

Chair
Cabinet Legislation Committee

FISHERIES AMENDMENT BILL: APPROVAL FOR INTRODUCTION

Proposal

1 I propose that the Cabinet Legislation Committee approve the attached Fisheries Amendment Bill for submission to Cabinet and introduction to the House.

Executive Summary

2 The proposed Bill would amend the Fisheries Act 1996 (the Act) to better reflect the widely accepted international interpretation of the precautionary approach as it applies to fisheries management decisions, in the New Zealand context. The amendment would mean that where information is absent, uncertain, unreliable or inadequate, decision makers should act cautiously so as to ensure sustainability of fisheries resources and address the impact of fishing on the aquatic environment. I consider that the proposed Amendment Bill ensures that decision makers will not be constrained in taking measures to ensure sustainability because information is absent, uncertain, unreliable or inadequate, even where the measures may limit short-term utilization.

Background

3 On 11 December last year I submitted a paper to Cabinet proposing that the Fisheries Act 1996 be amended to better reflect the widely accepted international interpretation of the precautionary approach. Cabinet 'agreed that the Act be amended so that in circumstances where information is uncertain or limited, decision makers can act cautiously so as to ensure sustainability of fisheries resources and address effects of fishing on the aquatic environment' [CAB Min (06) 46/6C].

4 I have issued drafting instructions to Parliamentary Counsel Office to prepare a Bill which would make amendments consistent with the construct of Fisheries Act 1996 and ensure that the Act better reflects the widely accepted international understanding of the precautionary approach. This draft Bill is attached. In order to expedite enactment prior to my making decisions for the next fishing year (commencing 1 October 2007), I have sought to make the minimum changes to the Act necessary consistent with the change agreed by Cabinet.

Comment

Concerns with the current legislation

5 Guidance on how information should be used in decisions relating to utilisation of fisheries resources in New Zealand is currently provided by section 10 of the Act. It states that:

"All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability shall take into account the following information principles:

- (a) Decisions should be based on the best available information:*
- (b) Decision makers should consider any uncertainty in the information available in any case:*
- (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:*
- (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act."*

6 The information principles set out above are applied to fisheries management decisions in combination with the purpose of the Act. The purpose of the Act is set out in Section 8. It states that:

"The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability."

7 The current wording in subsection 10(c) of the Act requires that when information is uncertain, unreliable or inadequate decision makers should be cautious in considering the effects of any decisions on utilisation and sustainability. In the medium to long-term sustainability and utilisation are compatible because stocks must be maintained at sustainable levels to allow optimal ongoing catches. If stock levels are low, however, short-term utilisation may need to be reduced so that both utilisation and sustainability increase in the medium to long-term.

8 The current wording in 10(c) could be argued to mean that decision makers should be cautious both about ensuring sustainability and about foregoing short-term utilisation opportunities. That is, that there is no requirement to favour sustainability over short-term utilisation in situations of uncertainty. This ambiguity could limit the ability to take measures to ensure sustainability when information is uncertain, unreliable, inadequate or absent, and such a limitation would be inconsistent with the precautionary approach.

9 The current wording of subsection 10(d) could also be interpreted inconsistently with the precautionary approach. There is an argument that uncertainty in information about a sustainability risk or utilisation opportunity should not be used as a reason for postponing or failing to take measures to provide for short-term utilisation. The proposed amendments would ensure that a decision to ensure sustainability would prevail.

Proposed legislative amendments to better reflect a precautionary approach to fisheries management in the New Zealand context

10 In agreeing to amendments to the Act to better reflect the precautionary approach, the December Cabinet paper noted my intention to amend the information principles in section 10 of the Act [CAB Min (06) 46/6C]. I consider that the minimum changes necessary to achieve the desired clarity involve subsections 10(c) and 10(d) and that only these subsections should be amended. I propose to delete the current subsections 10(c) and 10(d) and replace them with a new subsection 10(c) which incorporates the original intention of both clauses to better reflect the precautionary approach, within the current construct of the Act.

11 The new subsection 10(c) would make clear that where information is uncertain, unreliable, inadequate or absent, decision makers should be cautious when making decisions that concern utilisation and sustainability. Being cautious means that decision makers should consider the degree of uncertainty and risk inherent in the situation when making a judgement on what actions should be taken to ensure sustainability and provide for utilisation. Greater uncertainty would suggest the need for more caution in decision making. **In addition**, the new subsection 10(c) would also make it clear that while being cautious in making these judgements, decision makers should not use any of those factors as a reason for postponing or failing to take any measures to ensure sustainability.

12 The Bill would amend section 10 of the Act to read:

10 Information principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

- (a) Decisions should be based on the best available information;*
- (b) Decision makers should consider any uncertainty in the information available in any case;*
- (c) If information is absent or is uncertain, unreliable, or inadequate, decision makers –
 - (i) should be cautious; and*
 - (ii) should not use any of those factors as a reason for postponing or failing to take measures to ensure sustainability.**

13 Cabinet also 'noted that the Fisheries Act 1996 (the Act) needs amendment to better reflect [the] widely accepted international interpretation of the precautionary approach as it applies to fisheries' [CAB Min (06) 46/6C]. The text of the Cabinet paper explained that the precautionary approach was 'a way of dealing with uncertainty in a general sense, rather than a set of criteria for a specific decision'. It suggested an amendment that would better reflect the widely accepted international interpretation of the precautionary approach and would enable this approach to be applied across the range of fisheries management decisions provided for in the Act.

14 There are a number of more detailed implementation criteria that have been developed within the internationally agreed framework for the precautionary approach, to suit a variety of fisheries management contexts. I do not propose to incorporate any of these specific implementation criteria into the current amendments. Consistent with Cabinet's decisions, I wish to make the minimum amendments necessary to better reflect the widely accepted international interpretation of the precautionary approach and consider that the best way to do this is to amend

the information principles, as discussed above. These provide high level, general guidance for all decisions made under the Act relating to utilisation and ensuring sustainability.

Impact of proposed changes on fisheries management decisions

15 The impact of the proposed change will depend on the specific decisions being made, the stocks they relate to, and the state of information about them. In general it is unlikely to cause sudden changes in current fisheries management measures. In some fisheries a cautious approach in favour of sustainability may lead to recommendations for Total Allowable Catch (TAC) reductions, even though the information acquired since setting the existing TAC is not adequate to draw a definitive conclusion about a change in stock status. Fishers are likely to be concerned about the effect any TAC reductions will have on their operations. The proposed amendment will however reduce legislative ambiguity and the associated risk of litigation which might prevent decision makers from taking the measures judged necessary to ensure sustainability. The application of the proposed changes may negatively impact on utilisation in certain circumstances in the short-term, but it should ensure a more sustainable resource base so that all New Zealanders can continue to obtain significant value from the utilisation of fisheries resources. The overall impact of this change will be positive.

16 The proposed amendments will not change the strength of the duty that section 10 imposes on decision-makers. The current requirement to “take into account” the information principles would remain and imply a discretion on the degree to which the decision-maker must act in accordance with the principles. Decision-makers must still consider how utilisation will be affected by any decision to ensure sustainability, and will still have discretion as to the degree of risk they are prepared to tolerate. The proposed amendments will clarify that where information is uncertain, decision makers should be cautious and act towards ensuring sustainability, but judgement will still be needed as to where the appropriate balance lies in deciding on actions which provide for utilisation while ensuring sustainability. The Ministry of Fisheries will ensure its decision advice processes assist the Minister of Fisheries to make these judgements in a robust fashion consistent with the proposed amendments.

Consultation

17 Consultation has been undertaken with the Ministry for the Environment, Ministry of Economic Development, Te Puni Kokiri, Ministry of Justice, Treasury, Department of Conservation and the Ministry of Foreign Affairs and Trade. Their comments have been taken into account in the preparation of the proposals in this paper.

Regulatory Impact and Business Compliance Statement

18 A Regulatory Impact Statement was attached to the paper considered by the Cabinet on December 11 [CAB Min (06) 46/6C]. There are no business compliance costs arising directly from this proposal.

Compliance

19 The proposed Bill will be consistent with the following:

- a) The principles of the Treaty of Waitangi;
- b) Rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the

Human Rights Act 1993;

- c) The principles and guidelines set out in the Privacy Act 1993;
- d) Relevant international standards and obligations; and
- e) LAC Guidelines: Guidelines on Process and Content of Legislation, a publication by the Legislative Advisory Committee.

20 There are no financial, gender or disability implications arising from the recommendations in this paper.

Certification by Parliamentary Counsel

21 The Parliamentary Counsel Office has certified the attached Bill as in order for submission to Cabinet.

Binding on the Crown

22 The proposed Bill will be binding on the Crown.

Commencement of Legislation

23 The Fisheries Amendment Bill will come into force on the day after the date of assent.

24 It is proposed that the Bill be passed no later than 31 July 2007. The reason for this urgency is that I would prefer the legislative change to be in place prior to the next major set of fisheries management decisions (for the fishing year commencing 1 October 2007).

Parliamentary Stages

25 The Fisheries Amendment Bill is targeted for introduction on 19 February and should be passed by late 31 July 2007.

26 I propose the Bill be referred to the Primary Production Select Committee for its consideration. The Committee will be requested to report the Bill to the House back by late May or early June.

Recommendations

I recommend that the Cabinet Legislation Committee:

1. **note** that I have lodged a bid seeking a priority of 1 on the 2007 Legislative Programme for the Fisheries Amendment Bill;
2. **note** that, on 11 December 2006, Cabinet agreed that the Fisheries Act 1996 be amended so that, in circumstances where information is uncertain or limited, decision makers can act cautiously so as to ensure sustainability of fisheries resources and address adverse effects of fishing on the aquatic environment [CAB Min (06) 46/6C] ;

3. **note** that the Fisheries Amendment Bill will amend section 10 of the Fisheries Act 1996 to achieve the policy intent noted in recommendation 2;
4. **approve** for introduction of the Fisheries Amendment Bill, subject to the final approval of government caucuses;
5. **agree** that the Bill be introduced on 19 February 2007;
6. **agree** that the Government propose the Bill be:
 - a. referred to the Primary Production Select Committee for consideration; and
 - b. enacted by 31 July 2007.

A handwritten signature in black ink, appearing to read 'J Anderton', with a long horizontal stroke extending to the left.

Hon Jim Anderton
Minister of Fisheries