in more detail below.

#### **OPTION 1 – AQUACULTURE DEVELOPMENT PRECLUDED WITH NO LEGISLATIVE PROVISION FOR VOLUNTARY AGREEMENTS (STATUS QUO) [Supported by the Department of Conservation]**

27. Under Option 1, where MFish has assessed an undue adverse effect on commercial fishing, there would be no express provision in law for voluntary agreements to be reached. The Council would be required to remove the relevant area from any proposed AMA before the area is finalised and before any tender process to allocate the right to apply for a relevant coastal consent is initiated.
28. This would mean that development would not occur in circumstances where there is an undue adverse effect on commercial fishing. Alternatively, however, it is possible for individual aquaculture interests to reach voluntary agreement with commercial fishing interests early in

the AMA planning process to ensure that commercial fishers did not raise objections to the proposed AMA on the basis of undue adverse effects on commercial fishing. No specific legislative process or recognition is needed for such agreements. They are understood to already happen between other activities like cable layers and fishers. However, once an undue adverse effects assessment is completed, there would be no opportunity to change this assessment on the basis of any later agreement that may be reached between aquaculture interests and commercial fishing interests until the coastal plan is re-assessed at some time in the future. The departments that support Option 2 consider that it is unlikely that agreements would be reached early in the planning process to mitigate undue adverse effects under Option 1. This is because individual aquaculture interests that wish to develop a particular area would have difficulty establishing who to negotiate with and they would also have no incentive to negotiate any agreements. This is due to the fact that once a decision is made by the council to tender, any other developer could enter the process, irrespective of any previous voluntary agreement.

29. The rationale for Option 1 is linked to the need to retain the existing recognition of use rights and the balance between different rights holders in the coastal marine area. Any change to the current balance between different rights holders is to be considered as part of the wider Oceans Policy review. There are currently differing views between departments on whether explicitly providing in legislation for agreements to be reached between aquaculture interests and commercial fishing rights holders to mitigate an assessed undue adverse effect on commercial fishing could alter the existing balance between rights holders in the coastal marine area.
30. The proposal to provide in law for agreements to be reached between two separate commercial interests to resolve conflict in relation to public space (Option 2 discussed below) is new. DoC believe there is a risk this may shift the balance from a focus on undue adverse effects on *fishing generally* (the status quo) to a focus on the impacts on *individual ITQ holders*. Under the existing test, an impact on fishing generally may not be “undue” despite the fact that some individual fishers may be impacted significantly. However, DoC believe that the move to introduce commercial negotiations (likely to be compensatory payments in some cases) mean that every affected quota holder is likely to be compensated. They believe this enhances quota holder rights. The departments that support Option 2 note that individual fishers would only be able to reach agreement with aquaculture interests if MFish had already assessed an undue adverse effect on commercial fishing as a whole. Therefore, these departments believe that quota holders rights have not been enhanced by allowing for a voluntary agreement mechanism in this way.
31. Although this step in the process will be incorporated into fisheries legislation, it is being grafted on to RMA coastal plan process. DoC believe the public perception is likely to be that that coastal planning processes are put on hold while commercial transactions are conducted for access to the commons. DoC believe this will give property rights associated with commercial fisheries a strength of identity that will be more difficult to adjust at a later date.
32. Therefore, DOC recommends that, in the interim period while the Oceans policy is developed, the status quo be retained (retention of the undue adverse effect test in relation to commercial fishing but no formalisation of a step within the law to allow commercial transactions between parties). DoC does not consider this will restrict aquaculture development unduly in the meantime. The undue adverse effect test is a high one. They believe it is highly improbable that councils will locate marine farming in areas where such significant impacts on fishing would result.

OPTION 2 – PROVIDING FOR DEVELOPMENT WHERE VOLUNTARY AGREEMENT REACHED WITH ALL AFFECTED COMMERCIAL FISHERIES RIGHTS HOLDERS [**Supported by the Ministry for the Environment, the Ministry of Maori Development, MFish and The Treasury**]

33. Under Option 2, in situations where MFish has assessed an undue adverse effect on commercial fishing, legislation would provide that development would be precluded unless aquaculture interests and commercial fishing rights holders can reach agreement to address such effects. If a signed agreement involving all affected parties is provided then coastal permits can be considered and development can proceed.
34. In fisheries management under the quota management system (QMS), the intent is that aquaculture interests would need to gain agreement with quota owners rather than permit or holders of annual catch entitlements. This is because the only individuals who can concede long term access rights to a QMS fishery are those individuals that hold these rights in a fisheries context. However, for non-QMS fisheries, any agreement will need to be with permit holders as these are the primary rights holders prior to the movement of any stock into the QMS.
35. Under Option 2, the RMA tender process for the relevant area would be held after a reasonable time delay (i.e. six months). This delay would be to provide developers with the opportunity to try and reach agreement with commercial fisheries rights holders. It is important that a minimum tender value is set to ensure that the costs incurred by regional councils and the Crown during the application process can be offset through the tender process. This is because the potential costs of obtaining any agreement will affect the tender price. The resource consent application would only be considered following payment of tender monies and evidence of a signed agreement with those affected commercial fisheries rights holders identified through the MFish assessment process. A maximum time between the tender and uplifting the resource consent would be set to ensure that developers who are able to reach agreement with fishers are not restricted by higher tenders who are unable or unwilling to do the same.
36. Explicitly providing for negotiated agreements in legislation increases the opportunity for such agreements to occur. This is because the legislation will clearly identify that such voluntary arrangements are an acceptable option (and restrictions on development can be lifted accordingly). The process to identify undue adverse effects will also identify the fisheries rights holders from whom an aquaculture developer will need to gain agreement to address any undue adverse effect on fishing.
37. The departments that support Option 2 do not believe that providing legislative recognition of voluntary agreements between aquaculture interests and commercial fishers will change the existing recognition of use rights and the current balance between different rights holders in the coastal marine area. When looking at the undue adverse effect on fishing, MFish must already consider the impacts on individual rights holders. It is the cumulative effect of the impact upon individual rights holders that will decide whether there is an undue adverse effect on the fishery as a whole. Addressing the impacts upon all of the individuals will address the undue adverse effect on the fishery as a whole. The recognition of use rights and the balance between different rights holders in the coastal marine area is decided through the undue adverse effects test that occurs before any voluntary agreement is considered. The undue adverse effect on fishing test remains unchanged and therefore the balance of the rights remains unchanged.
38. However, there are implications for the operation of Option 2 that need to be acknowledged. In particular, this option provides a rent seeking opportunity for existing commercial fisheries rights holders. It would also mean that existing quota owners are in a favoured position when seeking sites that have an undue adverse effect on commercial fishing interests. Requiring 100% agreement from unduly affected commercial fisheries rights holders means that any individual quota holder could hold out against the collective interest of other quota holders.

This would potentially impede the national interest in getting the best value from use of coastal space. However, this option will facilitate the development of aquaculture in comparison to the status quo by providing a specific process to proceed despite an assessment of undue adverse effects. To try and mitigate these concerns, officials also explored the option of requiring agreement from only 75% of affected fisheries rights holders before allowing development to proceed with provisions to try and ensure minority interests were not unduly prejudiced. However, this option was not pursued due to the potential to create a Treaty grievance with Maori through compulsorily acquiring fishing rights of the minority albeit with the receipt of the same benefits negotiated by the majority in their agreement with aquaculture developers. The potential to appropriate quota provided in the Settlement raises wider issues about changing the way we currently recognise existing use rights in the coastal marine area. As previously noted, these types of issues need to be considered as part of the wider Oceans Policy review.

39. Therefore, the Ministry for the Environment, MFish, The Treasury, and the Ministry of Maori Development recommend that specific recognition should be provided in legislation to allow for development to proceed in circumstances where there are undue adverse effects on commercial fishing provided agreement has been reached with all unduly adversely affected commercial fishers.

### **Consultation**

40. The Ministry of Fisheries and the Ministry for the Environment have consulted with the Department of Conservation, Ministry of Justice, Ministry of Maori Development, Department of the Prime Minister and Cabinet, The State Services Commission, The Treasury, Ministry of Agriculture and Forestry, Ministry of Transport, Ministry of Economic Development, and the Department of Internal Affairs in the development of this paper. Comments have been incorporated into this paper.

### **Financial Implications**

41. The financial implications of the aquaculture reforms are contained in Paper A: “Overview of the Proposed Aquaculture Reforms.”

### **Human rights**

42. The proposals in this paper are not inconsistent with the Human Rights Act 1993. The proposals also appear to be consistent with the New Zealand Bill of Rights Act 1990.

### **Legislative implications**

43. The proposals in this paper would require legislative amendment to the RMA, the FA83, and the FA96. We propose that these amendments be included in a RMA (Aquaculture) Amendment Bill to be introduced into the House during 2002. An appropriate bid will be made for a legislative slot as part of the normal consideration of the 2002 legislative programme.

### **Regulatory impact and compliance cost statement**

44. A regulatory impact statement and business compliance cost statement (BCCS) is attached to the suite of Cabinet papers on the aquaculture reforms.
45. The BCCS notes that there are compliance costs associated with the processes outlined in this paper, but the reforms proposed should not lead to an increase in these costs.

### **Publicity**

46. Proposed publicity for the proposals outlined in this paper are provided in Paper A entitled “Overview of the Proposed Aquaculture Reforms”.

## Recommendations

47. It is recommended that the Committee:
1. agree to repeal the existing requirement for marine farmers to obtain a marine farming permit under the Fisheries Act 1983
  2. agree to retain the existing legislative requirement that aquaculture development should not have an undue adverse effect on fishing
  3. note that any consideration of changing the existing recognition of use rights and the relationships between different rights holders in the coastal marine area, including amendment to the existing undue adverse effects test, should be considered as part of the wider Oceans Policy review that was initiated in June last year
  4. agree that the undue adverse effects test should remain under fisheries legislation but the results of the assessment undertaken by the Ministry of Fisheries should also be incorporated into the planning processes under the Resource Management Act 1991
  5. note that officials will continue to work through the drafting process to try and ensure that the undue adverse effects test is coordinated with the proposed RMA process in the most efficient and effective manner
  6. agree that if aquaculture development has an undue adverse effect on customary or recreational fishing rights then development should not proceed
  7. note that departments have different views on whether providing legislative recognition of voluntary commercial agreements between marine farmers and fishers to mitigate undue adverse effects on commercial fishing would change the existing recognition of use rights and the balance between the different rights holders in the coastal marine area
  8. agree that, in circumstances where aquaculture development would have an undue adverse effect on commercial fishing, this should be addressed through

### **EITHER [Department of Conservation]**

- 8.1. Option 1 – Aquaculture development precluded with no legislative provisions for voluntary agreements (Status Quo)

### **OR [Ministry for the Environment, Ministry of Maori Development, Ministry of Fisheries, and The Treasury]**

- 8.2. Option 2 – Providing for development where voluntary agreement reached with all affected commercial fisheries rights holders

Hon Pete Hodgson  
Minister of Fisheries

Hon Marian L Hobbs  
Minister for the Environment

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