

FISHERIES
INSHORE NEW ZEALAND

Committed to Healthy Oceans; Sustainable Fisheries



**PAUA INDUSTRY COUNCIL
LTD**



**KINA INDUSTRY COUNCIL
INC**

Date 28 February 2017

Mr M Dunne
Ministry for Primary Industries
PO Box 5620
Wellington

Dear Martyn

**REQUEST FOR A SECTION 186A TEMPORARY CLOSURE OF
MAIR AND MARSDEN BANKS TO ALL SHELLFISH HARVEST**

1. Thank you for the opportunity to submit on this application. This submission is presented on behalf of Fisheries Inshore New Zealand Limited, the Paua Industry Council and the Kina Industry Council.

The Submitters

Fisheries Inshore New Zealand

2. 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.
3. 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.
4. FINZ works closely with other commercial stakeholder organisations that focus on regional Paua Industry Council
5. The Paua Industry Council Ltd (PICL) is the national representative organisation of the paua industry in New Zealand. The organisation receives its mandate from five regional organisations known as PauaMACs, which represent the interests of quota owners and Annual Catch

Entitlement (ACE) holders in each of the paua Quota Management Areas. PICL is directed by its board to add value to quota through active management of the paua resource, to ensure its sustainability and productivity, and to protect and enhance industry rights and interests. PICL plays a leading role in developing and presenting the paua industry's response on legislative and regulatory proposals affecting the paua industry.

Kina Industry Council

6. The Kina Industry Council (KIC) is the New Zealand national representative organisation of the commercial kina industry. Its purpose is to protect and promote the interests of the commercial kina industry. The Kina Industry Council represents the interests of the quota owners and ACE owners in most kina quota management areas.

Summary of Position

7. Fisheries Inshore, the Paua Industry Council and the Kina Industry Council oppose the s186A proposal to close Mair and Marsden Banks to the take of all shellfish for a period of two years for the following reasons:
 - a. A closure to the take of all shellfish is not legal;
 - b. The applicant has not provided information appropriate to assessing the proposal;
 - c. S186A closures are not a legal option to reserve space while other regulatory measures such as mātaítai are considered; and
 - d. The Minister is unable on the basis of the information supplied to be satisfied that the application is warranted.

Background

8. The Patuharakeke Iwi Trust Board (PTB) has sought a two year temporary closure to the take of mussels from Mair and Marsden Bank under section 186A of the Fisheries Act 1996. They suggest that, for the ease of monitoring and enforcement, it would be simpler to close the area to the gathering of all shellfish.
9. The Mair and Marsden Banks have long been a significant source of pipi for commercial, recreation and customary fishers. While the recreational and customary take are unknown, the Banks' pipi beds have been the primary source for commercially harvested pipi in New Zealand with annual landings generally being in excess of 150 tonnes. As a consequence of substantive declines in the abundance of pipi, the Banks were temporarily closed to the take of pipi in 2011 and were closed for the take of pipis under a FA Section 11 decision, effective 1 October 2014. Because the reason for the decline of the pipi is not known, it is not certain if or by when or to what degree the beds will recover.
10. Tangata whenua traditionally gathered mussels, pipis and other seafood from the Banks until the development of the Marsden Point refinery and industrial area. The mussel beds ceased to exist but, since the closure of the Marsden power stations, appear to be re-establishing themselves. The beds are, however, not extensive and it is not clear how abundant the beds may become. In the interim, harvesting pressure means the beds are being depleted again. We note the recent Court proceedings on the excessive take of mussels from the beds. There is no indication of how long the rebuilding process might take to create a sustainable fishery or how abundant the mussel beds may become.

11. PTB seeks to provide the mussels time to re-establish and become more extensive to provide a sustainable future supply.
12. PTB are seeking to prepare an application for a mātaimai reserve to cover the Banks. Commercial fishing is excluded from a mātaimai unless specific provision is made by the management board. The management board of a mātaimai has the power to introduce by-laws to manage fishing activity within the mātaimai. To be approved, a mātaimai must not “*prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species*”¹ – the prevent test.
13. Any mātaimai in the Banks will impact significantly on the commercial harvesting of pipi. While that proposal has yet to be lodged, given the value of the pipi beds to the commercial sector, any mātaimai application could reasonably be expected to fail the prevent test. While PTB has consulted a number of organisations and interested parties in respect of the proposed mātaimai, they have not contacted industry. Given the prevent test, the interest of commercial stakeholders and the power of the mātaimai board to impose by-laws, early engagement with industry is necessary.

Fisheries Act Section 186A Provision

14. S186A of the Fisheries Act 1996 provides that the Minister may temporarily close an area, 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.
15. S186A is a provision under the customary fishing section in Part 9 of the Act. Part 9 provisions were implemented to give effect to agreements in the Deed of Settlement of the Treaty of Waitangi fisheries claims to provide tangata whenua with the power to exercise “kaitiakitanga”.
16. The s186A provision has been interpreted on occasions as a loose provision to improve the availability of fish for tangata whenua when they are unable to satisfy their desired level of take. That interpretation is neither appropriate, nor correct. It misreads the term “*use and management practices*” and replaces it with “*use of, and management practices of*”. In the legislation, the word “*use*” is a descriptor of practices, as is the word “*management*”. The legislated provision of “*use and management practices*” collectively constitute kaitiakitanga, the management or stewardship of the resources.
17. 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.
18. 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.

¹ Section 23 (1)(e)(ii) of the Fisheries (Kaimoana Customary Fishing) Regulations 1998

19. 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.
20. 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.

The Submitters Oppose the Application

21. We oppose the application for a s186A temporary closure to the take of all shellfish for the Mair and Marsden Banks on the grounds that:
 - a. A closure to the take of all shellfish is not legal;
 - b. The applicant has not provided information appropriate to assessing the proposal;
 - c. S186A closures are not a legal option to reserve space while other regulatory measures such as mātaimai are considered; and
 - d. The Minister is unable on the basis of the information supplied to be satisfied that the application is warranted.

Closure to take of all shellfish not warranted

22. The application primarily seeks a closure to the take of mussel. The application contains information relevant to mussels. That component of the application is consistent with the legislation.
23. PTB has suggested that, for the ease of compliance, the take of all shellfish should be prohibited. They provide no information relating to other shellfish in the Banks. The Minister can only approve an application on the basis that tangata whenua are being adversely affected in respect of their use or management practices in respect of the exercise of their non-commercial fishing rights. Ease of compliance is not grounds for a closure to other shellfish. That component of the application is not consistent with the legislated provisions and to that extent is invalid.

Deficient Information

24. The material supplied by the applicant is inadequate. While the application contains anecdotal evidence as to the re-emergence and current unsustainable harvest of the mussels, nowhere does the application state why the closure should apply to all shellfish. Nor does it indicate what other shellfish might be affected by the closure or who might be affected.
25. Nowhere does the application state what the improved benefits are expected to be. Nowhere does it indicate when the beds might be considered sufficiently abundant to be re-opened. A s186A closure can be extended on application before the expiry of the two year period. Conceivably, if there are no objective performance criteria or desired outcomes stipulated, s186A closures can be extended ad infinitum. We cannot accept that was the intent when the provisions were passed by the House.
26. The information provided does not meet the evidence requirements set out by the Ministry for such applications. 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.

Not For a Valid Purpose

27. A s186A closure can only be implemented where the fishstock is in such a state that tangata whenua are unable to exercise established kaitiakitanga in the management of the stock and catch. A s186A closure cannot be implemented simply because there are insufficient fish available to meet the wants of tangata whenua or in this instance to protect stocks until an alternative management framework is in place.
28. The PTB application relies in the first instance on the inability of the fishery to meet their demand for seafood. The application seeks to protect and build up the mussel stocks to provide for the extractive needs of tangata whenua and then establish use and management practices for future management of the fishery under a mātaítai provision. That is an abuse of the legislated provisions and should not be permitted. In any event, it seems most likely that the mātaítai proposal would fail on the threshold test.

Minister Unable to Be Satisfied

29. 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.

Contact for Queries

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