

Cabinet Policy Committee

PROPOSED AMENDMENT TO THE FISHERIES ACT

Proposal

1. In the near future I will be proposing an amendment to the Fisheries Act 1996 (the Act).

Executive Summary

2. A February 2008 High Court decision has identified a deficiency in the Act, which means that the Minister of Fisheries (the Minister) will be unable in many instances to either increase or decrease a catch limit, even if the Minister has reason to believe that the limit is either not ensuring sustainability or not sufficiently providing for utilisation. An amendment to the Act is required well before 1 October 2008 to ensure that catch limits can be set where the available information is less than or different from what the Court has said is required. I and the Ministry of Fisheries will be discussing the proposed remedies with the fishing industry and other stakeholders.

Background

3. There are 629 fish stocks in the quota management system, all of which require a catch limit. Decisions on catch limits and other measures to ensure sustainability are generally based on uncertain information, and there is rarely an obvious and specific course of action. The Minister is required always to balance the need to enable the use of the resource with the requirement to ensure sustainability.
4. The primary provision to set fishing catch limits (a Total Allowable Catch, or TAC) is set out in section 13 of the 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 the Act.
5. In February 2008, the High Court overturned a catch limit decision (the Judgment) I had made for an orange roughy stock, following a challenge by some quota owners.
6. The Ministry of Fisheries has done a preliminary review of how catch limits have been set for all stocks. Three categories have emerged, based on the degree to which catch limits are

¹ In September 2007, I decided to reduce the TAC for an orange roughy stock from 1,470 tonnes to 914 tonnes. The Antons group, representing 66% of the quota, challenged the decision. The judicial review found in favour of Antons, and my TAC decision was quashed.

compliant with the judgment. If not compliant, then catch limits would be deemed unlawful and challenged, and existing catch limits could not be changed.

- a. **Compliant with Judgment:** About 20% of fish stocks (60% of the value of New Zealand's fishery) are compliant. In order to set a catch limit, section 13 requires an assessment of how many fish there are right now and how many fish there should be. Because this sort of assessment is technically difficult and usually expensive, it has only been done for about 20% of fish stocks. Therefore, only about 20% of stocks have been managed according to a stricter interpretation of section 13 of the Act, as determined by the Judgment.
 - b. **May not be compliant:** About 30% of fish stocks (30% of the value of New Zealand's fishery) may not have TACs compliant with the Judgment, or cannot be changed. Because of assessment difficulties, many catch limits have always been set using a range of alternative approaches depending on the type and amount of data available, the characteristics of the fishery and approaches used internationally. The legality of this approach has now been questioned by the Judgment: for some fish stocks the approach would be considered legal but for others there is little doubt a Court would overturn the catch limit decision if asked.
 - c. **Not compliant:** About 50% of fish stocks (10% of the value of New Zealand's fishery) have catch limits set in a way that was explicitly rejected by the Judgment. These are stocks with catch limits that have been set with very little information. The majority of these stocks have very low catch limits (often 10 tonnes or less), although there are notable exceptions, such as the orange roughy fishery with the catch limit that was successfully challenged in the High Court.
7. The Act acknowledges the inherent difficulty in making decisions, and section 10 requires that the Minister make decisions even where information is absent, inadequate or uncertain, to be cautious when confronted by uncertainty, and to use the best available information. While this enables action to be taken in situations of uncertainty, the Minister must still have some information about both the current and target stock levels. The Judgment states that a Minister cannot fall back on section 10 to make a decision when there is no estimation of the current stock level in relation to the target stock level.
8. The information standard for catch limit decision-making that emerges from the Judgment is neither technically feasible nor cost effective for a large number of New Zealand's fish stocks. In summary, the effect of the Judgment is that a large number of existing catch limits would be determined unlawful if challenged, and the Minister would be unable to change catch limits from their current level for between 50 and 80% of all fish stocks, even if the Minister has reason to believe that the limit is either not ensuring sustainability or not sufficiently providing for utilisation. For example, where monitoring suggests a downward trend for a fish stock, but the available information does not meet the threshold outlined in the Judgment, then no catch limit reduction would be possible. About 50 or so stocks have a catch limit review in any one year. Of this number, about 15 or 20 stocks would be affected: a desired TAC adjustment would not be possible.

Proposed Remedy: Legislative Amendment

9. The Minister must be able to legally set catch limits for all quota management system stocks, and it is unacceptable that this cannot be done for many of New Zealand's fish stocks. Catch limits must be changed before either 1 April or 1 October each year, depending on the designated date of the fishing year. A catch limit adjustment must be preceded by a consultation period required by the Act. Harvesting rights worth millions of dollars to quota owners, as well as the sustainability of fisheries resources, depends on the annual catch limit-setting processes. Accordingly, there is considerable urgency to clarify the legal framework in time to set catch limits for October 2008.
10. A major review of the Act, including catch limit setting provisions, is scheduled to begin in 2009. 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 the immediate deficiency.
11. As you are aware, I have proposed an amendment to section 10 of the Act, to ensure that a precautionary approach is applied to fisheries management decisions. This approach would mean that in situations of no or very little information, where the adverse consequences are potentially high but the likelihood is unknown, a decision should favour sustainability. This amendment has been considered by Select Committee, but did not secure the necessary support to proceed through the House and into law. Even if amended, section 10 would not make it easier for the Minister to make a lawful decision under the current wording of section 13.
12. Given the circumstances – the urgency, and clear defects with section 13 – I have asked the Ministry of Fisheries to begin work immediately on a proposed amendment to the Act. The amendment would be restricted to ensuring that the catch limit-setting provision of the Act is fully operational. An amendment would not change the general approach of the Act, including the fine balance developed for the twin objectives of sustainability and utilisation. Neither would it replace the major review of the Act starting in 2009.
13. Two other elements may need to be considered in addition to an amendment to section 13 (and possibly section 10). First, a confirmation of earlier catch limit decisions to ensure that the current ambiguity is not exploited by those who wish to challenge past catch limit decisions. Second, to legislate catch limit decisions for a limited number of fish stocks for which catch limits could not be reviewed whilst this ambiguity existed (despite being fully consulted on).

Consultation

14. Due to the urgency with which I wished to bring this to the attention of Cabinet, no consultation on this proposal has occurred yet, including with other government agencies. A key element of this process will be engagement not only with these other agencies, but also with the fishing industry and other stakeholders. I propose to return to Cabinet Committee with a proposal after these discussions and further policy development.
15. Because of the urgency in bringing forward legislation, there would not be time to fully consult with all iwi, and therefore I would largely be relying on discussions with Te Ohu Kai Moana, and Te Puni Kokiri.

Financial Implications

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

Human Rights Implications

17. In my view, this proposal is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Legislative Implications

18. This proposal will lead to a proposed amendment to the Fisheries Act 1996.

Regulatory Impact Analysis

19. Not required. A regulatory impact analysis will be provided with the proposed amendment to the Act.

Publicity

20. A press release will notify the general public of the development of an urgent amendment to the Act, coupled with direct contact with the fishing industry and other stakeholders.

Recommendations

21. The Minister of Fisheries recommends that the Cabinet:
- a) Note that the High Court has identified a deficiency in the Fisheries Act 1996 in relation to setting catch limits;
 - b) Note that as a result, the Minister of Fisheries is unable to either increase or decrease the catch limit for many of New Zealand's fish stocks, and that if challenged, the current catch limits may be deemed unlawful;
 - c) Note that discussions will begin immediately with government agencies, the fishing industry and other stakeholders to assess options to address this deficiency;
 - d) Agree that I will report back in the near future with a proposal for a legislative amendment to the Fisheries Act 1996.

Hon Jim Anderton
Minister of Fisheries

/ / 2008