

Client: The New Zealand Big Game Fishing Council Incorporated (NZBGFC); option4; and the Hokianga Accord

Subject: Ministry of Fisheries (MFish) proposal to amend section 13 Fisheries Act 1996 (FA)

Date: 11 April 2008

Introduction

- 1 Barry Torkington and I attended the meeting in Wellington on Thursday 10 April 2007 convened by MFish for the three-fold purpose of:
 - 1.1 Identifying the problem the Minister of Fisheries (Minister) perceives he has setting the total allowable catch (TAC) in any fish stock under the quota management system (QMS) as a consequence of the judgment of the High Court in *Antons Trawling Company Ltd v Esperance Fishing Co Ltd* and *Orneagan Developments Limited v Minister of Fisheries and Chief Executive of Ministry of Fisheries*, High Court, CIV 2007-485-2199 (*Anton*);
 - 1.2 How to resolve the Minister's perceived problem – the broad approach to be taken?
 - 1.3 The specific solution to be adopted.
- 2 The meeting was chaired by MFish's National Policy Manager, Mark Edwards. A list of the attendees is contained in the Appendix to this report.

Minister's dilemma?

- 3 As a consequence of the *Anton* decision, Mr Edwards:
 - 3.1 explained the problem the Minister, acting on Crown Law advice, considers he has in setting TAC's particularly in respect of TAC's scheduled to be set by 1 October 2008 this year.
 - 3.2 said that MFish was surprised at the High Court's literal interpretation of section 13(2)(b), namely, that 'although (the Minister's) advice was that Bmsy could not be estimated and he had no information from which he might estimate Bmsy or the current biomass, still less the way and rate at which the stock should be moved to Bmsy' which led to the Minister's 2007 decision being set aside: para.[67] of the *Anton* decision.

Overview

- 4 In summary, the problem the Minister/MFish consider they have from the *Anton* decision is not being able to set TACs on references such as CPUE which have historically been used.
- 5 The commercial fisher representatives considered that the issue was more the way in which MFish presented its advice to the Minister, a modification to which would allow the status quo to continue without amendment.
- 6 For non-commercial fishers (including customary) and the environmentalists the concern expressed was decisions being made on inadequate information thereby placing the viability of fish stocks at risk – sustainability - and additionally for non-commercial fishers thereby preventing them from being able to provide for their wellbeing.

Minister's/MFish's proposed legislative solution

- 7 The proposed amendment to section 13 outlined by Mr Edwards is that a subsection would be added to provide that where information is insufficient to determine the maximum sustainable yield then in those circumstances the Minister be allowed to set TACs on the information available, such as reference points. This suggests that drafting is well advanced.
- 8 Barry pointed out that if the Minister is unable to estimate current biomass and hence not able to determine MSY, then TACs ought to be set to achieve the purpose of the Act. c.f. section 14(1), (a)(b)(i) but without the qualification of 'biological characteristics of the species'.
- 9 This approach did not meet with the approval of either MFish or TOKM, the latter emphasising that the issue for TOKM is the tension between sustainability on the one hand, and utilisation on the other (possibly implying that having an imaginary MSY as a reference point better enables commercial fishers to continue fishing stocks under pressure: *Anton* – para. [16] and following).
- 10 Both Ms Gibbs and Mr Carter expressed the view that the *Anton* judgment provided sensible assistance by spelling out the nature of the information required to enable the Minister to set a TAC, namely, the estimation of current levels of biomass to obtain MSY, and if that information is considered at the lower end of the reliability scale then to adopt the precautionary approach made available in section 10 to estimate the current biomass.

Commercial's view of the judgment

- 11 Mr Carter, representing commercial fishing interests responded, by saying that:
- 11.1 the judgment was not a surprise; and
- 11.2 the High Court had applied the rules of statutory interpretation in reaching his decision.

In support, Mr Carter referred to the submissions made for *Anton*.

Information required for section 13 decisions

MFish

- 12 The MFish officials, Mr Edwards, Mr Leslie and Mr Lynch at various times throughout the meeting spoke of:
- 12.1 the prohibitive (and by implication presumably unreasonable) cost of obtaining the necessary information to estimate the biomass of a stock which the *Anton* decision requires;
- 12.2 the MFish practice to date of applying *MSY-related reference points* (such as *F_{msy}* (fishing mortality rate) or, *analytical proxies* (such as a percentage of *B_o* (unfish biomass) as a *B_{msy}* proxy, and the constant annual yield (CAY) for MSY in the absence of information to estimate *B_{msy}*, *F_{msy}*, MSY, or *conceptual proxies* such as historical catch per unit of effort (CPUE): para [47] of the *Anton* decision.

Environmentals

- 13 The Greenpeace, Forest & Bird, and Eco representatives emphasised the inadequacy of information on the majority of fish stocks such that the Minister's task of setting TAC's is 'like throwing a dart at a dart board'.

Commercials

- 14 Ms Gibbs of SEAFIC disagreed and expressed the view that from the information available, such as it is (using the Mercury Colville box for orange roughy as an example), an estimate of stock numbers in other areas could be extrapolated.

Non- commercials

- 15 Barry and I asked whether MFish had considered what additional information might be available if MFish fully applied the purpose (section 8), principles (sections 9 and 10), consultation/ input and participation obligations (section 12) and (from *Anton's* case) section 13 etc, rather that, as it often appeared, on a selective basis.
- 16 Barry:
- 16.1 expressed the view that without hard information or evidence, the more information on the MSY-related reference points, analytical, or conceptual proxies referred to above, the more uncertain the task of setting a TAC on that information may appear;
- 16.2 said that NZBGFC's desire is 'more fish in the water', and in many stocks Bmsy has meant depleted stocks that fall well below that required to satisfy the sustainable utilisation purpose of the Act thereby preventing people from providing for their wellbeing; and
- 16.3 asked MFish what thought had been given to the application of section 14 to set a TAC where information to estimate Bmsy was inadequate.

MFish only considering amendment to section 13

- 17 Mr Edwards response to the section 14 question (several times) was that MFish intends amending only section 13, and not section 14, to resolve the Minister's (perceived) problem in setting TACs.
- 18 SEAFIC, as mentioned earlier, did not consider that there was a problem from Anton and that the ways in which MFish presented its advice based on the available information was the issue.
- 19 TOKM's view was that there was no urgency for amendment especially without working group reports.
- 20 Non-commercial fishers and environmentalists expressed concern how an amendment rushed through might affect the way the FA works.
- 21 However, MFish has little appetite for any of these (more considered) approaches given the Minister's anxiety for an immediate solution to his perceived Anton problem.

Possible actions (for consideration)

Customary fishers, non-commercial fishers and environmentalists – a common desire?

- 22 Non-commercial fishers, represented by NZBGFC, option4 and the Hokianga Accord at the meeting, environmentalists and customary fishers appear to have a common desire of increasing the biomass of fish stocks for sustainability, and utilisation (both as defined in section 8).

MFish and commercial fishers

- 23 MFish and commercial fishers wish to retain section 13 amended only to enable a TAC to be set where MFish and the Minister consider that there is insufficient information to estimate the current biomass and Bmsy.
- 24 MFish emphasised that no other provisions such as sections 8, 9 and 10 were in mind for amendment, and that the desire of MFish was to be able to use the range of assessment techniques historically used to establish Bmsy under section 13.

Opportunity for a sustainable utilisation approach (section 8)

- 25 MFish's and the Minister's (perceived) problem presented by the *Anton* decision of not being able to set TACs without estimates of biomass presents the opportunity to put forward an alternative approach to set TACs based on information obtained by fully applying the relevant information gathering provisions of the FA (including sections 9, 10 and 12) that best meets the sustainable utilisation purpose of the FA.
- 26 Mr Edwards emphasised that the Minister's timeframe for amending section 13 is short so that the opportunity for customary fishers, non-commercial fishers and environmentalists to recommend an alternative approach is similarly brief.

Appendix

Attendees at MFish meeting held in MFish's Wellington offices 3.00pm to 5.45.pm

MFish:	Mark Edwards; Terry Lynch; Stefan Leslie; John Galvin
Commercial interests:	Jeff Carter of Chapman Tripp. Lawyers
Seafic:	Ms N Gibbs
TOKM:	Craig Lawson
Customary:	Richard Orzecki
Greenpeace:	Geoff Keay
Royal Forest and Bird:	Ms Kirsty Knowles
Environmentalists:	Barry Weeber, and Duncan Currie (barrister)
New Zealand Big Game Fishing Council:	Barry Torkington and Bruce Galloway