Aquaculture Amendment Bill

Note - the Aquaculture Legislation Amendment Bill was split into the Aquaculture Legislation Amendment Bill and the Aquaculture Legislation Amendment Bill (No 2) prior to introduction.

25 June 2008

Attorney-General

LEGAL ADVICE
CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
AQUACULTURE LEGISLATION AMENDMENT BILL

1. We have considered the Aquaculture Legislation Amendment Bill (PCO 7985/10.0) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We understand that the Bill is likely to be considered by the Cabinet Legislation Committee (LEG) at its meeting on 26 June 2008. We also understand that minor changes will be made to the Bill prior to its consideration by LEG. We will advise you immediately if any of those changes raise Bill of Rights issues.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered possible inconsistencies with the right to natural justice affirmed in section 27 of that Act.

PURPOSE OF THE BILL

3. The aquaculture management regime is designed to enable the sustainable growth of aquaculture in New Zealand and ensure the environmental effects of aquaculture are properly managed. The Bill amends the following Acts in relation to aquaculture:

- Aquaculture Reform (Repeals and Transitional Provisions) Act 2004;
- Fisheries Act 1996;
- Maori Commercial Aquaculture Claims Settlement Act 2004; and
- Resource Management Act 1991.

The amendments are largely technical in nature; however, the Bill also includes amendments that enable:

- agreements to be negotiated with relevant commercial fishers where an application would previously have been declined due to its adverse effect on commercial fishing;
- councils to manage situations where there are competing proposals in the same Aquaculture Management Area (AMA); and
- experimental aquaculture to take place outside AMAs provided that it does not have any undue adverse effect on fishing and is authorised by a resource consent.

The Bill also responds to the decision of the Environment Court in *SMW Consortium Limited v Tasman District Council* (9 May 2006). In that decision, the Environment Court found that applications for aquaculture activities can be made in respect of areas that are not designated as AMAs in operative regional coastal plans (although those applications cannot be processed). The

Ministry for the Environment has advised us that this decision was contrary to the original policy intent that applications for aquaculture activities made after the aquaculture reforms would be made in areas that are AMAs in operative coastal plans.

POSSIBLE INCONSISTENCIES WITH THE BILL OF RIGHTS ACT

Right to Natural Justice

Section 27(1) of the Bill of Rights Act affirms the right of everyone to the observance of the principles of natural justice.

The Bill inserts new sections 25A and 25B into the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004. New section 25A requires the chief executive of the responsible government department to assess the effect of application pending at the commencement of the Act on fishing resources. New section 25B(1)(a) requires the chief executive to consult with persons and organisations that the chief executive considers represent the classes of persons who have a customary, commercial or recreational fishing interests.

We have considered whether this provision limits the right to natural justice by conferring discretion on the chief executive to determine who has the right to be consulted. In our view, the chief executive would be required to exercise the discretion in a manner that is consistent with the right to natural justice. This view is supported by new section 26B(5) which enables a person to appeal a decision to the High Court if that person was consulted, ought to have been consulted or has an interest than is greater than members of the general public.

Right to Judicial Review

Section 27(2) of the Bill of Rights Act affirms the right of any person affected by a determination made by a public authority to apply for judicial review of that determination in accordance with the law.

The Bill inserts new sections 25B(8), 26B(8) and 50B(8) into the Aquaculture Reform (Repeals and Transitional Provisions) Act 2004. These sections require a person seeking a judicial review under Part 1 of the Judicature Amendment Act 1972 to do so within three months.

On the face of it, restrictions on the period within which a person may apply for judicial review are inconsistent with section 27(2) of the Bill of Rights Act; however, section 27(2) affirms the right to apply for judicial review "in accordance with law." This phrase recognises implicitly that the law may regulate review proceedings by imposing time periods within which proceedings may be brought so long as the regulation of the period does not amount to an effective denial of the right. We consider that a requirement to seek review within three months after the public notification of the determination does not amount to a denial of the right.[1] In reaching this conclusion we note that the range of persons who would have an interest in the outcome of the determination would already have been made aware of that determination. Those potentially affected by the decision will have received forewarning about the pending decision and had time to consider potential options for legal challenge.

Other Natural Justice Issues

For completeness, we note that the Bill inserts a new section 165BB into the Resource Management Act 1991 that would cancel existing aquaculture applications made after 9 May 2006 (the date of the SWM judgment) which do not relate to AMAs in operative regional coastal plans. Applications made before that date would not be cancelled but would remain valid for a further 10 years.

Retrospective legislation can be inconsistent with the Bill of Rights Act only in respect of criminal offences and penalties. It is possible that, in some circumstances retrospective legislation could affect the right to judicial review affirmed in section 27(2) of the Bill of Rights Act and also section 27(3) [2] of that Act which provides that every person:

...has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

It is arguable whether new section 165BB relates to a determination or decision as applicants have only been able to make application, not have those applications considered. In any case, sections 27(2) and 27(3) protect procedural rights and do not preclude alterations to the substantive law. Accordingly, an affected party could still bring judicial review proceedings challenging decisions of local authorities. New section 165BB does not interfere with the right of a litigant to bring or continue proceedings. It is a change in the substantive law rather than the imposition of procedural constraints.

CONCLUSION

Based on the analysis set out above, we have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Michael Petherick
Manager, Ministerial Advice
Office of Legal Counsel

Stuart Beresford
Manager, Bill of Rights/Human Rights
Public Law Group

---

footnotes

1. See White Paper "A Bill of Rights for New Zealand" (1985), paragraph 10.175. See also Grant Huscroft "The Right to Justice" in Rishworth, Huscroft, Optican, Mahoney *The New Zealand Bill of Rights Act* (Oxford University Press, 2003), 763.
2. For a discussion of section 27(3) and retrospective legislation see Butler & Butler *The New Zealand Bill of Rights Act* (LexisNexis NZ Ltd, Wellington, 2005), 960

In addition to the general disclaimer for all documents on this website, please note the following: This advice was prepared to assist the Attorney-General to determine whether a report should be made to Parliament under s 7 of the New Zealand Bill of Rights Act 1990 in relation to the Aquaculture Legislation Amendment Bill. It should not be used or acted upon for any other purpose. The advice does no more than assess whether the Bill complies with the minimum guarantees contained in the New Zealand Bill of Rights Act. The release of this advice should not be taken to indicate that the Attorney-General agrees with all aspects of it, nor does its release constitute a general waiver of legal professional privilege in respect of this or any other matter. Whilst care has been taken to ensure that this document is an accurate reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.