

[Notes for James Palmer in meeting with Parties -28 April 2008]

Fisheries Act 1996:

Section 13 Problem and Suggested Approach to Amendment

The Problem

- The primary provision to set fishing catch limits (a Total Allowable Catch, or TAC) is set out in section 13 of the Fisheries Act. Section 13 requires that the Minister set a TAC that maintains, rebuilds, or reduces a fish stock to a level at or above that which can produce the maximum sustainable yield. This is the target stock level in section 13 of the Act.
- The TAC decision for orange roughy in area 1 was challenged in court. The Judgment of Miller J of 22 February 2008 in *Antons Trawling Company Limited v The Minister of Fisheries* (CIV 2007-485-2199) found that before a TAC decision can be made under section 13, the Minister must be provided with information on the current stock level relative to the level that can produce maximum sustainable yield (MSY).
- In effect this requires an informed estimate of both current biomass and the biomass that can produce MSY (Bmsy) before section 13 can be applied by the Minister. As this information was not available for orange roughy, Miller J found that the Minister had no lawful basis to make a TAC decision under section 13(2).
- There are 629 fish stocks in the quota management system, all of which require a TAC to be set. Information on the current biomass and Bmsy is only available for a minority of stocks, although these comprise a large share of the value and volume of New Zealand's fisheries.
- A range of management strategies have been used for stocks where information on current biomass and Bmsy is not available, implemented at least in part through TAC decisions under section 13(2). The Judgment of Miller J means that these TAC-setting strategies do not comply with section 13(2).
- For a large group of stocks, TACs have been set on the basis of other information, including trends in indicators of the relative health of stocks such as catch per unit effort, fishing mortality estimates, exploitation rate estimates, sustained catch history, and biological parameters obtained by sampling size and age distribution in the catch. Such information is commonly used in other jurisdictions that are similar to ours, and is internationally accepted as appropriate for establishing sustainable catch limits.
- Obtaining information on current biomass and Bmsy for all stocks is not technically feasible given New Zealand's research capacity, nor would the cost justify this approach in many cases even if it was feasible.
- Unless information can be collected or an amendment to the Act is made, there are a few stocks in which the TAC could be made or changed without significant risk of legal challenge. While this may be tenable for a short period, this situation

poses increasing risk to fish stocks and the integrity of the QMS as time progresses.

The Objective

- 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 using the types of internationally-accepted information that have been used for the past two decades to inform Ministers' decisions on TACs in many stocks.
- The amendment should be the minimum necessary to achieve this objective and should seek to leave the existing operation of setting catch limits unchanged, including the balance between sustainability and utilisation.
- While enabling TAC decisions to be made for stocks where information required by current provisions is not available at reasonable cost, an amendment would not lessen the obligation in the Act to use the best available information or to be guided, to the extent practical, by achieving MSY.

The Timeline

- 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 limited information, new provisions need to be developed and enacted as soon as is possible.
- These time constraints will compress the normal timeframe for both policy development and the processes required for enactment.
- The Ministry of Fisheries has initiated discussions with key stakeholder groups to gain an understanding of their views on the problem and to discuss the approach to be taken to amend the Act. These discussions have not included possible wording of any amendments.

The Proposed Drafting Approach

- The approach being proposed is to leave all existing provisions in place for use with stocks where the required information is available, and to add two new subsections that will permit the Minister to make lawful TAC decisions for stocks where sufficient information is not available to use section 13(2).
- The suggested drafting (see below) represents preliminary wording. The relevant existing provisions of the Act (subsections 13(1) & (2)) are also attached for reference.

Suggestion for Discussion

The following is suggested as a starting point for drafting an appropriate amendment:

“13(2A) Where the Minister considers that the best available information is insufficient to allow a total allowable catch to be set for a stock under subsection (2) of this section, the Minister may set a total allowable catch for that stock that in his or her opinion is likely to lead to maximum sustainable yield.

13(2B) Where the Minister considers that the best available information is insufficient to allow a total allowable catch to be set for a stock under subsection (2) or subsection (2A) of this section, the Minister may set a total allowable catch for that stock that in his or her opinion achieves the purpose of the Act.

Insert a reference to s 13(2A) and (2B) in:

- s 13(4) to deal with variations to TACs
- s13(7) to deal with in season adjustments
- s14(1) to allow for TAC to be set other than in accordance with s13
- s11(5) to deal with setting catch limits in stocks outside the Quota Management System

Notes to the suggested drafting:

- Subsection 2A is intended to cover situations where management strategies are able to move stocks toward the MSY target despite the fact that all the information required by section 13(2) (as interpreted by Miller J in the Antons case) does not exist. Such approaches include constant fishing mortality (Fmsy) strategies.
- Subsection 2B is suggested to cover low and very low information stocks, but only where a TAC cannot be set under any of the other provisions of section 13.
- If only catch information is available, TACs are often set on the basis of average catch history for a period of seeming stability modified by some multiplier (≤ 1) reflecting biological characteristics of the stock. This attempts to continue to provide for utilisation at historical levels without risking stock collapse, but is not able to be linked at all with MSY. The suggested subsection 2B would be used in this low information situation.

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.

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