

17 November 2014

## **SUBMISSION BY INDUSTRY ON CUSTOMARY REGULATIONS FOR THE SOUTHERN TITI/MUTTONBIRD ISLANDS**

### **Introduction**

1. Thank you for the opportunity to make a further submission on the proposed customary fishing areas for the Titi Islands.
2. This submission has been developed by Fisheries Inshore New Zealand (FINZ). FINZ is the Sector Representative Entity (SRE) for inshore finfish, pelagic and tuna fisheries of New Zealand. It was formed in November 2012 as part of the restructuring of industry organisations. It currently has 144 members with 110 quota owners and 34 fishers, with membership steadily increasing. Its role is to deal with national issues on behalf of the sector and to work directly with and behalf of its quota owners, fishers and affiliated Commercial Stakeholder Organisations (CSOs). As part of that work it will also work collaboratively with other industry organisations and SREs, Seafood New Zealand, Ministry for Primary Industries (MPI) and Department of Conservation.
3. Its key outputs are the development of, and agreement to appropriate policy frameworks, processes and tools to assist the sector to more effectively manage inshore, pelagic and tuna fishstocks, to minimise their interactions with the associated ecosystems and work positively with other fishers and users of marine space where we carry out our harvesting activities.
4. Any queries on this submission should be directed to Tom Clark, Fisheries Inshore New Zealand, (04) 802-1514 or [tom@inshore.co.nz](mailto:tom@inshore.co.nz).

### **Summary of Submission**

5. Procedurally, this consultation is below an acceptable standard. Initiated in 2010, the matter is being re-presented in 2014 without any reference to recent developments, without any reference to the MPI-approved process for dealing with s186 applications,<sup>1</sup> and without any reference to points raised by submitters in 2010 or 2012.
6. We consider that the proposal to regulate a closure under the general provision of s186(1) is without a legislative foundation in that the Act does not permit any permanent closures other than taiapure and mātaimai.
7. We consider that no case for special consideration of the need for further customary closures in the Titi Islands has been presented.

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<sup>1</sup> See [http://www.fish.govt.nz/NR/rdonlyres/4FD40088-0792-4C4F-8BB9-1398E11CDA95/0/Section\\_186\\_guidelines\\_2011.pdf](http://www.fish.govt.nz/NR/rdonlyres/4FD40088-0792-4C4F-8BB9-1398E11CDA95/0/Section_186_guidelines_2011.pdf)

8. In the event that MPI seeks to implement regulations as proposed in the consultation, we request that MPI includes in the Final Advice Paper, the Minister's decision and any recommendation to Cabinet that:
  - a. Industry contends that there is no legislative provision to enable such areas to be established under s186 of the Fisheries Act; and
  - b. The unique circumstances giving rise to the need for such regulations should be clearly stated in any Final Advice Paper, the Minister's decision and any recommendation to Cabinet.
9. We note that industry and Ngai Tahu have made attempts to resolve this matter by other than regulated closures; we remain willing to continuing to work with Ngai Tahu in this regard. We consider that to be a better course of action to resolve the matter and recommend that MPI take a more active role to facilitate such an agreement.

### **Ministry Consultation**

10. The Ministry has sought any new advice from those who previously submitted on this matter. The matter first arose for consultation in May 2010. A number of commercial seafood organisations submitted on the proposals, objecting to the proposals.
11. The MPI proposal did not then proceed and the parties attempted to find an alternative resolution of the matter.
12. In May 2011, the Ministry introduced a new set of approved guidelines for the handling of special s186 requests.<sup>2</sup> Those guidelines recognised the preference for non-regulated resolutions. Para 15 stated:

*“The Crown is not obligated to make new s186 regulations in the form recommended by Maori and has discretion as to how the customary objectives of Maori can be met. The following factors inform whether new s186 regulations are appropriate:*

  - i. whether customary interests can be provided for through existing tools;*
  - ii. whether the proposed new s186 regulations meet the conditions of s186;*
  - iii. whether the proposed regulations are ultra vires or consistent with fisheries legislation, as well as other legal obligations (such as the Bill of Rights);*
  - iv. the rights and interests of other groups; and*
  - v. resourcing and implementation issues.”*
13. In October 2012, MPI advised the industry that MPI were proceeding to review the proposal and would forward a request to industry for any new information on the matter. No advice was forthcoming and the issue again went off the radar.
14. On 24 October 2014, MPI advised industry that Ngai Tahu had requested the matter proceed to resolution. Industry was asked to provide any new information that might relate to the matter by 17 November 2014.
15. Industry responded with a request that MPI provide an appropriate update of developments since the initial 2010 consultation and that MPI follow its own approved process. While some information was provided, as discussed later in this paper, it is not sufficient to allow submitters to form any opinion on the need for the proposed measures.

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<sup>2</sup> *ibid*

16. While the Ministry has admitted its concerns with the consultation process to date, they have not sought to remedy the deficiencies in any material way. This is not an acceptable way to manage consultations on material matters.

### **Section 186 Proposal Not Legally Valid**

17. We consider the current proposal to establish customary fishing areas under s186 of the Fisheries Act to be an inappropriate and improper use of s186.
18. Section 186 was introduced by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 to provide mechanisms by which the Crown's obligations under the Treaty Settlement could be given effect. Section 186(2) provided further detail on the content of regulations to be approved under s 186. They included:
- a. the establishment of taiapure (s186(2)(a) and mātaihai reserves (s186(2)(b) and (c))
  - b. the making of by-laws by a Maori Committee, marae committee or kaitiaki; and
  - c. allowing the taking of fish to sustain the functions of marae.
19. The regulations that give effect to the closure of marine space for customary purposes are contained in :
- c. Fisheries (Kaimoana Customary Fishing) Regulations
  - d. Fisheries (South Island Customary Fishing) Regulations.
20. Those regulations require certain thresholds of use, relationship and management to be attained before a taiapure or mātaihai can be approved. They also require the approval of the Minister to the establishment of the taiapure or mātaihai.
21. There is no general power in s 186 that allows for the permanent closure and exclusive use of marine space.
22. For a regulation to be valid, it requires a nominated entity to have the power to make a decision on a matter which gives rise to the need for the regulation. The regulation-making process then requires the draft regulation and the decision to make the regulation to be approved by the Executive Council, i.e. Cabinet. Cabinet then issues an Order in Council for the Governor General to make the regulation.
23. Without an express provision in the Act or in a regulation for the Minister or Chief Executive to approve the closure and make a recommendation to the Governor General to use his s297 power under an Order in Council make a regulation, there can be no regulation. There is no provision in s186 or in the regulations established under that provision that would empower ad hoc closures other than a taiapure or mātaihai to be made.
24. We demonstrate that position by referring to the following provisions of the Act which contain decision-making powers in respect of customary fishing:
- a. Section 183: Power of Minister to recommend declaration of taiapure-local fishery  
*"... the Minister shall ... make that recommendation accordingly"*
  - b. Section 186(2)(b) *"... empower the Minister to declare... to be a mātaihai reserve"*
  - c. Section 186A: Temporary closure of fishing area or restriction on fishing methods  
*"(1) The Minister may...close..."*
  - d. Section 186B: Temporary closure of fisheries –*"(1) The Chief Executive may ....temporarily close..."*

25. Section 186(1) contains no such powers. Neither the Minister nor the Chief Executive is empowered to permanently close marine space for customary purpose outside the provisions of a taiapure or a mātaítai.
26. The Governor General does not have decision-making powers under the Act. He acts in a constitutional role representing the Sovereign in a ceremonial sense but has no powers to make decisions other than to appoint or dismiss members of the Executive Council. Section 297 of the Act contains that constitutional role.
27. We also consider that bylaws established under s186(2)(d) can only have relevance where the marae committee or kaitiaki has governance or jurisdiction. If it does not have that jurisdiction, the marae committee cannot make bylaws restricting or prohibiting the taking of fish. Section 186 and the relevant regulations above limit that jurisdiction to taiapure and mātaítai.
28. Section 186(2)(e) allows for kaitiaki to approve, through permits, the taking of fish outside the constraints of the recreational limits for the continuance of functions sustaining the marae. This does not allow for constraints or restrictions to be imposed on commercial or recreational fishers.
29. In summary, s186(1) of the Act does not empower any one – Minister or Chief Executive – to permanently close marine space for customary purposes unless for a taiapure or mātaítai reserve. Without that empowerment, there can be no regulations to close an area. We contend that the MPI guidelines for dealing with new customary regulations under s186 of the Fisheries Act are legislatively incorrect and inappropriately interpreted.
30. We request that this industry argument be included in any Final Advice Paper to the Minister and in any advice to a Cabinet committee.

### **Special Circumstances Not Proven**

31. The MPI guidelines for processing s186 applications outside the provisions of s186(2)(b)-(e) indicate that such applications arise from special circumstances that do not make one of legislated or regulated options appropriate and that the application needs to be processed on a case specific merits basis. It makes the incorrect assumption that areas can be closed outside the legislated provisions discussed earlier.
32. We have requested information from MPI as to the volumes of catch required by tangata whenua or some indication of their inability to source their kaimoana. The information we have gleaned from our investigation is that:
  - a. the islands are inhabited by small groups of mutton-birders between mid-March and mid-April;
  - b. most of the sites are not fished by commercial fishers on account of the low density of fish-stocks;
  - c. while the muttonbirders may once have been reliant on supplies of seafood for their stay on the islands, that is no longer the case; and
  - d. seafood is currently taken under recreational terms and conditions.
33. More importantly, MPI has been unable to provide us with any information as to the inability of tangata whenua being unable to source sufficient fishstock for their needs. There is no indication that commercial fishing activity is having any detrimental impact on the ability of the mutton-birders to take their recreational allowances or that the recreational allowances are insufficient for their needs.

34. Notwithstanding having introduced consulted guidelines for the assessment of s186 requests, MPI has been unable to demonstrate that the MPI approved process has been followed.
35. We see no justification for a permanent closure when the mutton-birders are only in residence for two months. One argument raised is related to the sessile nature of the species involved. We recognise that the kina and paua populations may be considered sessile but some relocation of stock from outside the proposed reserves to inside the areas would be expected.
36. We cannot support the MPI view that there are special circumstances which require the closure of the areas. MPI have provided no information which supports the need for permanent closures. We are consequently unable to support the MPI proposal to close the kina, paua and rock lobster fisheries at the sites.

#### **Need to preserve uniqueness of any regulation**

37. Notwithstanding our opposition to the proposal, we note that the circumstances giving rise to the request for closures may be considered somewhat unique and without parallel in New Zealand.
38. We are concerned that the approval of this case will further erode the integrity of customary fishing protocols and processes and provide a precedent for a proliferation of unsubstantiated spatial claims in the future. Accordingly, we request MPI highlight the unique circumstances in any advice to the Minister and that advice be reflected in the Minister's decision.

#### **Better alternative exists**

39. We have reviewed the alternative actions available. We do not consider that mataitai closures are appropriate for the areas:
  - a. There is no argument made to manage the fisheries under kaitiakitanga principles
  - b. there are no issues with the management of the areas;
  - c. the areas are accessed for only a brief period and do not otherwise provide a traditional fishing ground for tangata whenua; and
  - d. the issue is solely about a source of seafood for muttonbirders on the islands between mid-March and late May.
40. If there are concerns as to the daily recreational take per fisher being insufficient for the group, we would have no opposition to customary fishing permits being obtained to provide for a greater take.
41. We have discussed the matters with our kina, paua and rock lobster management organisations. They have offered to impose voluntary seasonal closures, lightly fish any economic areas and even re-locate stocks to ensure a plentiful supply of stocks for the mutton-birders.
42. We are disappointed that these offers have not formed the basis for an agreement between the sectors to resolve the matter without the need for regulated closures. We suggest that MPI should take a more active role to facilitate an agreement between the parties.
43. In view of the legal issues and the absence of information as to special circumstances, we consider a facilitated agreement to be a better alternative to resolve the issue.