

Aquaculture Compensation Regulations

On 5 November, the Government issued regulations to give effect to the radical new approach to the consequences of a finding that a new aquaculture development will have an undue adverse effect (UAE) on commercial fishing found in 2011 reform of aquaculture legislation. We described that approach in a column around this time last year. Unless significant drafting flaws or inconsistency between the regulations and the Cabinet decision that authorised them are identified, they will come into force on 7 December.

The context for the *Fisheries (Aquaculture Compensation Methodology) Regulations 2012* is provided by Part 9A of the Fisheries (specifically, sub-part 4), which established that, if the Ministry of Primary Industries conducts a UAE test and determines that a UAE would result, and the aquaculture applicant has not reached an agreement with the affected quota owners, that applicant can opt to have the matter referred to arbitration.

The arbitration, which is to be conducted generally in accordance with the Arbitration Act 1996, must provide answers to two questions:

1. Whether the proposed aquaculture activities or the fishing in relation to which the UAE reservation has been made will be of “materially greater economic value to New Zealand”; and, if so
2. The appropriate level of compensation to be paid to affected quota owners.

As their name indicates, the purpose of the regulations is to set out the data and methodology that the arbitrator must use in answering those questions. In terms of the first of the two questions, the regulations provide that relative economic value of aquaculture v. fishing in a particular area should be based on the average greenweight export price for each species that is, or will, be harvested from the area in question, with the arbitrator to determine the period over which such prices should be averaged. If such data is not available (e.g. if the aquaculture will involve a new species for which no export market has previously existed), or the arbitrator is dissatisfied with the quality of the data, s/he is free to use other data/analysis provided by the parties.

Once the arbitrator is satisfied that the relative economic values of the aquaculture activities and fishing have been established, the regulations prescribe that the aquaculture activities will be considered to be of materially greater value than fishing if their value is not less than five times greater. Again, the arbitrator is given a narrow discretion to reach a different conclusion if faced with “overriding data or analysis to the contrary”.

Assuming that the proposed aquaculture activities pass the ‘materially greater economic value’ test, the arbitrator will move on to determining the appropriate level of compensation to be paid to affected quota owners. There are two components to this determination. The first is to establish the value of the quota that the UAE test has determined will not be able to be caught as a result of the aquaculture activities. The regulations provide that this should be based on quota trade prices or the net present value of ACE trade prices, or a combination of the two. Recognising that there are a number of difficulties in obtaining robust and reliable data on these prices (for example, because quota trades are rare and reported ACE prices are often skewed by transactions that are not at arms’

length), the arbitrator is authorised to consider other data provided by the parties where such prices do not provide a reliable indication of value.

Once quota value has been determined, the arbitrator is directed to apply a multiplier of 1.2 to reflect the consequential disruption costs (such as an inability to fulfil supply contracts as a result of reduced catches and solatium recognised in the legislation. Solatium is a concept aimed at recognising the intangible losses suffered by a party forced to accept a change to which they have not agreed.

A couple of observations: the intent of the regulations appears to be to minimise the extent to which parties can argue over different ways of assessing the value of aquaculture, fishing or the loss they suffer, while preserving a limited ability for an arbitrator to look at other approaches where the prescribed data or analysis doesn't appear to cut it. Having said that, it would be a mistake to think that the regulations reduce the arbitration to a merely mathematical exercise. There will be a number of points of which parties will differ and, the first few arbitrations, at least, will no doubt be hotly contested, as they establish precedents for the interpretation of the Act and regulations.

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