

Cabinet Policy Committee

## AMENDMENT OF THE FISHERIES ACT: TAC SETTING

### Proposal

1. This paper seeks policy approval of a proposal to amend section 13 of the Fisheries Act 1996 (the Act) to remedy a deficiency that was identified in a February 2008 High Court decision. This amendment is required urgently to allow decisions on catch limits to be made for the start of the fishing year on 1 October 2008.

### Background

2. This matter was previously considered by Cabinet Policy Committee in March following initial analysis of the problem identified by the High Court. The Committee noted that discussions would be held with government agencies, the fishing industry and other stakeholders to develop a remedy to allow catch limits to be set for all stocks [POL Min (08) 4/1]. This paper seeks approval of the results of that work so that an amendment Bill can be drafted and introduced as soon as possible.
3. Section 13 of the Act 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.
4. 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.

### The Problem

5. In February 2008, the High Court overturned a TAC decision I had made for an orange roughy stock, following a challenge by some quota owners. The problem identified by the Court with the lawfulness of that decision focuses on wording in section 13(2) of the Act. The Court has interpreted this provision as requiring a high level of information about the biomass of the stock. In particular, information must be available on the biomass level that can produce MSY, and on the current biomass level for the stock. It is only when this information is available that the appropriate paragraph from section 13(2) may be selected by the decision-maker.

6. Section 13(2) 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*.
7. 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. The High Court has now ruled that it is unlawful under the current provisions of the Act to set a TAC without applying this literal test, and to do that, the Minister must have estimates of both the current biomass level of the stock, and a level that can produce the MSY.
8. For a majority of New Zealand's 629 quota management stocks, this specific 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. Even some of these assessments are highly uncertain. Therefore TAC decisions are often based on limited and uncertain information. However, the Act still requires the Minister to balance the need to enable the use of the resource with the requirement to ensure sustainability.
9. The Act acknowledges this inherent difficulty, and deals with it through the principles in section 10. This section acknowledges that the Minister should be able to make decisions where information is inadequate or uncertain, enjoining him to employ the best available information. *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*.
10. Due to the difficulties outlined above, the application of section 13 has always included using a range of other indicators of the state of fish stocks, depending on the type and amount of data available, the characteristics of the fisheries, and international best practice. This approach is common around the world. A large number of New Zealand stocks have had TACs set based on information other than modelled assessments of current biomass levels in relation to maximum sustainable yield.
11. Furthermore, there are also a substantial number of stocks with TACs that have been set with almost no information (and hence no direct link at all to maximum sustainable yield). The majority of these stocks have very low TACs, although there are notable exceptions, such as orange roughy in area 1. Decisions on the sustainability of catches from these stocks are made with information provided from monitoring of catch and fishing practice, and assessment of the biological characteristics of the species.
12. The High Court's decision has ruled that the current wording of section 13 requires an assessment of current biomass and of the biomass level that can produce maximum sustainable yield. As stated above, this is neither technically feasible nor cost effective for the setting of catch limits for a large number of New Zealand's fish stocks. Accordingly,

this means that the Minister of Fisheries is not currently able to lawfully set TACs for many of New Zealand's fish stocks.

#### Proposed Remedy

13. The quota management system requires that the Minister of Fisheries must be able to legally set catch limits for all stocks. The recent judgement of the High Court requires amendment of the Fisheries Act in order to restore this ability.
14. The Ministry of Fisheries' 2007-08 Statement of Intent outlines plans for a major review of the Act in 2009-10, including the TAC setting provisions. However, it is not feasible to delay the development of a remedy for the deficiency identified by the High Court until this time, nor is it possible to bring forward this major review to address this immediate problem.
15. Therefore I have developed a proposal to amend the Act. The proposal is restricted to ensuring that the Act is fully operational, and that section 13 can be used as intended by Parliament and as has been standard practice since the Act was passed in 1996. This amendment would not change the general approach of the Act, including the fine balance developed for the twin objectives of sustainability and utilisation. Nor does it change the existing balance of interests between stakeholder groups.
16. The specific objectives of the amendment are:
  - a) Enable TAC decisions to be taken by the Minister in the absence of the biomass estimates currently required by section 13(2), using the best information available from a range of sources;
  - b) Do not disturb the balance of the Act as it has functioned in respect of TAC setting in recent years;
  - c) Be as consistent as possible with the current construction of the Act and be as simple as possible while conveying the intent clearly;
  - d) No TAC decision should be knowingly inconsistent with the current objective to maintain stocks at or above, or move them to a point at or above the level that can produce the maximum sustainable yield;
  - e) TAC setting should use the most information rich process available, without necessitating a level of research and stock assessment investment involving unreasonable cost, effort or time – consistent with section 10(a); and
  - f) TAC setting should continue to consider relevant social, cultural and economic factors.
17. It should be noted that the proposed amendment is consistent with the recent judgement of the Court of Appeal on kahawai in respect of objective (f) above.

18. The proposal involves the insertion of a new subsection into section 13 of the Act to be used where the best available information on a stock is insufficient to meet the test imposed by the existing provisions. The same considerations as apply to decisions under current provisions are carried over to the new subsection.

19. Indicative drafting and suggestions for an explanatory note are attached to this paper as Annex 1.

#### Consultation

20. Relevant government departments, non-commercial stakeholders and environmental groups have been informed of the problem and of the proposed approach to be taken to the amendment. Te Ohu Kaimoana and the Seafood Industry Council have been consulted in the development of the indicative drafting.

21. The Department of Prime Minister and Cabinet has been consulted on this paper. Te Puni Kōkiri and the Department of Conservation have been informed of the contents of the paper. Time constraints preclude detailed consultation with other departments, and I am satisfied that the proposal does not alter existing relationships or responsibilities.

#### Financial Implications

22. There are no financial implications that result from this proposal.

#### Human Rights Implications

23. This proposal is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

#### Legislative Implications

24. It is proposed that a Bill is prepared for introduction to the House on 21 July 2008, with a first reading on 24 July, and a priority of 2 (to be passed this year).

#### Regulatory impact analysis

25. Not required.

#### Publicity

26. A press release will notify the general public of the proposed urgent amendment to the Act, along with direct contact with the fishing industry and other stakeholders as appropriate.

## Recommendations

27. I recommend that the Committee:

1. Note that the High Court has outlined a deficiency in the Fisheries Act 1996 that prevents the continuation of current practice in respect of the Minister taking key decisions on catch limits for fisheries stocks in the quota management system;
2. Note that Te Ohu Kaimoana and the Seafood Industry Council have been consulted in the development of this remedy to ensure the Act can be used to set catch limits for all fish stocks;
3. Agree that the Fisheries Act 1996 should be amended to restore the ability of the Minister of Fisheries to make TAC decisions for all relevant stocks, in a way that takes into account the best available information, consistent with the objectives set out in paragraph 16 of this paper; and
4. Agree that the attached indicative drafting form the basis of formulation of an amendment Bill by Parliamentary Counsel to be submitted to Cabinet as soon as possible, for introduction on 21 July 2008 with priority 2.

Hon Jim Anderton  
Minister of Fisheries

14/07/2008

Annex 1

Material for Explanatory Note: Amendment to Section 13 of the Fisheries Act 1996

The effect of the judgment of Miller J of 22 February 2008 in *Anton's Trawling Company Limited v The Minister of Fisheries* (CIV 2007-485-2199) is that a key provision of the Fisheries Act – Section 13: Total Allowable Catch (TAC) – is not available for use in management decisions for many fish stocks. The TAC set under section 13 is the main instrument used to constrain fishing on each fish stock to levels that can be sustained over time.

The Court found that before a TAC decision can be made under section 13(2), the Minister must be provided with an estimate of both current biomass and the biomass that can produce the maximum sustainable yield (MSY). For a majority of New Zealand's 629 quota management stocks, this specific information is not available.

Since the Fisheries Act came into effect, a range of management strategies all aimed at supporting the goal of maximum sustainable yield have been pursued using alternative indicators of the relative state of the stocks, in addition to modelled estimates of biomass levels where available. Some of the alternative indicators have links to the MSY reference points of the Act but others do not.

This approach to management with limited information is the norm internationally, being commonly used in jurisdictions with similar regimes such as Australia, the US and Canada.

In order to continue lawful management with these strategies for stocks with limited information, the Act needs to be amended.

*Objectives*

- Enable TAC decisions to be taken by the Minister in the absence of the biomass estimates currently required by section 13(2), using the best information available from a range of sources.
- Do not disturb the balance of the Act as it has functioned in respect of TAC setting.
- Be as consistent as possible with the current construction of the Act and be as simple as possible while conveying the intent clearly.
- No TAC decision should be knowingly inconsistent with the current objective to maintain stocks at or above, or move them to a point at or above the level that can produce the maximum sustainable yield.
- TAC setting should use the most information rich process available, without necessitating a level of research and stock assessment investment involving unreasonable cost, effort or time – consistent with section 10(a).
- TAC setting should continue to consider relevant social, cultural and economic factors.

*Indicative Drafting*

1 Total allowable catch

(1) Section 13 is amended by inserting after subsection (2) the following subsection:

“(2A) For the purpose of subsection (2) of this section, if the Minister considers that the current level of the stock or the level of the stock that can produce the maximum sustainable yield is not able to be estimated reliably using the best available information, the Minister must:

- (a) not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for that stock;
- (b) have regard to the interdependence of stocks, the biological characteristics of the stock and any environmental conditions affecting the stock; and
- (c) set a total allowable catch under subsection (2) of this section that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.”

(2) Section 13(3) is amended by deleting the expression “paragraph (b) or paragraph (c) of”

(3) Section 13(4) and (7) are each consequentially amended by deleting the expression “(2) and (3)” (as asserted by section 4 of the Fisheries (Remedial Issues) Amendment Act 1998) from each place where they occur and substituting in each case “(2), (2A) and (3) and, as appropriate.”

**Transitional provision relating to consultation**

Any consultation in respect of a decision that requires consultation under the principal Act and that is to be made under section 13 as amended by this Act, is not invalid only because it occurred before the commencement of this Act.

**Analysis of the Drafting**

*Clause 1*

The intention of the construction of the new subsection (13(2A)) is firstly to ensure that it is only to be used when subsection 13(2) is not available due to lack of reliable estimates of biomass levels. A decision to this effect must take into account the principle of best available information (section 10(a)).

Secondly, the drafting emphasises through s.13(2A)(a) that the new subsection is intended to provide a means of making TAC decisions in the absence of definitive information on biomass levels.

Paragraph (2A)(b) indicates that the Minister must have regard to the same matters in decisions under the new provision as are taken under subsection (2).

Paragraph (c) uses the language "not inconsistent with" to allow for the fact that in some stocks requiring catch limits to be set, there will be insufficient information available to predict whether a particular setting will lead the stock to a level that can produce the maximum sustainable yield. However, a decision should not be able to be shown, on the basis of available information, to be inconsistent with that goal.

Sub-clause (2) deletes specific paragraph references from subsection 13(3) in order to generalise the applicability of the considerations to all of subsection 13(2) including decisions made through the conditions in the new (2A).

Sub-clause (3) amends references in other subsections of section 13 to refer to the new subsection (2A).

#### *Clause 2*

Clause 2 is a transitional provision to enable consultation on possible TAC changes that would come into effect on 1 October 2008 to be carried out while the amendment is still being considered by Parliament. This provision will ensure that such consultation remains valid should a decision be taken in respect of such issues under provisions of section 13 inserted by this amendment.