

Departmental Memo: Background to clause 9A of the Hauraki Gulf / Tīkapa Moana Marine Protection Bill

To	Minister of Conservation	Date submitted	23 July 2024
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Security Level	In Confidence		
From	Siân Roguski, Director Policy: s 9(2)(a)		
Subject	Background on clause 9A (the 'no compensation' clause) in the Hauraki Gulf / Tīkapa Moana Marine Protection Bill.		
Attachments	No Attachments		

Purpose – Te aronga

1. To provide you with background information on clause 9A (the 'no compensation' clause) in the Hauraki Gulf / Tīkapa Moana Marine Protection Bill and to respond to issues raised by Seafood New Zealand.

Background and context – Te horopaki

2. On 29 February 2024, officials sought your decisions on a range of policy issues from submissions received by the Environment Select Committee and policy issues identified by DOC following further consideration of the Bill. The inclusion of clause 9A was a DOC identified issue and you agreed with the recommendation to include it in the Bill on the basis that it aligns with existing approaches for not compensating for conservation and sustainability measures [24-B-0105 refers].
3. Inclusion of clause 9A in the Bill was subsequently recommended to the Committee in the Departmental Report. The Committee agreed with the recommendation and clause 9A was included in the version of the Bill reported back by the Committee.
4. Clause 9A was inserted in the Bill during the Select Committee stage when usual opportunities for public engagement had concluded. As such no engagement was carried out on the clause.
5. On 8 July 2024, you, Hon Shane Jones and Hon David Seymour received a letter from Seafood New Zealand regarding their opposition to the inclusion of a 'no compensation' clause (clause 9A) in the Hauraki Gulf / Tīkapa Moana Marine Protection Bill (the Bill). You and Hon Shane Jones have since received letters from Te Ohu Kaimoana and Hon Shane Jones has received a letter from the Rock Lobster Industry Council on this matter.

6. This memo provides you with a summary of the advice for including clause 9A and provides responses to issues raised by Seafood New Zealand.

Clause 9A – the ‘no compensation clause’

Policy rationale for the decision that the government would not compensate fishers

7. In February 2024, you were advised on the matter of compensation in the Bill [24-B-0105 refers] and recommended clause 9A be inserted on the basis of weighing up the following considerations and factors:
 - *the results of the impact analysis¹ of the proposed marine protection suggest that the effect on fishers would not be significant enough to warrant compensation; the protection areas represent a small percentage of quota management areas.*
 - *the marine protection areas proposed in the Bill do not involve the taking of property rights but will have an effect on the exercise of those rights; fishers may need to shift their fishing effort elsewhere within the quota management area at a potentially increased cost.*
 - *not compensating fishers for effects of the proposed marine protection in the Hauraki Gulf/Tīkapa Moana aligns with existing approaches for not compensating for conservation or sustainability measures: the Fisheries Act 1996 provides that the Crown is not liable to pay compensation for sustainability measures under that Act; and while the Marine Reserves Act 1971 is silent on compensation, the decision-making processes under the Act mitigate any requirement for compensation to be paid to quota owners. However, we note that there is not a consistent approach to compensation across marine protection areas that have been legislated for. For example, the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 and the Kaikōura (Te Tai o Marokura) Marine Management Act 2014 do not contain ‘no compensation’ clauses.*
8. Since providing the advice outlined above, we have also explored the appropriate balance between the benefits of conservation initiatives and the effects on users and the cost to the Crown. When compensation is payable to those who may be impacted, the cost to the Crown of providing compensation may shift this balance. The increase in cost could result in conservation initiatives not being progressed, impacting on conservation outcomes and achieving domestic or international targets.
9. The Kermadec Ocean Sanctuary Bill 2016 (the Kermadec Bill) included a ‘no compensation’ clause which attracted significant opposition from iwi, Te Ohu Kaimoana and fishing industry representatives. However, the Kermadec Bill would have resulted in no-take marine protection across an entire quota management area whereas this Bill would result in a small proportion of a quota management area being no-take.

Rationale for the inclusion of clause 9A

10. The inclusion of clause 9A is an avoidance of doubt clause to ensure there is not a possibility that fishers might attempt to take legal action to claim compensation.
11. **S9(2)(g)(i)**
[Redacted text]

¹ Revitalising the Gulf Stage 1 – Impact of the marine protection proposals on commercial fishers. <https://www.doc.govt.nz/globalassets/documents/getting-involved/consultations/2022/revitalising-the-gulf-2223/revitalise-gulf-commercial-fishers-report.pdf>

property from them. However, it is not possible to speculate what the results of court action might be.

12. While our advice remains to retain clause 9A, you could reconsider this clause and address the question of how the matter of compensation is approached as part of any further marine protected area reform work.

Matters raised by Seafood NZ

13. We have provided responses to the main issues raised by Seafood NZ below.

Clause 9A overrides common law to seek compensation

14. Seafood NZ writes that: *Clause 9A removes and overrides the existing common law right for affected rights owners to seek compensation when legislation has the effect of taking property. Its impact is exacerbated by the use of special legislation, which also removes all other opportunities for legal appeals by affected parties.*

Response

15. **S9(2)(g)(i)** Parliament has the power to pass legislation that impacts property rights without compensation, but it should not do so without good justification. Further, the inclusion of clause 9A aligns with existing approaches of not compensating for conservation or sustainability initiatives.
16. Seafood NZ states that the impact of clause 9A is exacerbated by the use of special legislation and reference the process under the Marine Reserves Act whereby: *“Affected parties would have an opportunity to seek other remedies for impacts on their property rights through the courts, such as by judicial review.”*
17. The Marine Reserves Act does theoretically leave scope for when a marine reserve is created to challenge the decision to establish protection (for example on the basis that impacts on fishing are undue) and for affected parties to try to secure compensation through legal processes. Under this Bill a challenge on the decision cannot be made as it is bespoke legislation and clause 9A would remove the possibility to try to secure compensation.

Clause 9A is inconsistent with existing New Zealand law

18. Seafood NZ writes that: *Clause 9A is unprecedented and inconsistent with existing New Zealand law including the Fisheries Act and Marine Reserves Act. It is also inconsistent with New Zealand’s Legislation Design Guidance, particularly in relation to the absence of ‘cogent policy justification’ and a ‘rigorously fair process’ to rule out the payment of compensation.*

Response

19. As noted in paragraph 7, the inclusion of clause 9A aligns with existing approaches for not compensating for conservation or sustainability measures. However, we acknowledge that other marine protection areas have been established via legislation that does not contain a ‘no compensation’ clause.
20. Parliament is empowered to take or interfere with property rights without compensation, but there should be sound policy rationale for this (Legislation Design and Advisory Committee (LDAC) Guidelines²). The policy rationale for not compensating fishers is set out in paragraphs 7-9.

² Legislation Design and Advisory Committee Legislation Guidelines 2021, chapter 4.4: <https://www.ldac.org.nz/assets/documents/LDAC-Legislation-Guidelines-2021-edition.pdf>

Clause 9A was inserted without consultation

21. Seafood NZ writes that: *Clause 9A was inserted without any consultation and without the ability for affected rights holders to make submissions on the matter. The clause interferes with the integrity of the Fisheries Settlement by introducing a significant change to the nature of quota rights (the 'currency' of the commercial fisheries settlement) without consultation with Māori.*

Response

22. Seafood NZ is correct that there was no public consultation on this clause. Given the timing of its inclusion (i.e. at the Select Committee stage) the usual opportunities for public engagement had concluded. It is common for policy decisions to be made at the Select Committee stage in this manner (i.e. without further engagement with mana whenua or the public).
23. As clause 9A was inserted for avoidance of doubt, it was not considered necessary at the time to carry out engagement on the insertion of the clause in the Bill.

Risk assessment – Aronga tūraru

24. There will likely be continued opposition to clause 9A from the fishing industry.

Next steps – Ngā tāwhaitanga

25. A response to the letter from Seafood NZ has been commissioned. DOC will work with Fisheries New Zealand on this response. You have also received a letter from Te Ohu Kaimoana on this matter which DOC will prepare a response to.
26. The dates for the Second Reading, Committee of the whole House, and Third Reading of the Bill are yet to be set.
27. At the Committee of the whole House stage Amendment Papers will be considered and voted on. This is the final opportunity to amend the Bill.
28. Officials are available to provide further advice on this matter.

ENDS