STRATEGIES, POLICIES and the law

BY JUSTINE INNS

The launch by the New Zealand aquaculture industry of its Aquaculture Strategy marked a shift away from the past few years, fixation on the legal regime for aquaculture to an emphasis on the policy environment within which the sector operates. However unsatisfactory the legal regime might be, it seems that it will be with us for the foreseeable future. Rather than a further beating of heads against that particular brick wall, the industry strategy seems to herald an era of just getting on with it.

Above all, the strategy emphasises the need for the industry to be more involved in aquaculture planning through the Resource Management Act. In particular, a key priority will be to "work with, and assist councils to identify areas for and establish environmentally sustainable new aquaculture management areas, or AMAs."

Local body planning through the Local Government Act has also been flagged as important. The LGA provides the framework for developing long-term council community plans and annual plans. These outline activities to be undertaken by councils, and how those activities will be funded. Given the likelihood that councils will continue to seek to generate revenue from aquaculture activities, whether through rating, coastal occupation charges or increasing resource consent fees, LGA planning processes will require attention from the industry.

Another suite of activities covered by the strategy relate to increasing certainty of tenure for existing marine farmers, including identifying and promoting successful examples of ways councils have dealt with consent renewals.

Another innovative idea is to explore an "evergreen contracts" model, whereby consents might be renewed part way through their term, so that incumbents always have a "buffer" of a number of years of guaranteed tenure ahead of them.

The need to look at the "bankability" of marine farming consents is also highlighted. A common complaint of smaller marine farmers, in particular, is that banks won't accept marine farming consents as security for business loans, with the result that the family home often ends up being mortgaged to fund the business.

The problem lies in section 122 of the RMA, which provides that resource consents are not "real or personal property", and that coastal permits do not give the holder "the same rights in relation to the use and occupation of the area (to which it relates), as if he or she were a tenant or licensee".

There are some exceptions to those general rules, but the impression clearly remains that resource consents, particularly coastal permits, are inferior to leases, licences and other forms of bankable property right.

The strategy does not ignore the fact that the aquaculture reforms left much to be desired. It flags the need to "work with the government to continually monitor and improve the aquaculture regulatory regime". Implicit is a recognition that another major overhaul of the legal framework is unlikely in the foreseeable future and that any further improvements will have to be incremental.

Frameworks for experimental/educational aquaculture and for freshwater/land-based aquaculture are highlighted as requiring further work. There is little doubt that the post-reform framework presents huge hurdles to experimental aquaculture activities, due to the practical difficulty of demonstrating the environmental effects that will result from an activity that has never been undertaken before. "Tweaking" of the framework to provide greater flexibility in this respect would be a real boon to the whole industry.

GOVERNMENT RESPONSE

The ministerial response to the strategy has been positive. The government has accepted the invitation to develop a national statement or policy, "that looks to maximise the value we get from aquaculture", and that states that "aquaculture is a legitimate and valued use of our coastal space," the Hon Jim Anderton said on July 27.

This is not, however, to be the "national policy statement" provided for under the RMA. Such policy statements are prepared through a formal, public process and are binding on local authorities. The national policy on aquaculture is intended to be a more political statement, recording the government's commitment to the future of the industry, rather than having any formal, legal effect. At the same time, it has been mooted that the New Zealand Coastal Policy Statement - a key RMA document that is binding on councils - could include guidance for councils on aquaculture development.

In launching the industry strategy, the Minister of Economic Development, Hon Trevor Mallard, chose to emphasise the need for industry improvement: "Rather than undertaking business-as-usual activities on a greater scale, the growth of the industry will come through better use of existing space… the development of new value-added products and the diversification into new markets."

While few would disagree with this sentiment, development will be limited, and the reforms will ultimately fail, if there is not also access to new aquaculture space.

Justine Inns joined Oceanlaw as a senior associate. She previously spent more than a decade as an advisor to various iwi (tribes), including several years with Ngai Tahu, responsible for implementing the iwi's Treaty of Waitangi claim settlement