



Ministry of
Fisheries
Te Tautiaki i nga tini a Tangaroa

2(f).

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Briefing Note: Process for Urgent Amendment of the Fisheries Act

Summary

The Minister of Fisheries has discussed with Cabinet an issue with the fisheries legislation that has been identified by the High Court. Cabinet has agreed to initiate a process to introduce an amendment to ensure the Fisheries Act will work as intended.

A recent High Court review of a decision by the Minister of Fisheries on total allowable catch (TAC) for orange roughy found that the TAC was unlawful and set the decision aside. The Court found that the language of section 13(2) of the Fisheries Act requires knowledge, or an informed estimate, of the state of the fish stock relative to the level that can produce the maximum sustainable yield (MSY), before the Minister of Fisheries can take a decision under that section. As this information was not available in this instance, the Minister had no lawful basis to make a TAC decision under section 13(2).

The High Court finding leaves the Minister of Fisheries unable to set and adjust TACs for the majority of fisheries stocks. The TAC is a key fisheries management tool: by setting a limit on the total extraction over a 12-month period it aims to ensure that fishing is sustainable over the near and long-term.

Precisely how many stocks may be affected by the ruling is unclear. There are 629 stocks in the Quota Management System. Information on the current level and the level that can produce MSY is only available for a minority of these, although these stocks comprise a large share of the value and volume of New Zealand's fisheries.

For about 50% of stocks, almost no information is available. For a further large group of actively fished stocks, TACs are set on the basis of trends in indicators of the relative health of stocks, such as catch per unit effort, sustained catch history, and biological parameters monitored by sampling size and age distribution in the catch. Such assessment proxies are commonly used in other similar jurisdictions.

This type of information is, however, in many cases not sufficient to determine whether a stock is at, above, or below the level that can produce MSY, and, given the ruling of the Court, cannot therefore be used to set a TAC under s13(2). Obtaining information on such stock levels for all stocks is not technically feasible given New Zealand's research capacity, nor would the cost justify this approach if it was feasible.

A further result of the Court finding is that current TACs may be vulnerable to legal challenge. If successful, the TAC could be set aside pending new decisions.

An amendment to the Fisheries Act is required to restore the functionality of TAC- setting. The objective of an amendment will be to enable the lawful setting of TACs under the information constraints that currently pertain for many stocks.

The Minister of Fisheries proposes to develop an amendment proposal as soon as possible. TACs for the 2008/09 fishing year must be set by early September 2008. To enable TACs to be adjusted (upward or downward) in stocks with information constraints, the new provisions need to be developed and enacted urgently.

All stakeholders would benefit from a rapid resolution to the a problem. There may not be universal agreement on the interpretation of the Court's judgement, but we can work together to ensure the remedy is appropriate.

Section 13: Nature of the Problem

Section 13 of the Fisheries Act 1996 is the key provision that enables the Minister to set catch limits (the total allowable catch or TAC) for each stock in the quota management system. As such it is the main instrument used to constrain fishing to levels of production that can be sustained over time, and therefore is critical for the management of fish stocks.

The focus for setting TACs is the management of stock biomass. Fisheries typically produce the greatest catch on a sustainable basis when the stock biomass is around a third of the original un-fished state. This notion of the biomass or *level* for each stock that will allow the *maximum sustainable yield* (MSY) to be produced is used in section 13 as a management reference point, generally interpreted as an obligatory target for management of the stock.

Section 13(2) (see extract attached) is structured as a list of three alternative objectives for setting TACs depending on the current state of the stock. The objective of the first option is to *maintain a stock at its current level, being in a state that satisfies the target of at or above a level that can produce MSY*. The second option aims to *rebuild a stock that is below such a level*, and the third option aims to *reduce the level of a stock that is above this target level*.

In practice to date, advice to the Minister on which option to use has been based on the objective (*maintain, rebuild, or reduce*). The conditions for selecting the objective (*is at or above, is below, or is above*), while key to the logic of selection, have not been viewed as a literal legal test. This is because the information available about the state of most of our 629 stocks is very uncertain. For many stocks the current state is unknown, and those that are well known are few in number although they encompass many of the high volume and high value fisheries. These are the stocks for which research funding is available to provide the required information.

So, for many stocks, indicators of the state of the stocks are used rather than modelled estimates of biomass levels. Some indicators have links to the MSY reference points of the Act but others do not. This means that often it is not known whether stocks are above, at, or below the MSY reference point, but the observed conditions of the stock can suggest the relative health of the stock. Time series data on such indicators collected over decades can provide a rich understanding of stock status relative to fishing exploitation rates despite the lack of estimates of biomass levels. Management action in the form of a TAC change is then introduced with a view to correcting or supporting the perceived state of the stock. This is not unusual internationally, and the same approaches are used in jurisdictions with similar regimes such as Australia, the US and Canada.

In the recent judicial review of orange roughy TAC decisions, the High Court found that a more literal interpretation should be taken of the conditions for using the provisions of

section 13. That is, the Minister must be of the informed view that a stock *is at or above*, *is below*, or *is above* (even if there is considerable uncertainty surrounding this view) before he may use these provisions to set a TAC. Where such estimates of the state of the stock are not available, because the available data taken together offer no or almost no insight into stock levels (which is the case for many stocks) section 13(2) is consequently not available for setting catch limits.

Current stock levels and target levels cannot be calculated accurately for many species. Section 10 of the Act (Information Principles) allows the Minister to set a TAC when estimates of stock levels in relation to the MSY target are uncertain, but, according to the judgement, section 10 does not allow the Minister to set a TAC without making any assessment of stock levels relative to the target level. In other words, the Minister cannot fall back on section 10 to determine the best risk management approach when there is no estimate at all of the current stock level relative to the level that can produce MSY.

This leaves the management system bereft of its key management instrument – the setting of a catch limit – for the majority of fish stocks. There are no other available mechanisms in the Act for setting TACs for most of these fisheries (Section 14 provides another mechanism for setting TACs under certain conditions and for a restricted list of stocks named in the third schedule).

A preliminary assessment of the effect of the Judgment on New Zealand's fish stocks shows that some catch limits are compliant with the requirements set out in the Judgment, and would therefore be deemed lawful if challenged. However, there are a number of stocks (such as the subject of the court case, orange roughy in management area 1) for which this is not the case. These are stocks for which information is very poor, and well below the threshold introduced by the Judgment. There is an additional category of stocks for which it would be unclear whether or not a TAC would be deemed lawful if challenged – which introduces an untenable ambiguity into the management framework. While it is not particularly useful to attempt to categorise every one of the 629 stocks, the analysis does show that around 50% are almost certainly non-compliant, and a further 30% are at risk of non-compliance.

The conclusion is that either the current provisions need to be modified to accommodate the practical management of stocks now excluded, or new provisions are required. Either of these requires amendment of the Act, and until this is achieved the key management tool for fisheries management cannot be used for most stocks.

Objectives and Constraints

The objective of the proposal to amend the Fisheries Act 1996 is to provide the Minister with a robust statutory framework to carry out the regular setting and adjustment of TACs, for all QMS stocks, to achieve the purpose of the Act.

Amendment is intended to enable the lawful setting of TACs under the information constraints that currently pertain for many stocks in the QMS.

While enabling TAC decisions to be made for stocks where it is not practical at reasonable cost to provide the biomass estimates required by current provisions, the amendment should not lessen the obligation in the Act for the Minister to use the best available information in making TAC decisions. That is, where biomass estimates are available at reasonable cost they should still be produced and used as the basis of TAC decisions.

Process and Timeline

TACs are set in an annual round and take effect for most stocks as of 1 October (start of the fishing year). The objective of an amendment process would be to have a Bill enacted in time for the 2008 TAC decisions. As the Act requires a consultation process prior to a TAC adjustment, any new law would need to be passed well in advance of 1 October.

The Minister of Fisheries wants this amendment drafted and introduced to the House urgently. This will compress the normal timeframe for both policy development and the processes required for enactment. The Minister would appreciate positive cooperation from all parties on this important issue for the integrity of the quota management system.

Attachment – Extract from the Fisheries Act 1996

13 Total allowable catch

(1) ~~Subject to this section, the Minister shall, by notice in the Gazette, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.~~

(2) ~~The Minister shall set a total allowable catch that—~~

- (a) ~~Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or~~
- (b) ~~Enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered—~~
 - (i) ~~In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and~~
 - (ii) ~~Within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock; or~~
- (c) ~~Enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.~~