

Hon. David Carter, Chair
Primary Production Select Committee
Parliament Buildings

FISHERIES ACT 1996 AMENDMENT BILL (No.2)
DEPARTMENTAL REPORT

General Policy Statement

1 This Bill amends section 13 of the Fisheries Act 1996. The purpose of the amendments is to enable the continuation of established practice in relation to setting a total allowable catch (TAC) under section 13. The Bill provides for technical amendments as a consequence of the judgment of Miller J in *Anton's Trawling Company Limited v The Minister of Fisheries* (High Court, Wellington, CIV 2007-485-2199, 22 February 2008). The court in that case decided that before a TAC can be set under section 13, the Minister must be provided with an estimate of both current biomass and the biomass that can produce the maximum sustainable yield (MSY).

2 Since the Act came into force, various management strategies—all consistent with the concept of MSY—have been pursued, some using modeled estimates of biomass levels and others using alternative indicators of the relative state of the stocks. Some of the alternative indicators have direct links to MSY. In other cases the links are inferred. These alternative approaches are commonly used in fish stocks where information on biomass is not readily available. This is the case for the majority of New Zealand's 629 quota management stocks and is the norm internationally, being commonly used in jurisdictions with similar regimes such as Australia, the United States, and Canada.

3 The amendments will enable TACs to continue to be set under section 13 using existing management approaches, even where the current biomass and the biomass that can produce a MSY are not able to be estimated reliably for many stocks.

Specific Objectives

4 The key objective of the proposed amendment is to restore the ability of the Minister of Fisheries to make total allowable catch (TAC) decisions for all relevant stocks, in a way that takes into account best available information, consistent with the following objectives:

- a) The Minister should be able to take TAC decisions in the absence of the biomass estimates currently required by section 13(2) of the Act, using the best information available from a range of sources;
- b) Amendments should not disturb the balance of the Act as it has functioned in respect of TAC setting in recent years;

- c) Amendments should 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);
- f) TAC setting should continue to consider relevant social, cultural and economic factors.

Analysis of Submissions

5 The Bill contains two clauses attracting comment from submitters: clause 4 – that amends section 13 of the Fisheries Act 1996; and clause 5 – a transitional provision to deal with consultation on proposals being considered for TAC changes before 1 October 2008. Most points made in submissions are focused on clause 4.

6 The issues raised in all submissions are set out in tabular form below, with the submitters supporting each point identified, and comments provided by the Ministry of Fisheries.

7 Submissions were received from the following ten parties:

Submission Number	Submitter Details
1 and 1A	Hokianga Accord Joint submission of Hokianga Accord, option4, and New Zealand Big Game Fishing Council
2	Te Ohu Kaimoana Trustee Limited
3	New Zealand Seafood Industry Council Limited
4	New Zealand Recreational Fishing Council
5	Environment and Conservation Organisations of New Zealand Inc.
6	Greenpeace Aotearoa-New Zealand
7	Forest & Bird
8W	Treaty Tribes Coalition
9W	National Union of Public Employees
Oral submission only	Anton's Trawling

Drafting Error

8 A cross-referencing error has been identified in the drafting of sub-clause 4(2) of the Bill. This provision amends references in subsection 13(3) of the Act. The current drafting reflects an early alternative construction for the main amendment inserting subsection (2A) that was subsequently revised. However the matter of the amending the reference to subsection (3) was not revisited. This matter is explained further following the table of issues from submissions, and a proposed amendment to sub-clause 4(2) is included in the recommendations.

Commentary on Related Issues

9 The Committee has asked officials for commentary on the related issues of the management of stocks above a level of biomass that can produce the maximum sustainable yield, the management of orange roughy stocks generally and the rationale for the proposal to cut the TAC for orange roughy in area 1 that led to the High Court review. These issues are discussed in separate advice papers that accompany this report.

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Summary of Recommendations

Purpose of Clause 4

Clause 4 inserts a new subsection (2A) into section 13 of the Fisheries Act 1996. This provides the Minister of Fisheries with alternative criteria for setting of total allowable catches for fishstocks in the quota management system, when the information requirements of subsection 13(2) are not able to be met for the stock – namely, that reliable estimates of a biomass level that is able to produce the maximum sustainable yield and the current biomass of the stock are not available.

Recommendation

MFish recommends that you:

- Note that most submitters comments were focused on this sub-clause, but that no suggested changes have been identified that are consistent with the policy objectives of the amendment.
- Agree that sub-clause (1) should not be amended.
- Agree that sub-clause (2) should be amended so that it does not effectively remove the existing reference in subsection 13(3) to subsection 13(2) paragraphs (b) and (c), and to add to subsection 13(3) a reference to the new subsection 13(2A).
- Agree that sub-clause (3) should not be amended.

Purpose of Clause 5

Clause 5 is a transitional provision to ensure that consultation on proposed TAC changes for the 2008-09 fishing year (commencing 1 October 2008) remains valid following the passing of the amendment. Some proposed TAC changes are currently being consulted on, in parallel with consideration of the Bill, although decisions on some of those TACs will not be able to be taken unless and until the Bill is passed. This clause ensures that this consultation is not rendered invalid merely because the provision under which the subsequent decision is taken has been altered by the amendment.

Recommendation

MFish recommends that you:

- Note that only one submission raised concerns that were linked to this clause.
- Agree that this clause should not be amended.

Fisheries Act 1996 Amendment (No.2) Departmental Report: Table of issues raised in submissions

Submitter's Intent	Submitter	MFish Comment
Support the Bill in its current form.	2 Te Ohu Kaimoana 3 SeaFIC 8W Treaty Tribes Coalition	The first two of these submitters were consulted in the development of the objectives and the drafting approach for this amendment and are in agreement with MFish that the Bill is consistent with the agreed policy objectives. They represent the parties whose economic interests are most directly affected by the setting of catch limits and whose quota asset values are likely to be affected by the inability of the Minister to adjust TACs. Treaty Tribes Coalition, while not acknowledging the need for amendment, supports the current wording on the basis that it does not change the balance of considerations in decision-making under the Act from what has been existing practice.
Support the need for an amendment to restore the ability to set TACs in low information stocks	4 NZRFC 5 ECO 6 Greenpeace 7 Forest & Bird	These submitters agree that an amendment is required to restore the Minister's ability to set sustainable catch limits for all stocks. However, they would also like to see this Bill used to alter the balance between utilisation and sustainability in the Fisheries Act, particularly in favour of sustainability, by a more stringent application of the precautionary approach. MFish notes that there is no consensus among stakeholders on such policy changes. In any event such a change in the balance of the Act is outside the scope of the policy approval for the Bill and not achievable in the available timeframe. Resolving this issue is best left for the policy and legislative review to be carried out by MFish over the next 2-3 years.
The Bill is a technical amendment to enable the continuation of established management practice following the recent High Court decision. Oppose any change to policy intent.	2 Te Ohu Kaimoana 2 SeaFIC 3 Sealab	MFish agrees. The key objective of this amendment is to restore the ability of the Minister of Fisheries to set and vary TACs for all OMS stocks without changing the balance of considerations in the Act that were operative before the recent High Court decision identified that Beurrent and Bmsy estimates are needed for decisions under s.13. Any further significant changes outside the scope of the Bill are better dealt with in a wider review of the Act where implications can be more widely assessed.
Oppose the Bill Rushing is risky The amendment does not address all the issues from the	1 Hokianga Accord Oral: Antons Trawling	MFish disagrees. Although the schedule for the passing the Bill is shortened, several months of consideration has gone into the preparation of the proposed amendment, and all key stakeholder groups were notified of the problem and the approach being investigated early in that process. MFish believes that the

<p>High Court review of ORHI decisions, such as the use of better information</p>		<p>amendment as proposed will achieve the stated policy objectives. MFish does not assert that the Bill addresses all issues raised in the Antons Trawling case over the orange roughy TAC for area 1. The Bill does not protect the Ministry or Minister from the requirement to conduct a proper process when developing advice and making decisions on the setting or varying of a TAC, including proper consultation, and properly taking into account the provisions of sections 8, 9 and 10 of the Act. Failure to conduct a proper process will still leave decisions exposed to judicial review proceedings. However, it does directly address the legal impediment to the continuation of TAC setting for most QMS stocks that was created by the judgement.</p>
<p>Do not support changes to legislation in response to unfavourable court judgements</p>	<p>§W Treaty Tribes Coalition</p>	<p>The Bill responds to the decision of the high Court that effectively prevents the setting of TACs. The Bill only seeks to enable the continuation of long standing and accepted management approaches. The Bill does not protect the Ministry or Minister from the requirement to conduct a proper process when developing advice and making decisions on the setting or varying of a TAC, including proper consultation, and properly taking into account the provisions of sections 8, 9 and 10 of the Act.</p>
<p>Section 14 should be amended and used instead of s13 by removing what they call the "biological impossibility" clause -- s.14 (8) (b) (i) -- and shared fisheries in particular should be managed above Bmsy under section 14.</p>	<p>1 Hokianganga Accord 4 NZRFC</p>	<p>MFish disagrees. Section 14 does not link TAC setting to MSY as a reference point as is required by section 13, but allows the Minister to set a TAC that he or she considers appropriate to achieve the purpose of the Act. The submitters believe that this would allow the Minister more scope to cater to the interests of non-commercial fishers in shared fisheries. Such a move away from the use of MSY and related reference points would be a major policy shift and is outside the scope of the policy approval for the Bill. The intention of section 14 is to provide an alternative means to set TACs when MSY reference points are not relevant to management. Examples of stocks managed under section 14 include:</p> <ul style="list-style-type: none"> • squid, which have a one year life cycle and where the biomass in one year cannot be used to predict the available yield in the future; • highly migratory species such as tunas and pelagic sharks, whose populations are spread over wide areas of the world's oceans, the biomass

		<p>of which cannot be managed through New Zealand catches;</p> <ul style="list-style-type: none"> • Southern Scallop, which is an enhanced fishery; and • Eels, where the biomass is extremely difficult to assess and their life history (they spawn only once at the end of a long lifetime) mean that escapement and size limits must necessarily augment catch limits. <p>MFish agrees with the views expressed by all three of these submitters in their oral submissions that use of section 14 is inappropriate in terms of the intention of the Act as it has operated, and that this would involve increased uncertainty about outcomes and considerable risk of unintended consequences.</p> <p>MFish disagrees. This new suggestion contradicts the previous contribution from the submitter that the TAC should be based directly on the purpose of the Act. This suggestion excludes the utilisation requirement of the purpose, and would clearly not meet the policy objectives for the amendment.</p> <p>MFish disagrees. Section 13 provides an explicit approach to fulfilling the purpose of the Act in providing for utilisation while ensuring sustainability. Section 13 sets up the biomass that can support the maximum sustainable yield as a minimum target level to both protect sustainability and to provide for the greatest value in utilisation. It is therefore unnecessary and would cause confusion to insert a reference to the purpose of the Act into section 13.</p> <p>MFish disagrees. The submitters seek further amendment to section 13 which would change the status quo and is outside the scope of the Bill. Subsection 13(3) has a specific purpose, which is to ensure that the Minister considers the impacts of the way and the rate at which a stock is moved towards its target biomass, on relevant social, cultural, and economic factors. This is a reminder that when managing for sustainability (for example when cutting TACs to rebuild a depleted stock) the immediate needs of those that utilise the fishery should not be disregarded. The environmental principles of section 9 of the Act are not diminished in this subsection by virtue of the fact that they are not directly mentioned. The wording of section 9 itself ensures that the environmental principles must be taken into account in any action under the Act.</p>
Oppose use of section 14 (oral submissions)	2 Te Ohu Kaimoana 3 SeaFIC 6 Greenpeace	
The criteria for a new section should be that the TAC “best ensures sustainability”	1A Hokianga Accord	
Should include reference to the purpose of the Act in s.13	5 ECO 7 Forest & Bird	
Should amend subsection 13(3) to include reference to the environmental principles from section 9 of the Act.	5 ECO 6 Greenpeace	
Selective use of section 9 environmental principles may	1&1A Hokianga Accord 4 NZRFC	

weaken their effect		<p>Environmental principles. This is not the case. The wording on these matters, for which the Minister is required to have regard in the proposed section, is drawn directly from the existing subsection 13(2).</p> <ul style="list-style-type: none"> • “the interdependence of stocks” is listed as a consideration in each of the paragraphs (a), (b), and (c) of s.13(2); • “the biological characteristics of the stock” is listed as a consideration in s.13(2)(b)(i); • any environmental conditions affecting the stock” is listed as a consideration in s.13(2)(b)(ii). <p>The intention here is to ensure that the Minister, under the new subsection 13(2A), would be required to have regard to the same factors that they were obliged to consider when setting TACs under subsection 13(2) before the recent High Court decision.</p>
Selective use of section 10 information principles may weaken their affect	1&1A Hokianga Accord 4 NZRFC	<p>MFish disagrees. Subsection (2A) would require the use of best available information, but does not preclude or alter the requirement for all decision-makers to take into account the information principles or alter how the principles should be used or interpreted. The statement does enjoin the Minister to make a decision, but this may be a decision not to alter the TAC because no new information is available to indicate a need to do so.</p>
Concern over use of “must” instead of “shall”	4 NZRFC	<p>This is a matter of change in drafting practice. “must” and “shall” have the same meaning in statutory interpretation, with “must” being the currently preferred practice. In this case “must” has been used in the drafting of the new subsection (2A), but the surrounding subsections [(1), (2), (3)] all use “shall” to achieve the same effect. Thus there is an argument that the new subsection should use “shall” to ensure that it is not interpreted to be a deliberate attempt to distinguish the meaning of the obligation. However, Parliamentary Counsel advises that this practice of amending a statute that uses “shall” by using “must” has been followed in other cases and is their preferred practice.</p>
Wording promotes Bmsy as sole objective and encourages setting of high TACs without adequate information	1 Hokianga Accord 4 NZRFC	<p>MFish disagrees. MFish believes the wording of the new subsection reflects as accurately as possible that of subsection 13(2) as interpreted before the Antons judgement. The new subsection does not constrain the Minister any more than the existing s 13, both of these subsections would allow the Minister to manage</p>

<p>TACs under s13(2A) should not be aimed at Bmsy – always above</p> <p>Precautionary approach should be incorporated more specifically into the drafting of the new subsection.</p>	<p>7 Forest & Bird</p> <p>5 ECO</p> <p>6 Greenpeace</p> <p>7 Forest & Bird</p>	<p>above Bmsy to some extent.</p> <p>MFish disagrees. This suggestion would represent a significant change to policy that is outside the scope of the Bill. Such suggestions would be better considered in the wider policy and legislative review already signalled to stakeholders.</p> <p>MFish disagrees. The amendment requires the Minister to use the best available information when making decisions under the new subsection (2A). Section 10 (information principles) of the Fisheries Act 1996 provides the expression of the precautionary approach in the New Zealand fisheries context. The amendment does not affect the duty on the Minister to apply the principles set out in section 10 when information is uncertain.</p> <p>As discussed above, the objective of this amendment is to restore the Minister's ability to set and vary TACs for all QMS stocks under the policies that prevailed before the recent High Court decision. Significant policy changes are better considered in a broader review of policy and legislation to be undertaken over the next 2-3 years.</p>
<p>Amend subsection (2A) to include requirement for the Minister to have regard to the need for additional research and measures to improve the quality of information.</p>	<p>5 ECO</p> <p>6 Greenpeace</p>	<p>MFish disagrees. The proposed new subsection 2A would require the Minister to use the best available information to set, maintain or vary TACs. The definition of best available information in the Fisheries Act includes <i>information that is available without unreasonable cost, effort or time</i>. The amendment does not remove the Minister's duty to apply the information principles in section 10 of the Act. To the extent that the requirement to have regard to the need for further research and information is increased, this proposal goes beyond the policy intent of the Bill which is to enable the continuation of established management approaches to the setting of TACs. Such a change may have significant unanticipated impacts on the way that decisions are made.</p>
<p>Include "variation" of TAC in subsection (2A)</p>	<p>5 ECO</p> <p>6 Greenpeace</p>	<p>MFish disagrees. Variation of a TAC is dealt with in a later subsection of section 13 – s 13(4). This subsection refers back to the considerations in subsections (2) and (3). The Bill includes a consequential amendment to subsection (4) that refers also to the new subsection (2A) so that the same considerations are always taken into account whether the TAC is being set for the first time or varied at a later stage. This addresses the point raised in the submissions.</p>
<p>Variation of TAC under new</p>	<p>5 ECO</p>	<p>MFish disagrees. This would represent a policy change to the situation prevailing</p>

<p>provision should only be downward</p>	<p>6 Greenpeace</p>	<p>before the Antons case. The purpose of the Bill is to enable the continuation of established practice in relation to the setting of TACs under section 13. The objective of section 13 is to set TACs that maintain or move fish stocks to or above a level that can produce the maximum sustainable yield. The Bill maintains these objectives. Existing management approaches are able to and have been used to identify situations when TACs for fish stocks can be raised to levels that are not inconsistent with the objective of maintaining the stock at or above a level that can produce MSY. The submission proposes a significant change to the objective of section 13 which would limit utilisation even when sustainability was ensured. The proposal could be at variance with the purpose of Section 8 of the Act to provide for utilisation of fisheries resources while ensuring sustainability in that TACs for the majority of stocks are likely to be set under the provisions of clause 2A(c) of the Bill for some time. Where best available knowledge indicated that a TAC could be safely increased, and increased utilisation provided for, the effect of this proposal would be to preclude such a decision.</p>
<p>Support for wider review of the Fisheries Act</p>	<p>1 Hokianga Accord 2 Te Ohu Kaimoana 6 Greenpeace 7 Forest & Bird</p>	<p>Submitters agreed that there was a need for a wider review of the Fisheries Act 1996 and that such a review should traverse the operation of sections 10, 13 and 14 of the Act. There was variance as to the outcomes sought by the review. Recreational interests sought an expansion of the Section 14 to allow for greater non-commercial utilisation benefit. Environmental groups sought greater emphasis of the precautionary approach to provide a greater emphasis on sustainability. The Ministry of Fisheries work programme for the 2008/09 year includes preliminary work on options to reform the Fisheries Act 1996. The work programme includes an intention to report to the new Government on possible options for reform. Any changes to the Act beyond the scope of the policy approved by Cabinet for the Bill would be better considered within a wider review of the Act.</p>
<p>The speed of the passage of the Bill will curtail rights to input and participation by tangata whenua into</p>	<p>1 Hokianga Accord</p>	<p>The submitter believes that the speed at which the Bill is being considered compromises input and participation of tangata whenua into the TAC setting process for fish stocks being considered for TAC changes for the 1 October 2008 fishing year.</p>

<p>sustainability decisions</p>		<p>MFish disagrees. Consultation on changes to TACs for Bluenose stocks and Orange Roughly 3B stocks are currently being conducted, prior the passage of the amendment. Decisions will be taken on these stocks after the passage of the amendment. Consultation would not be valid if it was carried with affected parties who were not apprised of the potential affects of the new law. To ensure that the consultation on the management of these stocks is valid, tangata whenua and affected stakeholders have been informed of the content of the amendment to enable them to assess how the law change will affect their interest in the fish stocks under consideration. In the Bill, clause 5(2) directs that the current consultation to be treated as complying with section 12 of the Act (consultation requirements) as long as it would have complied with that section if carried out after the passage of the Bill. The current consultation must still meet the requirements of section 12. Clause 5(2) does not legitimise consultation if it fails to comply with the provisions of section 12. The Bill does not affect the rights of tangata whenua to have input and participate in the TAC setting processes. The Ministry acknowledges that development of the Bill itself has not allowed the usual longer timeframe for consultation desirable when significant changes are being made. This concern is mitigated by the fact that a key objective in developing the amendment has been to merely restore the situation that applied before the recent High Court decision. The issue of minimal consultation reinforces the need to adhere to this objective, and not introduce changes to the balance of the Act in the passage of the Bill.</p>
<p>Amend the Act to allow Fisheries Officers to carry and use restricted weapons</p>	<p>9W National Union of Public Employees</p>	<p>MFish disagrees. This matter is entirely outside the scope of policy approval for the Bill.</p>

Recommendations

Purpose of Clause 4

Clause 4 inserts a new subsection (2A) into section 13 of the Fisheries Act 1996. This provides the Minister of Fisheries with alternative criteria for setting of total allowable catches for fishstocks in the quota management system, when the information requirements of subsection 13(2) are not able to be met for the stock – namely, that reliable estimates of a biomass level that is able to produce the maximum sustainable yield and the current biomass of the stock are not available.

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- Agree that sub-clause (2) should be amended so that it does not effectively remove the existing reference in subsection 13(3) to subsection 13(2) paragraphs (b) and (c), and to add to subsection 13(3) a reference to the new subsection 13(2A).
- Agree that sub-clause (3) should not be amended.

Purpose of Clause 5

Clause 5 is a transitional provision to ensure that consultation on proposed TAC changes for the 2008-09 fishing year (commencing 1 October 2008) remains valid following the passing of the amendment. Some proposed TAC changes are currently being consulted on, in parallel with consideration of the Bill, although decisions on some of those TACs will not be able to be taken unless and until the Bill is passed. This clause ensures that this consultation is not rendered invalid merely because the provision under which the subsequent decision is taken has been altered by the amendment.

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