

2 April 2008

Discussion on Options to Amend Section 13 of the Fisheries Act 1996

Background

The High Court has identified an issue with section 13 of the Fisheries Act 1996 (the Act) that presents difficulties in using some of the information that is currently used by the Minister to make decisions to set Total Allowable Catches (TACs). The Minister of Fisheries has discussed the issues with Cabinet. Cabinet has agreed to initiate a process to consider an amendment to ensure the Fisheries Act 1996 will work as intended.

A recent High Court review of a decision by the Minister of Fisheries on total allowable catch (TAC) for orange roughy found that the TAC was unlawful and set the decision aside. The Court found that the language of section 13(2) of the Act requires knowledge, or an informed estimate, of the state of the fish stock relative to the level that can produce the maximum sustainable yield (MSY), before the Minister of Fisheries can take a decision under that section. As this information was not available in this instance, the Minister had no lawful basis to make a TAC decision under section 13(2).

The TAC is a key fisheries management tool: by setting a limit on the total extraction over a 12-month period it aims to ensure that fishing is sustainable over the near and long-term.

Precisely how many stocks may be affected by the ruling is unclear. There are 629 stocks in the Quota Management System. Information on the current level of the fish stock and the level that can produce MSY is only available for a minority of these, (although this minority of stocks comprise a large share of the value and volume of New Zealand's fisheries).

For a large group of actively fished stocks, TACs are set on the basis of trends in indicators of the relative health of stocks, such as catch per unit effort, sustained catch history, and on biological parameters monitored by sampling size and age distribution in the catch. Such types of information are commonly used in jurisdictions that are similar to ours and are internationally accepted as appropriate for establishing sustainable catch limits. In other fisheries, (such a rock lobster) the management regime is well supported by sound research but use techniques to assess stock sustainability that are different to, but which are generally considered superior to, estimates of MSY. Estimates of MSY may be able to be made for some of this group of stocks.

For other stocks, some information is available on biological characteristics and current catch. This type of information is, however, in many cases not sufficient to determine whether a stock is at, above, or below the level that can produce MSY. In the absence of some valid estimate of MSY the ruling of the Court suggests this type of information alone cannot therefore be used to set a TAC under s13(2).

Obtaining information on such current stock levels and estimates of MSY for all stocks is not technically feasible given New Zealand's research capacity, nor would the cost justify this approach in many cases if it was feasible.

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 was previously used in many stocks to inform the Ministers decisions to set TACs.

TACs for the 2008/09 fishing year must be set by early September 2008. No determination has yet been made of stocks that might be amended in the current fishing year. However, to enable TACs to be adjusted (upward or downward) in stocks with information constraints, the new provisions need to be developed and enacted as soon as is possible.

While there may not be complete agreement on the interpretation of the Court's judgement, all stakeholders would benefit from a rapid resolution to the problem with section 13. The Ministry of Fisheries is keen to have stakeholder input into discussions to enable advice it to develop urgent advice to the Minister on an appropriate solution to this problem.

Section 13: Nature of the Problem

Section 13 of the Fisheries Act 1996 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.

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, although this may vary from species to species. 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.

Section 13(2) (see extract attached) 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.

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. This is because the information available about the state of most of our 629 stocks is uncertain. For many stocks the current stock level is unknown. Those that are well known although few in number although, encompass many of the high volume and high value fisheries (snapper, hoki).

So, for many stocks, indicators of the state of the stocks are used rather than modelled estimates of biomass levels. Some indicators have links to the MSY reference points of

the Act but others do not (age and size data, catch per unit effort). This means that often it is not known whether stocks are above, at, or below the MSY reference point, but the observed conditions of the stock suggest that they are being managed at sustainable levels. Time series data on such indicators collected over decades can provide a rich understanding of stock status relative to fishing exploitation rates despite the lack of estimates of biomass levels. Management action in the form of a TAC change is then introduced with a view to correcting or supporting the perceived state of the stock. This is not unusual internationally, and the same approaches are used in jurisdictions with similar regimes such as Australia, the US and Canada.

In the recent judicial review of orange roughy TAC decisions, the High Court found that a more literal interpretation should be taken of the conditions for using the provisions of section 13. That is, the Minister must have available an informed assessment of the current stock level and the stock level that will produce MSY (even if there is considerable uncertainty surrounding these estimates) before he may use the provisions of section 13 to set a TAC. Where such estimates of the state of the stock are not available, because the available data taken together offer no or almost no insight into stock levels (which is the case for many stocks) section 13(2) is consequently not available for setting catch limits.

Current stock levels and target levels cannot be calculated accurately for many species. Section 10 of the Act (Information Principles) allows the Minister to set a TAC when estimates of stock levels in relation to the MSY target are uncertain, but, according to the judgement, section 10 does not allow the Minister to set a TAC without making any assessment of stock levels relative to the target level. In other words, the Minister cannot fall back on section 10 to determine the best risk management approach when there is no estimate at all of the current stock level relative to the level that can produce MSY.

While estimates of MSY (albeit uncertain) may be able to be developed for some additional stocks, the High Court decision potentially leaves the management system bereft of its key management instrument – the setting of a catch limit – for a significant number of fish stocks. There are no other available mechanisms in the Act for setting TACs for most of these fisheries.

The conclusion is that either the current provisions need to be modified to accommodate the practical management of stocks now excluded, or new provisions are required. Either of these requires amendment of the Act, and until this is achieved the key management tool for fisheries management cannot be used for most stocks.

Objectives and Constraints

The objective of the proposal to amend the Fisheries Act 1996 is to provide the Minister with a robust statutory framework to carry out the regular setting and adjustment of TACs, for all QMS stocks, to achieve the purpose of the Act.

Amendment is intended to enable the lawful setting of TACs under the information constraints that currently pertain for many stocks in the QMS.

While enabling TAC decisions to be made for stocks where it is not practical at reasonable cost to provide the biomass estimates required by current provisions, the amendment should not lessen the obligation in the Act for the Minister to use the best available information in making TAC decisions. That is, where biomass estimates are available at reasonable cost they should still be produced and used as the basis of TAC decisions.

Process and Timeline

TACs are set in an annual round and take effect for most stocks as of 1 October (start of the fishing year). If it was decided that an urgent amendment was the best option, the objective would be to have a Bill enacted in time for the 2008 TAC decisions. These time constraints will compress the normal timeframe for both policy development and the processes required for enactment.

The Ministry wish to discuss the impact of the judgement, the necessity for an urgent amendment to the Act and the proposed form of an amendment with stakeholders as soon as possible.

The Minister would appreciate positive cooperation from all parties on this important issue for the integrity of the quota management system.

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.*