



LEGISLATION ADVISORY COMMITTEE

PO Box 180
Wellington 6401

Phone 04 494 9897

Fax 04 494 9859

www.justice.govt.nz/lac

Email sam.miles@justice.govt.nz

27 March 2013

Shane Ardern
Chair
Primary Production Committee
Parliament Buildings
WELLINGTON

Dear Mr Ardern

**FISHERIES (FOREIGN CHARTER VESSELS AND OTHER MATTERS)
AMENDMENT BILL**

1. The Legislation Advisory Committee (LAC) was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.
2. The terms of reference of the LAC include:
 - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;
 - to help improve the quality of law making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with LAC Guidelines, and discouraging the promotion of unnecessary legislation.

Introduction

3. The primary focus of this Bill is to require all vessels in the EEZ to be flagged as NZ ships so as to ensure appropriate standards of fisheries management, employment and vessel safety. As the RIS notes, the potential impact on owners of the new requirements is significant, stemming from the need for

operational changes and increased costs, possible decrease in the value of some quota and catching rights, and loss of vessels.

4. The concerns of LAC arise in relation to the new powers to suspend and cancel registration of all fishing vessels for breach of a condition of registration, which are a significant expansion of the Chief Executive's (CE) current authority. We query whether an appropriate balance has been struck between protection for those impacted by the new powers and effective executive decision making.
5. Our starting point in considering this issue within the best practice guidelines of LAC is "*Where a statutory power may significantly affect rights or interests, it is generally desirable for the statutory scheme to specify the protections that decision-makers must accord to those affected*" (para 13.6.1).
6. The relevant LAC Guidelines go on to summarise the relevant balancing exercise as follows:
In order to determine what, if any, procedural protections ought to apply to a given power, it is necessary to consider:
 - *the importance of the interests at stake;*
 - *the nature and expertise of the decision-maker;*
 - *the value of any given procedural protection to the particular decision; and*
 - *any constraints upon the decision-making process, such as limited resources, confidentiality or a need for rapid decisions.**On this basis, statutory provisions should specify what, if any, procedural requirements are to apply to a given power.*

Questions for Select Committee

7. LAC member have concerns about four aspects of the new suspension and cancellation powers of the CE, given the potentially serious consequences of suspending or cancelling a fishing operation.
 - Whether the grounds for suspension and cancellation for a breach of registration are sufficiently clear to those who may be affected?
 - Whether the minimum times for response to notices of intention to suspend or cancel are sufficient?
 - Whether operators should have a statutory appeal process to test the validity of the CE's decision, or the information upon which the CE has relied, other than judicial review?
 - Whether, in light of the Attorney-General's report on the Bill's consistency with the New Zealand Bill of Rights Act 1990 (BORA), it would be desirable to clarify whether the new offences are strict liability or not?
8. LAC members, conscious of the complexity of the operational background of this legislation, do not express a strong view on the appropriate response to these questions. But they consider them to be significant and recommend that the select committee considers them carefully.

Summary of new powers to suspend and cancel registration of fishing vessels
(The legislative basis for this summary is provided in Appendix 1.)

9. Under existing provisions the CE can impose any conditions on the consent to registration of a fishing vessel. Amendments now enable the CE to change the conditions of registration by written notice and also provide that all conditions of consent are deemed to be conditions of registration.
10. This now empowers the CE to suspend or cancel registration for any breach of a condition of registration, applicable to all vessels in the EEZ. These new powers sit alongside and are additional to the amendments introduced in this bill to allow the CE to suspend and cancel registration for breaches of fisheries management, employment or vessel safety.
11. An operator could receive notice of a breach of condition of registration and have 48 hours to correct the breach. If the breach is not rectified, the CE could issue 7 days' notice of the intention to suspend registration, and must give the operator a reasonable time to make submissions on the matter. The period of suspension can be extended. If the breach is still not rectified the CE can give 7 days' notice of cancellation of registration.
12. It follows that if a notice of intention to suspend is followed by a notice of cancellation, an operator/owner could have a minimum of 14 days to respond from the notice of suspension, but is likely to have longer at the discretion of the CE when considering any submissions.
13. A cancellation notice can be issued for any breach of a condition of registration following notice of suspension, if the operator has still not complied with the conditions of registration. Cancellation can also be imposed, without a prior notice of suspension, because specified persons associated with the fishing vessel have been "convicted of an offence relating to fishing or transportation in the fisheries jurisdiction of NZ or that other country". The minimum time to respond to a notice of cancellation for reason of a conviction, without prior suspension, is 7 days.
14. Judicial review is the only formal process to challenge the validity of the CE's decision, or the information upon which the CE has relied in issuing a suspension or cancellation notice.
15. On the face of it two new strict liability offences of continuing to fish after receiving a notice of suspension or cancellation are established, carrying the penalty of a fine not exceeding \$100,000. The statutory defence available for defendants is to prove that the contravention was from a cause beyond their control and that the fish caught after the notice was issued have been returned to the sea.
16. The BORA report states that "in the absence of an explicit indication that the offences are intended to be strict liability, we consider the Courts would likely read in a mens rea element" in line with case law.

Discussion

Breach of condition of registration

17. As suspension and cancellation can now be imposed for any breach of a condition of registration and there is no constraint on the conditions the CE can impose, there is little guidance for operators wanting to avoid breaches.
18. One possible improvement would be to refer to the kinds of conditions where breach will give rise to suspension or cancellation. Another is to include a qualifier conveying that the breach must be serious or harmful. Such a limitation could also apply to the provisions providing for suspension and cancellation for breaches relating to "fisheries management, employment and vessel safety laws".
19. The same kind of constraints could also be applied to the provision that allows the CE to cancel registration where the "vessel's owner, operator, foreign charter party or notified user is convicted in NZ or in any other country of an offence relating to fishing or transportation in the fisheries jurisdiction of NZ or that other country". This gives a very wide ambit indeed for potential breach.

Timeframes

20. The 7 day grace in relation to the notices of intention to both suspend or to cancel registration is expressed as a minimum. The CE is explicitly required to allow reasonable time for submissions to be made after a notice of intent to suspend is issued but there is no requirement to consider submissions in relation to a notice of intent to cancel. In relation to the first ground for cancellation, ie following a notification of suspension, this seems not unreasonable as the operator will already have had an opportunity to make submissions.
21. Cancellation on the grounds of conviction for an offence, however, could take place in 7 days without any consideration of submissions. As cancellation is a more drastic outcome than suspension, this does not seem so reasonable. If the minimum timeframe of 7 days were imposed there would not be much time to seek a judicial review of the decision.
22. A possible improvement would be to ensure that where cancellation does not follow a suspension period, there is an opportunity to make submissions. Another possibility would be to specify timeframes for bringing submissions and consideration of them, rather than reliance on the CE's estimation of a "reasonable time".
23. The adequacy of the 7 day notice minimum if vessels are involved in complex operations in a remote location may be a relevant issue for the industry.

Review of CE Decision

24. The committee might consider whether a statutory framework that allows operators to seek review of the CE's decision to issue notice of suspension or of cancellation, before the notice is implemented, is warranted.

25. The consequences of stopping a fishing operation midstream are so significant, that operators should perhaps have a more formal opportunity to rectify any mistakes or misinformation that has been relied on rather than simply making submissions to the person who issued the notice, before filing for judicial review. The application of the new powers to all operators in the EEZ mean that the potential impact on smaller operators for whom judicial review may be out of reach for cost reasons is particularly draconian.
26. Review could be accessible by giving an independent official the power to review the decision. It is noted that in relation to fishing permits made under delegated authority of the CE, s94 provides that an applicant for certain fishing permits is entitled to have the decision reviewed "by the CE or a person designated by the CE who was not involved in the original decision". Issuing fishing permits seems no more significant an exercise of delegated powers than suspension or cancellation of registration.

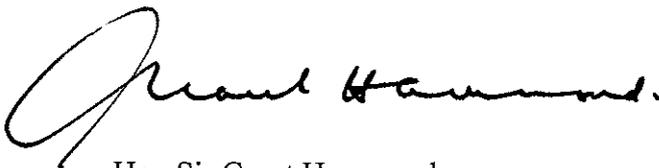
Strict Liability

27. We note that the Fisheries Act 1996 contains a number of strict liability offences. If it is intended that the new offences be strict liability, in alignment with the other offences in the Act, then this should be clear on the face of the provision. However, given the potentially serious consequences we suggest they should not be strict liability, as the BORA report assumes.
28. Suspending fishing mid-operation and mid-ocean may be a greater consequence for large fishing operations than imposition of the \$100,000 fine. Since fishing vessel means "any vessel capable of being used for fishing", strict liability for a fine could be a serious problem for smaller owner operators.

Conclusion

29. Thank you for taking the time to consider the LAC's submission on this bill. The LAC does not wish to be heard on this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read "Grant Hammond". The signature is fluid and cursive, with a large initial 'G'.

Hon Sir Grant Hammond
Chair

APPENDIX ONE: LEGISLATIVE CONTEXT

Suspension and cancellation

30. Under the Act, registration of vessels requires the consent of the CE and any consent “may be granted subject to such condition as the CE thinks fit to impose” s103(4). Proposed amendments to s103 provide that the CE may amend, add or revoke any conditions of consent by written notice, and that all conditions of the consent to registration are deemed to be “conditions of registration” cl4).
31. **Suspension** of registration is a new power of the CE relating to all vessels within the EEZ (cl 5, new s106A)) and so impacting on both large and smaller fishing operations. The bill provides that the CE may suspend registration for "any reasonable period determined by him or her if satisfied on reasonable grounds that registration for the time being poses a risk of a breach of fisheries management, employment or vessel safety laws justifying that action; or there has been a breach of any condition of its registration" (new s106A(1)).
32. The CE must give the operator notice that it is considered there has been a breach; state the grounds for this belief; set out what must be done to correct the situation; and state the period within which actions must be undertaken or cease, which must be not less than 48 hours. If the actions specified are not taken in the required period, the CE can "give the operator not less than 7 days' notice in writing of the intention to suspend registration" and must also "give the operator a reasonable time to make submissions" and must "consider any submissions made" (cl5, new s106(5)). The period of suspension can be extended by the CE on the same or any other ground already specified.
33. If the CE is “satisfied that the operation has not complied with any conditions and requirements imposed” following suspension, the CE may **cancel registration**. The CE may also cancel registration if the “vessel’s owner, operator, foreign charter party or notified user is convicted in NZ or in any other country of an offence relating to fishing or transportation in the fisheries jurisdiction of NZ or that other country”, and if satisfied that the vessel is forfeit to the Crown” (cl6, new s107(6)).
34. Before cancelling, the CE must give not less than 7 days’ notice of the intention to cancel and state the grounds relied on for cancellation (new s107(7)).

Review of CE Decision

35. The legislation does not provide a process whereby owners can challenge a 7 day notice of suspension from the CE other than by making submissions, for which the CE must allow a reasonable time. There is no such provision relating to the 7 day notice of intention to cancel.
36. In some situations the notice to cancel may follow a 7 day notice of intention to suspend and therefore there would have been an earlier opportunity to

make submissions. This would not apply where cancellation follows from someone's conviction for an offence relating to fishing or transportation.

37. Judicial review would appear to be the only formal process to challenge the validity of the CE's decision, or the information upon which the CE has relied in issuing the notice. .

Two new strict liability offences

38. If a fishing vessel continues to operate after notice of suspension or after a notice of cancellation of registration, the owners become liable for a fine of up to \$100,000 under existing s252(5). The two new offences of:
- using a vessel for fishing while registration is suspended (new s106A(9)); and
 - using a vessel in contravention of subsection 7A [ie an operator who receives a notice of intention to cancel registration must not use the vessel to take fish for sale] (cl6 new s107(10));

are grouped with existing offences in the Act declared to be of strict liability under s240.

39. To avoid conviction for continuing to fish after a notice of suspension or cancellation is given, the operator must show that the "contravention was due to an accident or default - - -or some other cause beyond the defendant's control" and the defendant took reasonable precautions, and shut down their fishing operation within 7 days and returned to the sea any stock caught after the notice was issued (existing s241).
40. The other offences listed in s252(5) expressed as strict liability and liable for the same level of fine, appear to relate to breaches of various conditions and requirements under the Act. At present they cannot result in the owner ceasing to operate at all. However, as detailed above, the new power enables the CE to suspend registration for "any reasonable period determined by him or her if satisfied on reasonable grounds that - - - there has been a breach of any condition of its registration".
41. The BORA report states that "in the absence of an explicit indication that the new offences are intended to be strict liability, we consider the Courts would likely read in a mens rea element" in line with case law.