The Marine Reserves Bill

A submission from the Marine Transport Association (NZ) Inc

January 2003

MARINE TRANSPORT ASSOCIATION'S SUBMISSIONS on the MARINE RESERVES BILL.

1. Introduction

The Marine Transport Association (MTA) represents the interests of New Zealand's marine charter, passenger ferry, barging and aquaculture vessel operators. We have approximately 250 financial members, including most of the industry's leaders. The Association's members operate in "restricted limits" – i.e. in coastal waters such as the Hauraki Gulf, Marlborough Sounds or Fiordland, or on inland waterways such as lakes and rivers.

Members have been invited to comment on this submission.

There are four sectors in the Association :

- Charter boat operators who operate for fishing trips, sightseeing, and the like;
- Ferries such as Fullers Auckland and Subritzky shipping;
- Coastal barges; and
- Aquaculture vessels such as mussel farm boats, etc.

Because our members are active in both fishing and sightseeing activities (and on occasion, both in the same business) there is a tension between those two possibly conflicting activities in the marine environment. However, this submission intends to meet both sectors' needs and present a unified approach.

We understand that several other marine industry organisations have commented on the Bill; in particular the NZ Recreational Fishing Council and the Seafood Industry Council. We support the general thrust of those submissions in so far as they focus on the marine ecosystem management process and the marine reserves' place in that process.

2. Our participation so far

The Association lodged a submission with the Department of Conservation during the review of the Marine Reserves Act, saying that the review was timely as the current Act needed to be updated. However, we opposed a blanket quota (10% by 2010) of coastline becoming marine reserves because the timescale was too short and thereby undermining the consultation process.

We also stressed the importance of giving equal weight to all participants in the maritime industry which may be affected by the reserve creation process.

We commented that a "nil take" for fishing encouraged poaching by recreational fishers because of the difficulty in policing the reserve. Consequently we suggested that promoting larger areas of sea with a limited take – e.g. a maximum daily "bag" for recreational fishers - would be easier to enforce and would allow fish stock to regenerate across a larger area. We asked that any new legislation allow for fishing flexibility when establishing reserves in the future.

3. What we support in the Bill

The Bill's principal improvement over the current system is to provide a clear timetable to establish a reserve and a requirement for the Minister of Conservation to make a decision allowing or declining the proposal. We also support the ability to review a reserve to ensure it is still meeting the legislation's objectives and to abolish it if it is not.

4. Marine Reserves and the marine environment

The Association supports the concept and creation of marine reserves. There is no doubt that sections of the coastline should be set aside for scientific study or public enjoyment of the marine environment in its original state, just as blocks of land are set aside as national parks where forestry, mining, hunting and other exploitative activities are curtailed or controlled.

However, the Association supports the process contained in the current Marine Reserves Act rather than the proposed system outlined in the Bill. We shall return to this point later in the submission.

Marine reserves are but one tool to manage the marine ecosystem, but they should not be allowed to become the only tool or a tool of last resort. Just as a system of national parks, state forests, regional parks and scenic reserves offer different levels of protection to the terrestrial environment, the marine environment also has a hierarchy of tools to protect it.

At the top is the Marine Reserves Act 1971, intended to protect and preserve areas in the marine environment for the conservation of marine biodiversity, which proves the most comprehensive level of protection for both species and the marine habitat.

The prime purpose of the Fisheries Act 1996 is to ensure sustainability of the fisheries resource and maintain biodiversity. Fisheries plans offer stakeholders a

mechanism to protect, maintain or restore habitats and ecosystems which are important for marine biodiversity. However, the Act protects against fishing activities rather than control other commercial activities such as tourism, mining or oil drilling.

Mataitai and Taiapure reserves, established under the Fisheries Act, are areas set aside as traditional fishing grounds where tangata whenua have a special relationship with the area. While both Maori and non-Maori can fish in these areas, bylaws can be made by the tangata tiaki restricting or prohibiting fishing if they consider it necessary for sustainable management.

Regional Coastal plans (Resource Management Act 1991) allow regional councils to manage coastal areas in association (or at least not inconsistently with) the NZ Coastal Policy Statement. The Statement makes it a national priority to preserve the natural character of the coastal environment and to protect significant indigenous vegetation and fauna.

The Marine Mammals Protection Act 1978 establishes marine mammal sanctuaries to protect particular species such as dolphins, whales, seals, etc.

The Wildlife Act 1953 establishes wildlife sanctuaries and refuges to protect particular species in a defined geographic area. Those with a marine component are usually found in inter-tidal areas. While limited in their extent, the reserves provide permanent protection and are part of the protected areas network.

The Quota Management System (QMS) allows the NZ fisheries resource to be managed in a sustainable fashion by setting catch limits well above the level at which the fish stock can replenish itself. The QMS is viewed as world-leading by other jurisdictions which do not have a managed fisheries with unsustainable fishing practices. Arguments imported from these jurisdictions to justify marine reserves as a tool to manage fishing activities should be discounted because NZ enjoys an excellent and sustainable resource management programme.

In addition, there are a number of controlled areas around the coast such as shipping routes, cable areas and the like which prohibit or restrict anchoring or fishing activities.

The current range of legislation allows for a comprehensive range of protection tools from full protection of all marine life to safeguarding specific species or customary rights in local areas. It is important to keep this in mind when dealing with a piece of legislation which severely restricts access and use to a large portion of the public domain, as envisaged in the Bill.

5. A comparison with the 1971 Act's management role and the proposed Bill

The 1971 Act provides for the setting up and management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study. Such areas may contain underwater scenery, natural features or marine life of such distinctive quality, or so typical, or beautiful, or unique that their continued preservation is in the national interest.

The Association supports this definition of a marine reserve. It is objective, measurable and succinct; it can be seen and accepted by everyone as being somewhere special and different where extractive activities such as fishing and mining are inappropriate and should be prohibited. It is part of a continuum of marine management options which we have discussed above.

The Bill takes the process a considerable distance further. It seeks (clause 7) to conserve indigenous marine biodiversity which are representative examples of the full range of marine communities and ecosystems which are common and widespread; and outstanding, rare, distinctive or internationally important; and natural features that are part of the biological and physical processes of these marine communities, or are outstanding, rare, unique, beautiful or important.

In our view this purpose is far too broad. It is also subjective, difficult to measure and enforce. For example, we find it difficult to justify a "no fishing" policy in an area where species are "representative, common and widespread". Terms such as "beautiful", "distinctive" or "important" are too subjective to allow consistent application or measurement. They do not allow analysis of the risks of threats to marine life; rather the Bill presents a preferred remedy – no fishing – when a more restrained management approach such as the options above is more appropriate and realistic.

Because of this flaw, our principal submission is that the Bill should not proceed.

5. A clause-by-clause review of the Bill

Despite our submission that the Bill not proceed, there is a strong desire on Government's part to move to a more liberal approach to establishing marine reserves, and the balance of our submission looks at the Bill clause by clause.

Part 1 – Clause 3

Consultation Ministers : The Bill's focus is on improving the process to establish marine reserves, and because commercial activities in the reserves are seriously

restricted, we submit that the Ministers of the Crown responsible for tourism, commerce, and/or regional development should be included in the consultation process so that commercial interests in the vicinity of the proposed reserve are taken into account.

Clause 5

The Association is concerned that enforcement of marine reserves in the past has put fishing charters in jeopardy as they traverse the reserve with fish caught legitimately elsewhere. We expect that "innocent passage" will be interpreted to permit fish to be carried across the reserve.

We note that clause 12 (3) (b) has a similar effect.

Clause 7

The Association believes that the purpose of marine reserves should provide a high level of protection, because there is a range of mechanisms in place to provide protection at other levels, as we have outlined in section 4 of this submission.

To do this the Bill should focus on "outstanding, rare, distinctive or internationally important ..." and all reference to "representative examples" in sub-clause (a) be deleted.

Clauses 8 and 9

The principles in the Bill are very important as there are a number of requirements throughout the Bill for decisions to be consistent with its "purpose and principles". For that reason it is essential that the principles are balanced and acknowledge that there can be adverse effects in establishing reserves – for example, on people whose livelihoods depend on the sea surrounding or which makes up the proposed reserve.

The concept of "populations" is too broad. The term is too vague, and, along with "ecological processes" could be used to justify huge reserves which impinge unreasonably on other maritime activities.

Sub-clause (b) suggests that marine areas which are important as fishing, farming or mining may be "restored to" an indeterminate state via a marine reserve. We consider this too subjective to measure and will restrict existing activities. There are other tools available to "restore" harvested or mined areas and the concept of "restoration" should be deleted.

Clause 18 - Concessions

The issue of concessions is a vexed one with the Association. In general, the wider tourism industry accepts that commercial activities carried out on a reserve or national park should pay a concession to the Crown to recognise the benefit they are gaining from the reserve.

It is important to remember that concessions are paid by the operator who on-charges the customer. It is not a donation from the operator's profits; it is a cost of business which must be recovered from the customers. Consequently those who use the service pay and those who do not, don't pay.

We have no issue with a concessionable activity which requires everyone who partakes in it also contributes to the concession. For example, everyone who stays in a campground or hotel on DoC land pays for the right to do so via the concession.

We are more concerned about activities which have an element of choice about them. For example, almost everyone visiting a marine reserve must do so via a vessel of some sort. Those who own their own vessel can visit without paying a concession. In that sense, entry to the reserve is free.

Members of the public who do not own a vessel must therefore either hire one or pay for someone to take them. Only in the latter case is a concession required and consequently, **entry to the reserve is not free**; in addition to the fee required for the service, the passenger, via the operator, must may a fee to the Crown. It may be $3 per head or it may a percentage of the revenue – whatever the amount, people who must travel on a commercial vessel pay an entry fee to the reserve which people with their own boats do not.

We consider this policy unreasonably discriminatory and urge the Select Committee to amend the Bill so that a concession for transport to and in the reserve is either not required or specifically zero-rated.

Clause 36

Regional Councils have an important role in coastal and inland waterway management. We submit that management plans for a marine reserve should also not be inconsistent with the relevant regional council's management strategies.

Clause 40 (2) (a)

The question of consultation is very important. Under the current Act, the Minister of Fisheries may veto a proposed reserve if it interferes with fisheries management plans and policies. The Bill reduces this to "consult"; in other words, the Minister (nor any of the other consulting Ministers) have any right of veto over a proposed reserve, regardless of the impact it may have on other management activities or commercial businesses.

Fisheries management includes a range of tools to ensure the resource is managed in a sustainable fashion. Fishing is also a major employer and economic resource for the country as a whole. Obviously the Association supports sustainable fishing practices. We have noted earlier that creating marine reserves is not a fisheries management tool; section 4 above describes those. However, establishing a marine reserve may well conflict with fisheries management policies and practice to the wider detriment of the country.

For example, if 1,000 people enjoy fishing in a five kilometre stretch of coast, closing part of it will restrict that 1,000 peoples' fishing activities to a smaller area, which is likely to be to the detriment of the marine environment around the reserve. This is unlikely to be considered sustainable resource management.

We believe it is essential for a wider policy view that the Minister of Fisheries continues to have the power of veto when a marine reserve is proposed.

Clause 40 (2) (b)

Because of the pro-reserve bias in the Bill, it should be more specific about the consultation process. The current wording "practicable and appropriate" is too vague and open to subjective interpretation, and may allow people whose livelihoods depend on the area in question being omitted from the consultation process.

Specifically, the plan preparer must be required to consult people or organisations representing commercial activities in, near or affected by the proposed reserve.

We note that clause 46 includes a requirement to consult with people or their representatives when establishing marine reserves.

Clause 49

We submit that a marine reserve proposal should contain a clear statement of the objectives of the proposed area, an analysis of the alternative ways of achieving these objectives and the reason why a marine reserve is the preferred option, and an evaluation of the costs and benefits of the various alternatives.

By including this in the Bill it is made very clear to a reserve's proposers that there may be better alternatives to achieve their objectives rather than creating a reserve.

Clause 53

In general, we support the transparent process to establish a marine reserve. However, because the reserve may have a serious impact on existing commercial activities, and to allow for representative organisations to consult properly, we submit that the Director-General should be authorised to extend the submission period beyond 60 days (sub-clause (2) (c)) if necessary to allow for effective consultation.

Sub-clause (3) should be extended to include anyone who is operating a commercial activity in or adjacent to the proposed reserve. This will make it very clear that a business has the right to be consulted rather than running the risk of being excluded because the Director-General did not consider it to be an "interested person".

Clause 56

Because the creation of a marine reserve has considerable far-ranging effects and submitters expect their arguments for or against a reserve to have been taken into account, the applicant (including the Director-General) must (not "may") respond to the submissions.

Clause 62

As it stands, an independent report will not be worth the paper it's written on unless it is able to comment on all matters germane to the proposed reserve. This obviously must include the "appropriateness of a recommendation" other than poor process or failure to comply with the Act/Bill.

We strongly submit that there should be no barriers to a comprehensive independent report into a proposed reserve, which must include the appropriateness of declaring the reserve in the first place. Sub-clause (4) should be deleted and sub-clause (2) amended so that the independent report be authorised to comment on both the merits of the proposed reserve as well as the process followed to establish it.

We also submit that other parties affected by the proposed reserve have the right to request the Minister to seek an independent report.

Clause 64

The Director-General should be required "to take account" of the consultation Ministers' views ("have regard to" is unacceptably weak), and should also be required to deal with the issues raised by the Ministers. Perhaps the Resource Management Act's wording "mitigate, remedy or avoid" could be incorporated to show that the consultation process actually has some value.

Clause 67

Provided the "principles" section is amended along the lines we have suggested, we support the cumulative wording of sub-section (2). It is important that due regard is given to commercial and recreational fishing separately, as well as economic use and development. To make sure that the Minister considers all potential and actual users of the proposed reserve, we submit that existing commercial activities (i.e. other than fishing) be specifically included in the sub-section.

We submit that three sub-clauses be added :

(c) (iv) existing commercial activities, either land or marine based, in or near the proposed reserve;

(d) if it is intended to protect representative examples of the full range of marine communities that are common or widespread, a marine reserve is the least-cost method, including methods in other statutes, for achieving that protection;

(e) is consistent with any statements of government policy that are intended to fulfil NZ's obligations under the International Convention of Biological Diversity.

Proposed sub-cause (e) would ensure that proposals are consistent with the proposed Marine Protected Areas Strategy, for example.

Compensation

We note that the Bill is silent on the issue of compensation to commercial operators whose business, investment and livelihood is adversely affected by the proposed marine reserve. This is a crucial issue for the Association, as it is for other organisations.

There are parallels in other legislation where the state compulsorily acquires or otherwise adversely affects property or an investment. For example, the Public Works Act requires a land-owner to be compensated for land acquired.

Failure to recognise investment is contrary to natural justice, is unreasonable and inequitable.

We strongly submit that sub-clause (3) be amended thus :

"An adverse effect is not undue under subsection (2) (c) if the Minister is satisfied that either (a) the benefit to the public interest in establishing the marine reserve outweighs the adverse effect, or (b) the adverse effect is able to mitigated by means of any agreement reached between the proposed and those adversely affected, including the payment of compensation or adjustment assistance."

6. Conclusions

The Association reiterates that it is not opposed to the creation of marine reserves, provided the process in the current Act is followed. The current Act gives weight to scientific purposes and preserves areas of significance in a manner which is objective and measurable.

We also note that marine reserves should not be used as a surrogate fisheries management tool. There are a wide and effective range of tools to do this, including the QMS, which other countries do not have. Consequently, the Select Committee should not be persuaded by arguments that marine reserves have been adopted by "other countries" as a fisheries management device.

Our preference is for the Bill not to proceed. However, if it does, we have suggested a number of ways it should be amended to take account of a wider range of objectives and activities which must be considered when propoing a reserve.

While all are important to us, a summary of our key points is :

- All commercial activities likely to be affected by the proposed reserve should be taken into account and the consultation process at all levels be amended to do so.

- The purpose of the Bill should be made measurable and objective.

- The concession regime should be amended so that the mode of transport to get to the reserve is not a concessionable activity.

- The Minister of Fisheries' right of veto is restored.

- The Director-General and/or the reserves' proposers must show that a marine reserve is the most cost-effective way to meet their objective in establishing it.

- That there are no restrictions on what may be contained in an independent report into the proposed reserve, and that any affected person or organisation may request such a report.

- That compensation should be paid to individuals or organisations which are adversely affected by a proposed marine reserve.

The Association welcomes the opportunity to make this submission and asks to be heard in support of it.

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