

Proactive Release

Statutory publication due:
2 October 2023

The following Cabinet papers and related Cabinet minutes have been proactively released by the Minister of Foreign Affairs

Title	Reference
<i>Cabinet Minute of Decision – Report of the Cabinet Legislation Committee: Period Ended 18 August 2023</i>	CAB-23-MIN-0387
<i>Cabinet Legislation Committee – Minute of Decision – Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023</i>	LEG-23-MIN-0143
<i>Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023</i>	
<i>Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023</i>	



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Legislation Committee: Period Ended 18 August 2023

On 21 August 2023, Cabinet made the following decisions on the work of the Cabinet Legislation Committee for the period ended 18 August 2023:

Proactively Released by the Minister of Foreign Affairs

LEG-23-MIN-0143

**Tokelau (Exclusive Economic Zone) Fishing
Amendment Regulations 2023**
Portfolio: Foreign Affairs

CONFIRMED

Proactively Released by the Minister of Foreign Affairs

Rachel Hayward
Secretary of the Cabinet



Cabinet Legislation Committee

Minute of Decision

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Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023

Portfolio Foreign Affairs

On 17 August 2023, the Cabinet Legislation Committee:

- 1 **noted** that Tokelau has requested the implementation of the changes set out in the 2023 Amendment regulations, consistent with Tokelau's commitment to the 4th Arrangement Implementing the Nauru Agreement relating to Fish Aggregating Device (FAD) Tracking and FAD Buoy Registration;
- 2 **noted** that the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 provide the legal framework to give effect to the Fourth Implementing Arrangement;
- 3 **noted** that under the Tokelau Act 1948, New Zealand is responsible for regulations relating to the Tokelau EEZ;
- 4 **noted** that drafting instructions were authorised without reference to Cabinet in accordance with paragraph 7.95(d) of the Cabinet Manual 2023;
- 5 **noted** that the Tokelau Fisheries Management Agency has been consulted on the content of the Regulations;
- 6 **authorised** the submission to the Executive Council of the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 [PCO 25544/5.0];
- 7 **noted** that the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 come into force on 21 September 2023.

Rebecca Davies
Committee Secretary

Present:

Hon Grant Robertson (Chair)
Hon Dr Ayesha Verrall
Hon Damien O'Connor
Hon Andrew Little
Hon Kieran McAnulty
Hon Ginny Andersen
Hon Willow-Jean Prime
Hon Dr Duncan Webb
Hon Rachel Brooking
Hon Jo Luxton
Tangi Utikere, MP (Chief Government Whip)

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

~~In Confidence~~

Office of the Minister of Foreign Affairs
Chair, Cabinet Legislation Committee

Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023

Proposal

- 1 This paper seeks authorisation for the submission to the Executive Council of the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 (“the 2023 Amendment Regulations”).

Policy

- 2 Tokelau is a non-self-governing territory of New Zealand that is substantially self-governing. Tokelau’s offshore fisheries are managed under the Tokelau (Exclusive Economic Zone) Fishing Regulations 2012 (the 2012 Regulations), made under sections 8 and 11 of the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 (the Act).
- 3 To maximise the value of its offshore fisheries, Tokelau participates in the Palau Arrangement established by the Parties to the Nauru Agreement (PNA) for the collective management of the Western Pacific tuna fishery. Tokelau has committed to implementing conservation and management measures agreed by the PNA.
- 4 The 2012 Regulations require amendments to implement new measures agreed at a 2020 meeting of PNA Ministers, in which the Tokelau Minister of Fisheries participated.¹ The new measures regulate the use of tracking devices on Fish Aggregating Devices (FADs) used in the tuna fisheries of the Western Pacific in an area which includes the Tokelau Exclusive Economic Zone (Tokelau EEZ).
- 5 The Tokelau Fisheries Management Agency (FMA) has advised that the practice of commercial fishing on FADs represents a significant proportion of the purse seine fishing² efforts that occur in the area covered by the PNA and provides economic returns to Tokelau. Without the use of these devices, Tokelau would not have a commercially viable purse seine fishery.
- 6 These Amendment Regulations will enhance the capacity to manage FADs and fishing on FADs in the Tokelau EEZ. This is increasingly important with the likelihood of increased fishing on FADs and increased FADs in the water as a result of the improved status of fish stocks, along with growing concerns about the impact of FADs on the marine ecosystem. The FMA has advised that to reduce the amount of synthetic marine debris, operators are being encouraged to use, or transition towards using, non-plastic and biodegradable materials in the construction of FADs. The

¹ As reflected in the Fourth Implementing Arrangement to the Nauru Agreement Relating to Fish Aggregating Device (FAD) Tracking and FAD Buoy Registration, decided in June 2020 (the FAD Buoy Arrangement).

² A purse seine is a large wall of netting deployed around an entire area or school of fish.

Western and Central Pacific Fisheries Commission³ has also agreed to the use of only non-entangling FADs in the Convention Area from 1 January 2024.

- 7 The FMA and the Administrator of Tokelau have requested the Ministry of Foreign Affairs and Trade progress the necessary amendments.
- 8 The key changes in the 2023 Amendment Regulations are to:
 - 8.1 prohibit unregistered FAD buoys in the Tokelau territorial sea or sea of the Tokelau EEZ;
 - 8.2 give the Administrator power to seize and dispose of unregistered FAD buoys and any FAD attached to it found in the Tokelau territorial sea or sea of the Tokelau EEZ;
 - 8.3 give the Administrator power to refuse a license to the owner of a purse seine vessel who has breached the FAD Buoy Arrangement;
 - 8.4 add an implied condition in licenses for purse seine vessels to ensure the vessel is not used to fish in the Tokelau EEZ on a FAD with an unregistered FAD buoy;
 - 8.5 require all FAD buoy operators to register their buoys prior to deployment and ensure they are operating to specified reporting standards;
 - 8.6 provide for offenses and penalties where these regulations are breached pursuant to Section 8(1)(k) of the Act; and
 - 8.7 provide a defence to those offences.
- 9 Every person who commits an offence will be liable on conviction to a fine not exceeding \$100,000. This is commensurate with the penalty currently in the 2012 Regulations for fishing without a licence and considered appropriate given the potential serious impacts of unmanaged fishing on FADs.
- 10 It will be a defence to these offences if the defendant is able to prove that the contravention was due to the act or default of another person, or to an accident or to some other cause beyond the defendant's control; and the defendant took reasonable precautions and exercised due diligence to avoid the contravention.
- 11 The 2023 Amendment Regulations are entirely routine, and do not require a new policy decision. Accordingly, drafting instructions were authorised without reference to Cabinet in accordance with paragraph 7.95(d) of the Cabinet Manual 2023.

Timing and 28-day rule

- 12 The 2023 Amendment Regulations must be gazetted by September 2023 to allow Tokelau officials to finalise access arrangements for fishing in the Tokelau EEZ for 2024. A waiver of the 28-day rule is not sought.

³ The Western and Central Pacific Fisheries Commission is a Regional Fisheries Management Organisation established by the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean that overlaps the area of high seas covered by the PNA.

Compliance

- 13 The Regulations comply with:
- a. the principles of the Treaty of Waitangi;
 - b. advice from the Treaty Provisions Officials Group on any Treaty of Waitangi provisions (there are no such provisions);
 - c. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - d. the principles and guidelines set out in the Privacy Act 2020;
 - e. relevant international standards and obligations; and
 - f. the Legislation Guidelines (2021 edition), maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 14 There are no grounds for the Regulations Review Committee to draw the Regulations to the attention of the House under Standing Order 327.

Certification by Parliamentary Counsel

- 15 The draft Regulations have been certified by Parliamentary Counsel as being in order for submission to Cabinet.

Impact analysis

- 16 The Minister of Foreign Affairs previously authorised drafting of the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023. Cabinet's impact analysis requirements therefore do not apply.

Publicity

- 17 None proposed.

Proactive release

- 18 I propose to release this paper proactively as a whole.

Consultation

- 19 Tokelauan officials working for the Fisheries Management Agency have been consulted during the development of the draft 2023 Amendment Regulations.
- 20 The Ministry for Primary Industries and Ministry of Justice have also been consulted on the draft 2023 Amendment Regulations.

Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 note that Tokelau has requested the implementation of the changes set out in the 2023 Amendment regulations, consistent with Tokelau's commitment to the 4th Arrangement Implementing the Nauru Agreement relating to Fish Aggregating Device (FAD) Tracking and FAD Buoy Registration;
- 2 note that the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 provide the legal framework to give effect to the Fourth Implementing Arrangement;
- 3 note that under the Tokelau Act 1948, New Zealand is responsible for regulations relating to the Tokelau EEZ;
- 4 note that drafting instructions were authorised without reference to Cabinet in accordance with paragraph 7.95(d) of the Cabinet Manual 2023;
- 5 note that the Tokelau Fisheries Management Agency has been consulted on the content of the Regulations;
- 6 authorise the submission to the Executive Council of the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023;
- 7 note that the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023 come into force on the 28th day after the date of their notification in the *Gazette*.

Authorised for lodgement

Hon Nanaia Mahuta

Minister of Foreign Affairs

Proactively Released by the Minister of Foreign Affairs

Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023

Order in Council

At Wellington this day of 2023

Present:
in Council

These regulations are made under sections 8 and 11 of the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 and section 4 of the Tokelau Act 1948 on the advice and with the consent of the Executive Council.

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**Tokelau (Exclusive Economic Zone) Fishing
Amendment Regulations 2023**

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Regulations

1 Title

These regulations are the Tokelau (Exclusive Economic Zone) Fishing Amendment Regulations 2023.

2 Commencement

These regulations come into force on 21 September 2023.

3 Principal regulations

These regulations amend the Tokelau (Exclusive Economic Zone) Fishing Regulations 2012.

4 Regulation 3 amended (Interpretation (general))

In regulation 3(1), insert in their appropriate alphabetical order:

activated, in relation to a FAD buoy, means satellite communication services for the FAD buoy have been enabled by the FAD buoy service provider

deactivated, in relation to a FAD buoy, means satellite communication services for the FAD buoy have been stopped or terminated by the FAD buoy service provider

deployed means introduced to the sea

FAD or **fish aggregating device** means any human-made, or partly human-made, floating or semi-submerged device, whether anchored or not, intended for the purpose of aggregating fish, and includes any natural floating object on which a device has been placed to track or fix its location

FAD buoy means any device or system that can be used by any vessel to locate, track, or otherwise monitor a FAD

FAD buoy operator means the entity listed on the PNA FAD Buoy Register as responsible for a particular FAD buoy

FAD buoy service provider means a business that provides FAD buoys and associated services to FAD buoy operators

FAD Buoy Tracking Arrangement means the Fourth Arrangement Implementing the Nauru Agreement relating to Fish Aggregating Device (FAD) Tracking and FAD Buoy Registration

Nauru Agreement means the Nauru Agreement Concerning the Cooperation in the Management of Fisheries of Common Interest concluded on 11 February 1982, as amended

PNA means the parties to the Nauru Agreement

PNA FAD Buoy Register means the FAD buoy register established by the chief executive of the PNA Office

PNA FIMS means the PNA's Fisheries Information Management System

PNA Office means the office established under Article V of the Nauru Agreement

switched off, in relation to a FAD buoy, means the FAD buoy has been manually turned off to prevent it being able to send or receive satellite transmission

switched on, in relation to a FAD buoy, means the FAD buoy has been manually turned on to enable it to send or receive satellite transmission

unique identification number, in relation to a FAD, means its manufacturer's identification number

unregistered FAD buoy means a FAD buoy that is not registered on the PNA FAD Buoy Register

5 Regulation 16 amended (Procedure for granting licence to purse seine vessels)

After regulation 16(3), insert:

- (4) The Administrator must not grant a licence under subclause (2) to the owner of a purse seine vessel who has breached the FAD Buoy Tracking Arrangement by—
 - (a) deploying an unregistered FAD buoy in any waters covered by the FAD Buoy Tracking Arrangement or in the exclusive economic zone; or
 - (b) using the purse seine vessel to fish on a FAD with an unregistered FAD buoy in any waters covered by the FAD Buoy Tracking Arrangement or in the exclusive economic zone.
- (5) However, if the owner of a purse seine vessel who has breached the FAD Buoy Tracking Arrangement in the manner specified in subclause (4) has paid a penalty in relation to the breach, the Administrator is not required to refuse to grant the owner of a purse seine vessel a licence under subclause (4).

- (6) The Administrator may rely on information supplied to the Administrator by the PNA Office in relation to whether the owner of a purse seine vessel—
 - (a) has breached the FAD Buoy Tracking Arrangement;
 - (b) has paid a penalty in relation to a breach of the FAD Buoy Tracking Arrangement.
- (7) Subclauses (4) and (5) do not limit the Administrator’s power to refuse to grant a licence under subclause (2)(b).

6 Regulation 19 amended (Cancellation of licence for breach of condition)

In regulation 19(1), after “18”, insert “or 35C(2)”.

7 Regulation 28 amended (Conditions of deemed licence)

- (1) After regulation 28(1)(c), insert:
 - (ca) the condition implied by regulation 35C, if applicable:
- (2) In regulation 28(2), replace “(c)” with “(ca)”.

8 Regulation 29A amended (Suspension and cancellation of licence and forfeiture of access fee)

In regulation 29A(2), replace “(c)” with “(c) or (ca)”.

9 New regulations 35A to 35D and cross-heading inserted

After regulation 35, insert:

FAD buoys

35A Unregistered FAD buoys prohibited in territorial sea or sea of exclusive economic zone

- (1) No unregistered FAD buoy may be in the territorial sea or the sea of the exclusive economic zone.
- (2) However, an unregistered FAD buoy may be in the territorial sea if it is attached to an anchored FAD.

35B Administrator may seize and dispose of unregistered FAD buoys found in territorial sea or sea of exclusive economic zone

- (1) The Administrator may seize and dispose of any unregistered FAD buoy (and any FAD attached to it) found in—
 - (a) the sea of the exclusive economic zone; or
 - (b) the territorial sea, unless the unregistered FAD buoy is attached to an anchored FAD.
- (2) The Administrator is not obliged to identify or locate, or attempt to identify or locate, the owner of an unregistered FAD buoy (and any FAD attached to it) found in the territorial sea or the sea of the exclusive economic zone.

35C Licence conditions: fishing on unregistered FAD buoys prohibited in exclusive economic zone

- (1) The condition in subclause (2) is implied in every licence granted under regulation 16.
- (2) The owner of a licensed purse seine vessel must ensure that the vessel is not used to fish in the exclusive economic zone on a FAD with a FAD buoy, unless the FAD buoy is registered on the PNA FAD Buoy Register.

35D Duties of FAD buoy operators

A FAD buoy operator must ensure that, in relation to any FAD buoy that is deployed in the exclusive economic zone,—

- (a) the FAD buoy is registered on the PNA FAD Buoy Register before it is deployed; and
- (b) the FAD buoy is activated, switched on, and transmitting information automatically in near real time to the PNA FIMS at least once in every 12-hour period; and
- (c) the information that is transmitted by the FAD buoy is—
 - (i) the unique identification number of the FAD buoy; and
 - (ii) the position fix (latitude and longitude) of the FAD buoy; and
 - (iii) the date and time of fixing of the position of the FAD buoy expressed in Universal Time Constant; and
- (d) the PNA FIMS is advised within 24 hours if the FAD buoy—
 - (i) is being switched off after removal from the sea; or
 - (ii) is being deactivated; or
 - (iii) fails to transmit for 72 consecutive hours; or
 - (iv) is stationary for 72 consecutive hours within 1 nautical mile from land and the FAD buoy operator believes the FAD buoy has drifted onto a reef or beach; and
- (e) the unique identification number is clearly visible.

10 New regulations 39A to 39C inserted

After regulation 39, insert:

39A Offence for unregistered FAD buoy to be in territorial sea or exclusive economic zone

- (1) If an unregistered FAD buoy that is not attached to an anchored FAD is found in the territorial sea, the owner of the unregistered FAD buoy commits an offence.
- (2) If an unregistered FAD buoy is found in the sea of the exclusive economic zone, the owner of the unregistered FAD buoy commits an offence.

- (3) Every owner of an unregistered FAD buoy who commits an offence under subclause (1) or (2) is liable on conviction to a fine not exceeding \$100,000.

39B Offence for FAD buoy operator

- (1) A FAD buoy operator who breaches any of the requirements of regulation 35D commits an offence.
- (2) Every person who commits an offence under subclause (1) is liable on conviction to a fine not exceeding \$100,000.

39C Further provision relating to offences in regulations 39A and 39B

In proceedings for an offence against regulation 39A or 39B,—

- (a) it is not necessary for the prosecution to prove that the defendant intended to commit the offence; but
- (b) it is a defence if the defendant proves that—
- (i) the contravention was due to the act or default of another person, an accident, or some other cause beyond the defendant's control; and
 - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

Clerk of the Executive Council.

Explanatory note

This note is not part of the regulations, but is intended to indicate their general effect.

These regulations, which come into force on 8 September 2023, amend the Tokelau (Exclusive Economic Zone) Fishing Regulations 2012 to implement, in Tokelau, the Fourth Arrangement Implementing the Nauru Agreement relating to Fish Aggregating Device (FAD) Tracking and FAD Buoy Registration (the **FAD Buoy Tracking Arrangement**). The **Nauru Agreement** is the Nauru Agreement Concerning the Cooperation in the Management of Fisheries of Common Interest concluded on 11 February 1982.

The FAD Buoy Tracking Arrangement requires the registration of FAD buoys. A **FAD buoy** is any device or system that can be used by any vessel to locate, track, or otherwise monitor a FAD. A **FAD** (or **fish aggregating device**) is any human-made, or partly human-made, floating or semi-submerged device, whether anchored or not, intended for the purpose of aggregating fish, and includes any natural floating object on which a device has been placed to track or fix its location. The FAD Buoy Tracking Arrangement requires FAD buoys to be registered on a register maintained by the office established under Article V of the Nauru Agreement (the **PNA FAD Buoy Register**).

The main amendments made in these regulations are—

- to amend the procedure for granting a licence to purse seine vessels where the owner of a purse seine vessel has breached the FAD Buoy Tracking Arrangement (*see regulation 5*);
- to provide that a licence granted to a purse seine vessel may, in certain circumstances, be suspended or cancelled if the new implied condition is breached (*see regulations 6 and 8*);
- to imply a condition in licences granted to purse seine vessels that the owner of a licensed purse seine vessel must ensure that the vessel is not used to fish in Tokelau's exclusive economic zone on a FAD with a FAD buoy, unless the FAD buoy is registered on the PNA FAD Buoy Register (*see regulations 7 and 9*);
- to prohibit unregistered FAD buoys from being in Tokelau's territorial sea, in certain circumstances, or in the sea of Tokelau's exclusive economic zone (*see regulation 9*);
- to give the Administrator of Tokelau the power to seize and dispose of unregistered FAD buoys found in the sea of Tokelau's exclusive economic zone and, in certain circumstances, in Tokelau's territorial sea (*see regulation 9*);
- to impose duties on FAD buoy operators in relation to FAD buoys that are deployed in Tokelau's exclusive economic zone (*see regulation 9*);
- to provide for offences in relation to unregistered FAD buoys found in Tokelau's exclusive economic zone or in Tokelau's territorial sea and in relation to FAD buoy operators who breach the duties imposed on them (*see regulation 10*).

Issued under the authority of the Legislation Act 2019.

Date of notification in *Gazette*.

These regulations are administered by the Ministry of Foreign Affairs and Trade.