

16 March 2016

Mr M Dunne
Ministry for Primary Industries
PO Box 5620
Wellington

Dear Martyn

**REQUEST FOR A SECTION 186A TEMPORARY CLOSURE AROUND ASTROLABE REEF
TO THE TAKE OF ALL FISHERIES RESOURCES**

1. Thank you for the opportunity to consult on this application. Fisheries Inshore NZ Limited (FINZ) represents 80% by value and volume of the inshore finfish, pelagic and tuna fisheries of New Zealand. It was formed in November 2012 as part of the restructuring of industry organisations. 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.
2. 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.
3. FINZ 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 the regional fishstocks.
4. Our concern in this matter relates to the policy and procedures operated by the Ministry for Primary Industries, rather than the specifics of the locality and the closure sought.

Background

5. The Motiti Rohe Moana Trust has requested a two-year section 186A (s186A) temporary closure to the take of all fisheries resources within three nautical miles of Astrolabe Reef. The proposed area is approximately 97 km². In support of their application, the Trust has provided supporting material relating to Bay of Plenty fisheries and the draft Motiti Rohe Moana Customary Fishing Plan. That plan indicates a rahui based on Astrolabe Reef bounding proposed proposed mātaihai and marine reserves.

6. The Bay of Plenty Regional Harbour Master has imposed a 2 nm exclusion zone for the last 4 years as a result of the M. V. Rena running aground in October 2011. While the decision to leave the Rena wreck in place was announced on 26 February 2016, the Harbour Master has yet to make a decision as to whether to lift or amend that restriction.
7. The Trust seeks an urgent consideration of the request as the Trust wishes to maintain the existing closure to allow stocks to re-build if the Harbour Master lifts the exclusion notice in the very near future.

Fisheries Act Section 186A Provision

8. The Fisheries Act 1996 contains two comparable provisions for temporary closures. S186A applies to the North Island waters, Section 186B applies to South Island waters.
9. S186A of the Fisheries Act 1996 provides that the Minister may temporarily close an area of, or temporarily restrict or prohibit the use of any fishing method in respect of an area, **only** if he or she is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights by—
 - (a) improving the availability or size (or both) of a species of fish, aquatic life, or seaweed in the area subject to the closure, restriction, or prohibition; or
 - (b) recognising a customary fishing practice in that area.
10. The Ministry website contains the current advice to applicants:

“EVIDENCE TO SUPPORT AN INITIAL REQUEST:

 1. Describe tāngata whenua non-commercial customary fishing use and management practices;
 2. Provide reason(s) for requesting the temporary closure, i.e. the fishing activity of concern;
 3. Explain how the customary use and management practices are being impacted upon;
 4. Indicate how a S186A temporary closure, for up to two years, will recognise and make provision for the use and management practices through improving either the availability and/or size of a species, or recognising a customary fishing practice. [While the section requires that only one of the elements of S186A needs to be established, it is preferable to address both these elements so that all relevant information is available];
 5. Describe the proposed area/s and boundaries;
 6. List the species at issue (each individual species must be identified);
 7. Describe the fishing method and how this is having an adverse effect (if applicable);
 8. Define the length of time for temporary closure, method restriction or prohibition proposed; and
 9. Outline the consultation already undertaken with other stakeholders, especially with tāngata whenua. “
11. The website also carries the following section in the Questions and Answers section for customary fishing.

...Section 186A is designed to respond to local depletion of fisheries resources which may be affecting the ability of tangata whenua to catch fish for customary purposes.

12. The material supplied by the applicant does not meet the MPI statement of the evidence to support an initial request. Nowhere is there a statement as to the current depleted state of the fishery or the detrimental impacts fishing is having on the ability of customary fishers to exercise their non-commercial fishing rights. Nowhere does the application state why a 3 nm zone is sought, what species are at issue or why a two year closure is appropriate. Nowhere does the application state what the improved benefits are expected to be.
13. We recognise that customary fishers, like all fishers, have been excluded from the Astrolabe Reef area for the past four years. In the regulated absence of all fishing, it is not reasonable to assert that commercial fishing has impacted on the ability of the customary fishers to exercise their rights.
14. There has been little consultation with those who will be affected by the proposal, e.g. the commercial fishing industry. Any consultation in respect of the Rena incident or the resource consent does not constitute consultation on the proposal.
15. S186A of the Act provides the Minister with sweeping powers that override other provisions. To approve the application, the Minister must be satisfied that a problem exists that requires addressing and that the temporary closure will have the effect required to address the problem.
16. In order to be satisfied, the Minister must be able to demonstrate that he has subjected the application to a careful scrutiny of the risks and benefits and is satisfied that the proposal will result in outcomes consistent with the legislated provisions. The legislated tests require a change in state to result – a continuation of the status quo is not consistent with the legislated provision. The Minister’s decision is judicially challengeable and the Minister must therefore identify the reasons as to why he is satisfied that the application should be granted.
17. We have noted in previous submissions the absence of proof or scientific evidence that would allow the Minister to be satisfied of the need to take action and science or benchmarks that would indicate when any depletion has been remedied. The majority of applicants appear to assert the above grounds in the justification for their applications but none appear to provide supporting information as to the extent of their claims.
18. Without relevant information as to the current state of fisheries resources, the expected outcomes and reasons as to why the application if granted will result in those outcomes, the Minister is unable to be satisfied as to the merits of the proposal.

FINZ Opposes the Application

19. As stated above, FINZ provides no view on the merits the specific closure being sought by Motiti Rohe Moana Trust, that is a matter for the Trust and its members and we respect their views. However, we consider the integrity of the Fisheries Act, and the statutory tests within it, are of paramount importance to FINZ and its members. We base our views solely on that aspect of the application and MPI’s subsequent consultation process.
20. FINZ opposes the application for a s186A temporary closure for the 3nm surrounding Astrolabe Reef on the grounds that:
 - a. The applicant has not provided information appropriate to assessing the proposal;

- b. With the existing 4 year closure, the fisheries resources are not likely to be in a depleted state; and
- c. The Minister is unable on the basis of the information supplied to be satisfied that the application is warranted.

Deficient Information

- 21. The application claims the need for the closure to allow stocks to increase to former levels of abundance yet provides no evidence that the stocks are in any way depleted. Nor does the application contain any standards or measures by which the abundance growth would be measured.
- 22. The information provided does not meet the evidence requirements set out by the Ministry for such applications.
- 23. In the absence of such material, it is not possible to assess the merits of the proposal or to assess whether the proposal is consistent with the policy objectives of the s186A provision.

Stocks Not Likely to Be Depleted

- 24. The area has already had four years of closure and recovery as a consequence of the Rena incident. During that time, the Harbour Master imposed an exclusion zone which excluded all fishing – commercial, recreational and customary. There is anecdotal evidence from the salvors that the fish abundance has improved during that time.
- 25. There is no evidence to suggest that the pre-Rena abundance was depleted nor that the current level of abundance is so low as to warrant a s186A closure. To the contrary, the 4 year closure and the absence of all fishing should have allowed the stocks to improve and to diminish any prospect of a local depletion of fisheries resources. The applicant acknowledges the fisheries resources are abundant and seeks urgency in the consideration of the application to prevent those resources being utilised by those who have been denied access to the resources in the past four years.
- 26. There is no evidence to suggest that a further two year closure will improve the availability of fisheries resources over that which currently exists.

Minister Unable to Be Satisfied

- 27. Section 186A requires the Minister to be satisfied that the policy objectives will be achieved before he can grant the application. In the absence of material information to support the application, the Minister is simply unable to meet any evidential test and therefore the legal requirements in s186A of the Fisheries Act 1996.
- 28. Given the applicant's statement as to the current abundance of the fisheries resources around Astrolabe Reef, the Minister needs to be satisfied that the application is consistent with the purpose of s186A of the Fisheries Act.

Contact for Queries

- 29. This submission has been prepared by Tom Clark, Policy Manager, FINZ. If there are any queries, he can be contacted on (04) 802 1514.