

BRIEFING FOR

PRIMARY PRODUCTION SELECT COMMITTEE

Subject	Fisheries Act 1996 Amendment Bill (No.2)
Summary	This paper provides background on the Fisheries Act 1996 Amendment Bill (No.2)
Action sought	Read paper for meeting of 31 July 2008
Submitted	30 July 2008
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Purpose

1. This paper provides you with background on the Fisheries Act 1996 Amendment Bill (No.2) (the Bill).

Purpose of the Bill

2. This Bill amends section 13 of the Fisheries Act 1996 (the Act). Section 13 provides for the Minister of Fisheries to set the Total Allowable Catch (TAC) for stocks in the Quota Management System. The TAC is the main instrument used to constrain fishing to levels that are sustainable over time.
3. The intent of the amendment is to enable the Minister to continue to set TACs in accordance with well-established management strategies and practices that have been used since the Act was passed in 1996.
4. The Bill is in response to a High Court decision of 22 February 2008. The Court found that before a TAC can be set under section 13, the Minister must be provided with estimates of the current biomass level of the stock ('Bcurrent') and the biomass level that can produce the maximum sustainable yield ('Bmsy').
5. Estimates of Bcurrent and Bmsy are not available for most of New Zealand's fish stocks. In the absence of such estimates, current practice is to set the TAC for a fish stock using the best available information on its state. This information is obtained from a range of sources.
6. The decision of the High Court effectively makes the TAC-setting process under the Act inoperable for most stocks. The Bill is intended to enable established practice in setting TACs to continue, without changing other aspects of the Act.

Background: Setting a TAC under Section 13

7. TAC-setting under section 13 is the key instrument enabling the Minister to set catch limits for stocks in the Quota Management System. It is critical for the sustainable management of fish stocks.

8. The focus for setting TACs under section 13 is to manage stock levels (biomass). Fisheries typically produce the greatest catch on a sustainable basis when the stock biomass is around a third of the original unfished state. This is because in an unfished stock, the population contains large numbers of old, slow-growing, unproductive fish. As the population is fished down, these unproductive fish are replaced by young, usually quick-growing fish that enable a quicker replacement of the same tonnage of biomass. The concept of the biomass that will allow the maximum sustainable yield to be produced (Bmsy), is used in section 13 as a management reference point: an obligatory minimum target level for long-term management of the stock.

9. Section 13(2) is structured as a list of three alternative objectives for setting TACs depending on the current state of the stock. That is, if the current state is:

- (a) at the target level: the TAC should be set to maintain a stock at its current level;
- (b) below the target level: the TAC should be set to rebuild the stock level; or
- (c) above the target level: the TAC should be set to reduce the stock level.

10. To date, advice to the Minister on which option to use has been based on the objective (i.e. maintain, rebuild, or reduce stock levels). The conditions for selecting the objective (i.e. whether the current state of the stock is at, above or below the target), while key to the logic of selection, have not been viewed as a literal legal test.

11. In the judgment of Justice Miller in Anton's Trawling Company Limited v The Minister of Fisheries, High Court, Wellington, CIV 2007-485-2199, of 22 February 2008, the High Court found a problem with how section 13(2) was being applied and overturned a decision setting a TAC. The problem identified by the Court focused on wording in section 13(2) of the Act.

12. The Court has interpreted section 13(2) as requiring of Bcurrent and Bmsy to be available for the stock. This requires a high level of information about the stock. Following the High Court ruling, it is only by using reasonable estimates of Bcurrent and Bmsy that the appropriate objective and paragraph from section 13(2) may be selected by the decision-maker for changing the TAC for that fish stock. The High Court found that making a decision without estimates of Bcurrent or Bmsy is unlawful.

Problem

13. For a majority of New Zealand's 629 quota management stocks, this biomass information is not available. Assessing current biomass is technically difficult, usually expensive, and has to be modelled (i.e. derived from a model rather than directly observed). It is both feasible and cost-effective to undertake this sort of assessment for less than 5% of the stocks in the quota management system (although these include the most valuable stocks, such as hoki, rock lobster and orange roughy 3B). Therefore TAC decisions are necessarily based on limited and uncertain information.

14. The Act acknowledges this information difficulty, and deals with it through the principles in section 10. Section 10 acknowledges that the Minister should be able to make decisions where information is inadequate or uncertain, but requires that the best available information be used. Best available information is defined in the Act as the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.

15. Because of the difficulties in obtaining reliable estimates of $B_{current}$ and B_{msy} , various management strategies—none of them inconsistent with the objective of achieving maximum sustainable yield—have been pursued, some using modelled estimates of biomass levels and others using alternative indicators of the relative state of the stock. Some alternative indicators have direct links to maximum sustainable yield; in other cases the links are inferred. Information on the sustainability of catches is obtained from monitoring of catch and fishing practice, and assessment of the biological characteristics of the species. However, in the absence of this legislative amendment these alternative indicators could not lawfully be used, even though they are valid for determining sustainable catches.

16. These approaches to setting TACs, using information such as fishing mortality, exploitation rates, and catch per unit effort indicators, are also established practices used in other countries, such as Australia, the United States, and Canada, that have similar fisheries management regimes to ours.

Objectives of the Bill

17. The Quota Management System requires that the Minister of Fisheries set catch limits for all stocks. The recent judgement of the High Court requires an amendment of the Act in order to restore this ability in a practical way.

18. The Bill is restricted to ensuring that the Act is fully operational, and that section 13 can be used in the way that has been standard practice since the Act was passed in 1996.

19. In particular, the Bill:

- (a) enables TAC decisions to be taken by the Minister in the absence of biomass estimates currently required under section 13(2);
- (b) requires that where $B_{current}$ and B_{msy} are known, that this information is used;

- (c) requires the use of the best information available, consistent with section 10(a) of the Act;
 - (d) provides that deficiencies in information are not reasons to defer making decisions to set a TAC;
 - (e) requires the Minister to have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock, as currently required under section 13(2); and
 - (f) requires that no TAC decision should be knowingly inconsistent with the current aim of section 13 to maintain stocks at or above, or move them to a point at or above, a level that can produce maximum sustainable yield.
20. The Bill does not change:
- (a) the balance of the Act as it has been applied in respect of TAC setting;
 - (b) the general approach of the Act, including the balance between the objectives of sustainability and utilisation;
 - (c) the existing balance of interests between stakeholder groups with respect to allocation; or
 - (d) the information principles contained in section 10 of the Act which require the Minister to consider the effects of uncertain information on both utilisation and on sustainability of a fish stock.

Impact of the Bill on the setting of TACs

21. The Bill will not change the way fisheries management strategies are developed and implemented.

22. The Bill will enable the Minister to continue to use the same sort of information, and the same fisheries management strategies and assessment approaches that are currently used to set a TAC, when there are no reliable estimates of $B_{current}$ or B_{msy} . The Bill requires the Minister to consider the same biological and environmental factors as are currently considered in section 13 of the Act.

23. The Bill precludes the Minister from using absence or uncertainty of information as a reason for postponing or failing to set a TAC. This provision may, in some circumstances, mean that the Minister must set a TAC with relatively poor information. This situation is recognised and provided for in the information principles (section 10) of the Act. The Bill does not alter current provisions or practice relating to the use of information under uncertainty.

24. The Bill requires that no decision to set a TAC should be inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce maximum sustainable yield. This retains the current aim under section 13 of managing stocks to achieve maximum sustainable yield (even though the Minister has no reliable estimate of $B_{current}$ or B_{msy}). The Bill uses the language "not inconsistent with" to allow for the fact that for some stocks where a TAC must be set, there will be insufficient information available to predict whether a particular setting will move the stock toward a level that can produce maximum sustainable yield. However, a decision should not be able to be shown, on the basis of best available information, to be inconsistent with that aim. Again, this is a

continuation of the management strategies that were used before the recent High Court decision.

Transitional Provisions

25. The Bill contains transitional provisions that apply to consultation. The Bill provides that consultation about setting a TAC, that is carried out before the commencement of the Bill, is to be treated as complying with section 12 (consultation requirements) of the Act.

26. The Ministry is currently consulting on possible changes to TACs for a small number of fish stocks (Bluenose 1,2,3,7 and 8 and Orange Roughy 3B). If changes are considered necessary for any of those stocks the Minister will need to make decisions in September to enable changes to be in place by the start of the new fishing year (1 October 2008).

27. It could be argued that fishers' rights to be properly consulted might be affected if consultation is conducted at a time that the Act requires a reliable estimate of Bcurrent and Bmsy, but decisions are made under the amended statute. To minimise the potential for impact on fishers' rights, the Ministry has informed representatives of those with a fishing interest in the relevant fish stocks of the content of the Bill and the likely impact on the setting of the TAC if the Bill is passed unamended by the House. This approach is intended to fully inform affected parties and enable them to make submissions on TAC changes in an informed manner. The transitional provision is unlikely to cause any difficulties in practice as the amendment is intended to make section 13 operate in a way that stakeholders are already familiar with.

28. The Ministry of Justice has concluded that the transitional provisions are consistent with the Bill of Rights Act.

Likely Stakeholder Response

29. The New Zealand Seafood Industry Council (SeaFIC), Te Ohu Kaimoana, recreational fishing interests, and environmental organisations have been informed of the problem in setting TACs that has arisen from the decision of the High Court.

30. SeaFIC and Te Ohu Kaimoana have been consulted on the development of drafting of the amendment and have indicated their support for the wording of the Bill.

31. Environmental organisations have been informed of the content of the Bill. Some have indicated support for the Bill. They have recognised the need for immediate amendment to section 13 of the Act to enable current practice to continue, while expressing their concern that there are other aspects of the Act that they consider need reform in the future.

32. Recreational interests have been informed of the content of the Bill. While recognising the need for an amendment to the Act to allow TACs to be set, some groups have expressed the view that section 14 of the Act should be amended to

enable the Minister to set TACs with management targets other than maximum sustainable yield. This approach was not considered appropriate at this time because it would have materially changed the management target inherent in the Act and potentially the balance between the interests of stakeholders.

33. Separate involvement of representatives of Maori customary fishers has been limited, but they will be informed and provided with relevant material. This material is also available on the Ministry's website.



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