

SUBMISSION TO THE LOCAL GOVERNMENT AND ENVIRONMENT COMMITTEE ON THE KERMADEC OCEAN SANCTUARY BILL APRIL 2016

1. Fisheries Inshore New Zealand Limited (*Fisheries Inshore*) appreciates the opportunity to comment on the Kermadec Ocean Sanctuary Bill, which received its first reading on 15 March 2016.

Request to be Heard

2. Fisheries Inshore requests the opportunity to be heard in support of this submission. Please contact Dr Jeremy Helson, Chief Executive, Fisheries Inshore New Zealand Limited (021 2728 727) for any queries in respect of this submission or our appearance before the Select Committee.

Who we are

3. Fisheries Inshore represents 80% by value and volume of the inshore finfish, pelagic and tuna fisheries of New Zealand. We were formed in November 2012 as part of the restructuring of industry organisations. Our role is to address national issues on behalf of the sector and to work directly with, and on behalf of, our members. In doing so we also work collaboratively with other industry organisations, Seafood New Zealand, Ministry for Primary Industries (MPI) and the Department of Conservation.
4. Our key outputs are:
 - the development of, and agreement to, appropriate policy frameworks, processes and tools to assist the sector to manage inshore, pelagic and tuna fishstocks more effectively,
 - to minimise the sector's interactions with protected species and associated ecosystems; and
 - to work positively with other fishers and users of marine space where we carry out our harvesting activities
5. Fisheries Inshore also works closely with other commercial stakeholder organisations that focus on regional and operational issues, including the Northern Fisheries Management Stakeholder Company Ltd, Area 2 Inshore Finfish Management Company and Southern Inshore Fisheries Management Company, which are the mandated organisations for the management of regional fishstocks.

Our Interest in The Bill

6. Fisheries Inshore represents both:
 - a. quota holders who own quota shares in the fish stocks in the Kermadec Fisheries Management Area, known as FMA10 in fisheries legislation; and
 - b. fishers who have fished, currently fish or will fish pelagic stocks in the proposed Kermadec Ocean Sanctuary (KOS).
7. The Bill seeks to implement the September 2015 decision of Cabinet to establish the KOS by closing that part of the Exclusive Economic Zone (EEZ) that surrounds the Kermadec Islands. The Bill will have the effect of prohibiting all fishing in the KOS and prohibiting any compensation for those quota-holders and fishers who will suffer loss as a consequence of that closure.
8. As such, Fisheries Inshore's interest in the Bill relates to its impact on the quota holders and fishers that have fishing rights and interests in the area of the proposed sanctuary.

Summary of Submission

9. This Fisheries Inshore submission highlights:
 - a. Fisheries Inshore supports the concept of the KOS but has concerns with some of the measures contained in the Bill;
 - b. Marine life in the Kermadecs is largely located in the coastal zone and the benthic zone. The seas above the deeper benthos do not teem with marine life. Those fish and mammal species that do migrate through the KOS do so rapidly;
 - c. The sustainability of the KOS and the benthos is protected by existing internationally recognised marine reserves and a Marine Protected Area;
 - d. The legislative process to prepare the Bill was deficient and failed to meet the standards and obligations for consultation with affected parties;
 - e. The Bill is not a sustainability measure;
 - f. Compensation has been unfairly denied to those affected by the fishing closures contained in the KOS proposal; and
 - g. The Bill does not address cost recovery levies payable on FMA10 fishstocks.
10. Fisheries Inshore submits the Select committee should recommend:
 - a. the Bill be withdrawn and direct: the KOS proposal be:
 - i. properly consulted with interested parties; and
 - ii. re-considered by Cabinet on a fully informed basis;
 - b. that in any revision of the Bill, there should be a provision for the payment of compensation to affected parties; and
 - c. that in any revision of the Bill, there should be a provision that exempts quota-holders from the payment of Fisheries Act levies in respect of FMA10 fishstocks.

Introductory Comments

The Kermadec Ocean Sanctuary Bill

11. On 29 September 2015, the Prime Minister announced the government's intention to establish the KOS covering 620,000 square kilometres of New Zealand's EEZ. The area was described generally as one of the most pristine and unique environments on Earth. Under the Bill all fishing and mining in the area would be prohibited.

The Nature of the Kermadec Ocean Sanctuary

12. The KOS would consist of the EEZ associated with the Kermadec Islands of Raoul, Macauley, Curtis/Cheeseman and L'Esperance. There is only a small coastal fringe of shallower water consisting mainly of reef material. Kelp beds are largely absent and the seafloor drops away steeply from the Islands. The eastern extent of the KOS is dominated by the Kermadec Trench which can reach to depths of over 8km. To the west, the KOS is dominated by the South Fijian Basin reaching down to depths of over 4 km. The islands are surrounded by a marine reserve extending 12 nautical miles from the shore. Most of that reserve consists of a seabed deeper than 500 metres but which can reach down to 2 km. Most of the marine reserve seabed is out of reach of daylight. The greatest diversity of marine life is associated with the benthos rather than the water column above the benthos.
13. The Kermadec region has been characterised by some as *"teeming with an incredible array of plant and animal life – much of which is found nowhere else on the planet"*.¹ The September 2015 Cabinet paper and the February 2016 MFE Regulatory Impact Statement (RIS) give the impression of an oceanic environment that is *important from a global perspective because of its rich biodiversity and geology* (para 2). The RIS claims *the biodiversity and relatively unspoiled nature gives it a crucial role in ocean*

¹ WWF Press release, 11 April 2016.

ecosystems, including playing a role as a migration route and safe haven for far ranging species (e.g., seabirds, sharks, turtles and whales) (para 3).

14. While the Cabinet paper and the Regulatory Impact Statement characterise the Sanctuary area as unique and pristine, that description applies primarily to the terrestrial and benthic environments. The ocean above the seabed can hardly be described as pristine or unique. It is simply part of the wider South Pacific Ocean and contains species that are commonly found elsewhere throughout the South Pacific.
15. A recent review of the Kermadec corridor indicated that the Kermadec corridor was not an important migratory corridor for most species.² Most species pass through FMA10 rapidly and do not associate with the Kermadec Ridge or Kermadec Islands. The analyses of tracking information indicate the larger tunas tend to transit only through the southern end of the area, swordfish tend to transit through the western side of the area and some shark species will transit through the middle of the area close to the Islands in search of prey.

Qualified Support for Marine Protection and the Kermadec Ocean Sanctuary

16. Fisheries Inshore supports protection of the marine environment from identified risks. In some cases the most appropriate management tool to provide that protection may be a marine reserve or other spatial measures such as an ocean sanctuary.
17. Fisheries Inshore also supports the general concept of the Kermadec Ocean Sanctuary but has reservations about some of the specific measures proposed. We consider that some of the measures are excessive and are unnecessary to ensure the sustainability of the Kermadec marine environment.

Current Protection is Recognised Internationally

18. The Kermadec Marine Reserve that extends 12 nautical miles from the Kermadec Islands was established in 1990. The reserve covers 745,000 hectares or 7,450 square kilometres and remains one of the largest marine reserves in New Zealand. Through regulated constraints on human activity, it protects the coastal environment from exploitation and accidental damage. As noted earlier, most of the reserve has depths of over 500 meters. The reserve provides effective protection for the coastal marine ecosystems of the Kermadecs.
19. In 2007, an industry initiative led to the establishment of 17 Benthic Protection Areas (BPAs) that collectively protect 30% of the EEZ. The largest of those BPAs is the Kermadec Benthic Protection Area that protects the unique benthos of the region. The Kermadec BPA covers an area of c. 620,000 square kilometres, including part of the Tongan Trench and its underwater volcanoes. FINZ supports the protection afforded to the EEZ around the Kermadec Islands through the Fisheries (Benthic Protection Area) Regulations 2007.
20. These two measures represent significant protection of the marine environment. The International Union for Conservation of Nature (IUCN) is the world's oldest and largest global environmental organisation and recognises the Kermadec BPA as a Category VI Marine Protected Area (MPA).³ The IUCN reports the Kermadec BPA has a primary focus of protecting the benthos from bottom trawling but also has regulations on activities in the entire water column. The Kermadec MPA is one of the world's 10 largest Marine Protected Areas.
21. We support the concept of the KOS and particularly the extension of protection for the benthos from all human activity. The Kermadec benthos is pristine and contains geological features that are globally rare. Those features warrant the additional protection from the activities listed in Clauses 9(2)(b)-(e) of the Bill.
22. However, we submit that it is unnecessary to prohibit all fishing in the KOS. Should the government wish to implement a level of protection greater than that required to ensure sustainability under the Fisheries Act 1996, or that required to be recognised internationally as a Marine Protected Area, it should recognise

² The Kermadec Corridor – an important habitat for migrating oceanic fishes, Kermadec Discoveries and connections, April 2016, Francis M Duffy C, Holdsworth J and Sippel T.

³ http://www.protectplanetoocean.org/official_mpa_map. It should be noted that the choice of category is based on the primary objective(s) of the MPA; the categories are not intended to be hierarchical (see Day et al, 2012. *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas*. Gland, Switzerland: IUCN, 36pp at page 15). The report is available [here](#).

the existing rights and interests affected and compensate those parties rather than suggesting that additional protection is required for sustainability purposes.

Our Submission on the Bill

23. Our submission focuses on
 - a. the provisions that:
 - i. exclude all fishing from the sanctuary as set out in Clause 9(2)(a) of the Bill; and
 - ii. preclude compensation for the loss of the rights and opportunities to fish in the area; and
 - b. failings in the processes leading to the provisions in the Bill.
24. The submission contains material that supports our claims that:
 - a. The Crown should have consulted with affected parties, particularly Iwi;
 - b. The KOS is not for sustainability purposes;
 - c. The Bill unfairly denies compensation to affected parties, and
 - d. The Bill would unjustly allow costs to be recovered on impaired quota.
25. We have focused our submission on the principles and provisions in the Bill rather than provide the Select Committee with details as to the extent of fishing and the nature of compensation that ought to be provided. Other industry submitters will provide such detail to the Select Committee and we endorse those submissions.

Lack of Consultation

26. There was no consultation with industry stakeholders or Iwi on the proposal to establish the KOS. The Chief Executive of Seafood New Zealand received advice of the announcement on 28 September 2015 after the close of normal business and less than 12 hours before the embargo time.
27. There was a similar lack of consultation with Iwi, many of which are members of Fisheries Inshore, as are Te Ohu Kai Moana Trustee Ltd and Aotearoa Fisheries Ltd. This aspect of the government's process is particularly concerning given the special relationship between the Crown and its Treaty Partner and the specific requirements embodied in the Fisheries Deed of Settlement. We support the submissions made on this matter by Iwi and their representative organisations and further suggest it is inappropriate for the Bill to proceed before the Courts have provided judgement on the matter that is currently awaiting hearing.
28. The government's approach is inconsistent with section 12 of the Fisheries Act 1996. That section requires consultation with those persons or organisations having an interest in the stocks or the effects of fishing on the aquatic environment where sustainability measures are to be introduced. Sustainability measures include not only adjustments to allowable catch limits under sections 13, 14, 14A, or 14B but also may relate to areas from which fish may be taken, the size, sex or biological state of fish that can be taken, fishing methods used and the times at which fish are taken.
29. While we acknowledge that section 12 does not directly apply to the present matter, it specifies the government's consultation requirements when implementing measures that are akin to those in the Bill. Further, the Cabinet paper specifically referred to section 308 of the Fisheries Act 1996 in an attempt to justify avoiding compensation for affected parties. We submit that it is not appropriate for the Crown to selectively rely on section 308 of the Fisheries Act 1996 whilst ignoring section 12 that simply embodies a core principle of sound policy development and governance.
30. Industry attempted to engage with Government and officials over the months following the Prime Minister's announcement. A letter sent to the Prime Minister on 30 November 2015 set out the wider industry's concerns and sought the opportunity to work towards a marine protection initiative that would meet the needs of government, Iwi and the seafood industry. The Minister for the Environment declined that offer in a letter dated 2 March 2016.

Recommendation:

Fisheries Inshore submits that the Select Committee should recommend the Bill be withdrawn and direct the KOS proposal be properly consulted with interested parties.

Not for Sustainability Purposes

31. Fisheries Inshore supports protection of the marine environment. However, determining the appropriate form of protection must be based on a robust assessment of the risks to that environment. The documentation supporting the establishment of the KOS, and which gives direct rise to the provisions of the Bill, does not contain any such assessment of the risks.
32. While protecting the benthos, the BPA provisions do not prohibit other forms of fishing such as surface long line fishing for pelagic tuna. The sanctuary area has long been used by New Zealand vessels to catch tuna and other pelagic fish by surface long line fishing. Surface long lines for tuna are generally set around 400 metres deep. All surface long line fishing is subject to the use of mitigation measures to reduce the prospect of by-catch of seabirds, turtles and other protected species. There is no evidence to support any assertion that surface long line fishing in the region poses any material threat to marine life in the region or that any measures need to be taken for sustainability purposes.
33. To think that establishing the Kermadec Sanctuary will provide protection for tuna, sharks and other marine mammals in the face of fishing effort bordering the sanctuary and the migration paths of tuna is wishful thinking. We refer the Select Committee to the website maintained by Global Fishing Watch which is a partnership that is designed to show all of the trackable fishing activity in the ocean.⁴ We include a screenshot of the Pacific Ocean.

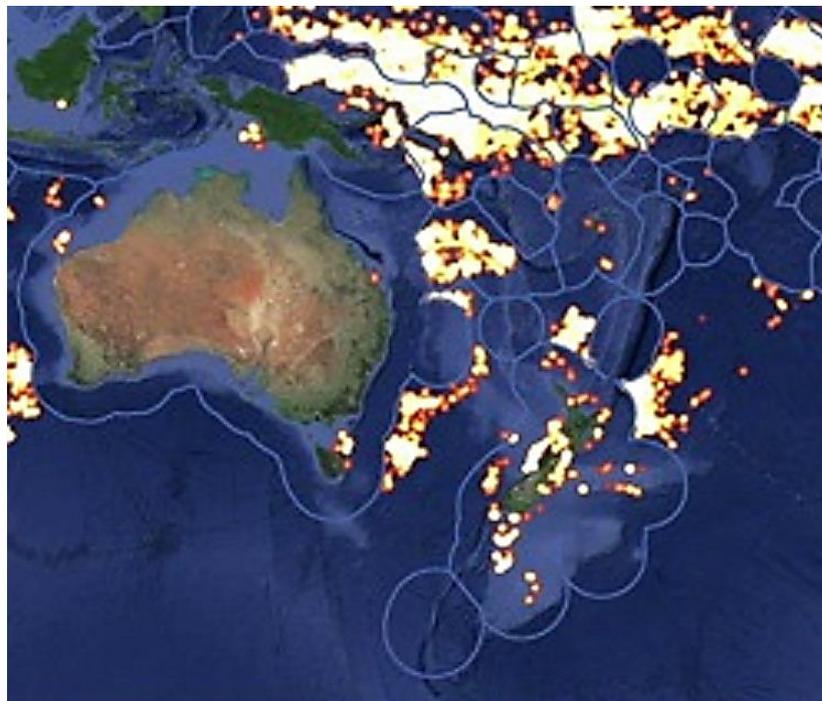


Figure 1: Fishing effort in the south west Pacific

34. If the purpose of the Kermadec Ocean Sanctuary was to provide protection to tuna stocks, that is a fisheries management matter to be addressed through the Fisheries Act 1996 and New Zealand's involvement in the relevant Regional Fisheries Management Organisations (RFMOs).
35. Government has asserted that it can remove the rights of quota owners, including Iwi, simply because they have chosen not to fish in the area. Such limited fishing cannot result in a sustainability issue. This clearly indicates the false assertion that the Sanctuary is being implemented for sustainability purposes. It is disingenuous for the Crown to simultaneously argue the "sustainability" point while also asserting that because quota owners have not used their rights they have suffered no loss and should receive no compensation.

⁴ <http://globalfishingwatch.org/>

36. For the Government to assert that the decision to create the KOS was “a measure taken for sustainability purposes” is fallacious. Sustainability has already been ensured through the Fisheries Act and by the protection afforded through the existing marine reserve and BPA. As stated above, that protection has been internationally recognised. The decision of Government to create a “no-take” zone was not to ensure sustainability, but to garner international recognition. While that is government’s prerogative, such action should accept the natural consequences and accommodate or compensate affected parties.

Recommendation:

Fisheries Inshore submits that the Select Committee should recommend the Bill be withdrawn and direct the KOS proposal be re-considered by Cabinet on a fully informed basis.

Unfairly Denies Compensation to Affected Parties

37. Clause 308 of the Fisheries Act 1996 states:

308 Protection of the Crown, etc

(1) ...

(2) Nothing effected or authorised by—

(a) any provision of this Act that contains or provides for measures to ensure sustainability (including sustainability measures, conditions on permits, special permits, or licences for the purpose of ensuring sustainability, and the varying of any total allowable commercial catch as a direct consequence of a variation in the corresponding total allowable catch); or

(b) any provision of this Act that contains or provides for measures relating to the introduction of a stock to the quota management system (including the setting of the total allowable commercial catch and transitional provisions for bringing under this Act any species or classes of fish, aquatic life, or seaweed that were, immediately before the commencement of Part 4, subject to Part 2A of the Fisheries Act 1983); or

(ba) any provision of this Act providing or having the effect that catch history ceases to be the basis for quota allocation for any stock or species; or

(c) any of sections 11, 13, 14, 15, 16, 19, 22, 23, 25, 26, 29A, 45, 47, 52, 53, 54, 56 to 58B, 67, 67A, 81, 82, 147, 148, 163, 289, 319, 320, 321, 329, 338, 339, 340, 347A, 352, 362, 367, 368, 369, 369A, 369B, 369C, 369D, 369E, 369F, and 369T; or

(d) any provision of the Fisheries Act 1983 that is amended or enacted by this Act—

shall be regarded as making the Crown liable to pay compensation or damages to any person.

38. The section removes the obligation to pay compensation in specified circumstances; primarily those required to ensure stocks are fished sustainably.
39. Clause 9 of the Bill excludes all fishing in the Sanctuary. Clause 5 Transitional Provisions (Schedule 1, Part 1 Clause 1 refers) specifically excludes any compensation “for any loss, damage or any adverse effect on a right or interest (including without limitation, to or on the value of quota or a right to fish) arising from the enactment or operation of this Act”. This provision has its origins in the characterisation of the KOS as a measure taken for sustainability purposes in the September 2015 Cabinet document and the 25 February 2016 Regulatory Impact Statement.
40. As demonstrated above, that characterisation is erroneous. The KOS is already internationally recognised as a marine protected area. The decision of the Government to establish the KOS as a “no take” zone reflected other than sustainability motivations. Consequently the Bill should not preclude consideration of compensation for the impact on the property rights of quota holders and the business operations of fishers who have, are or will fish the permissible stocks in the KOS.

41. The provision in the Bill to deny compensation is in direct contrast to provisions for compensation in other Government initiatives. Part 5 of the Public Works Act 1981 contains extensive provisions that recognise the need for compensation of landowners and other parties whose interests are adversely affected by a decision that requires an impairment of private property. Full compensation for acquisition, taking, injurious affection, or damage is a basic entitlement. The Public Works Act sets out comprehensive grounds for compensation and determination of the amount of compensation. The Act also provides compensation for business loss.
42. The September 2002 paper by K Guerin of The Treasury remains one of the leading commentaries on compensation in the New Zealand context. Guerin's paper:

... reviewed arguments about the definition of a taking, "the act by which a government assumes or assigns control over all or part of a property right held by a private party", the protections required against such action, and the role of compensation in such protection. The underlying issue is the crucial issue of security of property rights, in terms of both basic constitutional principles, and the vital role of such rights in providing incentives for investment in and use of the underlying property.

43. Section 5 of the paper provides the New Zealand context for takings:

New Zealand's legal framework is based on a common law heritage. For example, fundamental common law principles require that property will not be expropriated without full compensation (Legislation Advisory Committee, 2001). The checklist in the Legislation Advisory Committee Guidelines, under the heading of "basic principles of New Zealand's legal and constitutional system", asks whether the legislation complies with fundamental common law principles, whether vested rights have been altered (if so, is that essential, and if so, have compensation mechanisms been included), and whether pre-existing legal situations have been affected, particularly by retroactivity (if so, is that essential, and what mechanisms have been adopted to deal with them).

44. It is not acceptable as a matter of principle that the Government has chosen to take property without compensation. We submit that this Select Committee should not permit that inequitable and unjust decision.
45. Of major concern to industry is the attempt by the Government to trivialise quota in Kermadec stocks. The September 2015 Cabinet paper characterises the quota in the Kermadec stocks as an "administrative quirk". The stocks are not a quirk – they were stocks that were in the QMS at the time the 1989 Interim Settlement was reached with Maori in respect of their Treaty of Waitangi fisheries claims. The settlement included the provision of 10% of the TACC for each species already in the QMS, including the stocks in FMA10. Quota was the currency of the settlement and cannot be trivialised as being an "administrative quirk".

Recommendation:

Fisheries Inshore submits that the Select Committee should recommend that in any revision of the Bill there should be a provision for the payment of compensation to affected parties.

Unjust Cost Recovery

46. All quota for fishstocks in the QMS incurs cost recovery levies. The levies for MPI and Department of Conservation services are allocated among commercial fish stocks on the basis of the value of the stocks, being the Total Allowable Commercial Catch (TACC) allocation times the Port Price for the species. The TACC is that share of the Total Allowable Catch (TAC) allocated by the Minister of Fisheries to the commercial fishing sector. The port price is an indicator of the value of species, surveyed annually by MPI. For those stocks where there are no prices available, the methodology requires the use of a species price.

47. Industry-wide services such as compliance (\$10.4m per annum) and registry services (\$4.5m per annum) are allocated to all stocks. Levies for research and observers are allocated to the stocks benefitting from the research or creating the risk to the aquatic environment.
48. Quota-holders for FMA10 stocks incur cost recovery levies, albeit they are relatively low. It is not acceptable that quota-holders who are prohibited from utilising their quota rights must pay cost recovery levies in respect of those stocks. The September 2015 Cabinet paper notes that if quota is continued to be held by quota-holders, there should be no cost recovery in respect of that quota.
49. The Government has indicated that it will not reduce the TACC to zero which would have the effect of zeroing any cost recovery levies. MPI has indicated that it will not change its methodology to calculate the port price. In the absence of any decision to the contrary, cost recovery levies will be calculated and be payable on any FMA10 stocks notwithstanding the prohibition on catching those stocks. That is neither acceptable nor consistent with the Cabinet paper.
50. Should the Bill progress in its current form, an additional provision should be included to ensure that any levies on FMA10 fishstocks are not recoverable from quota-holders of those stocks.

Recommendation:

Fisheries Inshore submits that the Select Committee should recommend that in any revision of the Bill there should be a provision that exempts quota-holders in FMA10 fishstocks from the payment of Fisheries Act levies in respect of those FMA10 fishstocks.