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Submission to: Primary Production Committee

Submission: Supplementary submission against the Fisheries Act 1996 Amendment Bill (No.2) 240-1 (2008)

From: option4/Hokianga Accord/New Zealand Big Game Fishing Council

Supplementary Submission

Introduction

1. The Ministry of Fisheries (MFish) has proposed an amendment to section 13 of the Fisheries Act 1996 in response to the High Court's decision in Antons Trawling Company Limited vs the Minister of Fisheries [22 February 2008].
2. Essentially the High Court ruled that the Minister cannot set a total allowable catch (TAC) limit under section 13 of the Fisheries Act 1996 (the Act) without having estimates of the biomass that will provide maximum sustainable yield (B_{msy}) or current stock size.
3. The Hokianga Accord, in conjunction with option4 and the New Zealand Big Game Fishing Council, submitted to the proposed amendment and appeared before the Primary Production Committee on August 7th.
4. This document is a supplementary submission to the Primary Production Committee, from all three organisations, jointly referred to as the Hokianga Accord.

A simple technical amendment or a risky quick response?

5. The proposed amendment, developed by MFish officials and fishing industry representatives SeaFIC and Te Ohu Kaimoana, is a 'quick-fix' to allow the Minister to make management decisions for Orange Roughy and Bluenose stocks by 1 October 2008.
6. The Minister has the authority to make interim decisions for these deepwater species. An interim decision will address the need to have decisions made for the new fishing year and allow time for a comprehensive review of the Act, if that is deemed appropriate.
7. The proposed amendment purports to address the issues raised by the High Court by making lawful what Justice Miller deemed was unlawful. This practice was described in court by MFish's counsel as being "extra-statutory." [para 16].

8. The Hokianga Accord submits the amendment does not address the faults nor will it improvement management, it will simply legalise current, defective Mfish practices.
9. The Hokianga Accord objects to the improper, inadequate process being applied to this proposed amendment.
10. After more than twenty years of having a quota management system (QMS) less than 4% of the 629 fish stocks have estimates of B_{msy} and are not likely to have estimates within the foreseeable future.
11. The Hokianga Accord recommends to the Committee that a long-term solution be developed to address the issues raised by the High Court and thereby enable future Ministers to sustainably manage the majority of QMS fish stocks.

Section 13

12. The purpose of Section 13 is to have stock levels at or above a level that will produce the maximum sustainable yield (MSY).

This is achieved by:

- a. *maintaining* the stock *at or above* the level that will produce MSY having regard to the interdependence of stocks; or
- b. *altering* the stock level where *below* a level that will produce MSY:
 - in a way and a rate to *restore to or above* a level that will produce MSY having regard to the interdependence of stocks; and
 - *within a period* (timeframe) appropriate to the stock, having regard to the biological characteristics of the stock and environmental conditions affecting the stock; or
- c. enables the stock level where *above* a level that can produce MSY to be altered in a way and a rate to move the stock level *towards or above* a level that will produce MSY having regard to the interdependence of stocks: section 13(2).

Section 13(3) provides that in considering the way in which and the rate at which a stock is moved towards or above B_{msy} under paragraph (b) or (c) the Minister shall have regard to such social, cultural and economic factors as the Minister considers relevant.

13. Section 13 has been successfully used for stocks with reliable B_{msy} data and is not in need of amendment.
14. Any amendment of s13 to achieve unintended outcomes, such as the setting of a TAC when stock levels that give rise to B_{msy} estimates cannot be determined with any certainty, poses the very real risk that the purpose of the Act will not be achieved. Further risks include depletion of fish stocks and interdependent species, and people being unable to provide for their wellbeing or exercise their right to catch fish for food.

Can the Minister simply manage fish stocks to higher levels than B_{msy} ?

15. Even though the word ‘**above**’ contained in the phrase ‘at or **above**’ (*emphasis added*) implies discretionary powers, it does not specify how much above B_{msy} the stock level must or can be. The level is likely to be close to B_{msy} .
16. Section 5 requires the Act to be interpreted, and all persons exercising of performing functions, duties, or powers conferred or imposed by or under the Act in a manner consistent with the international treaties to which New Zealand is a signatory. In this regard UNCLOS directs nations to either fish their stocks to B_{msy} or make such stocks available to offshore fleets, not just leave fish in the water.
17. In the Anton decision Millar J noted in [10] that New Zealand has such an international obligation and in [12] that the Minister’s objective when setting a TAC must be utilisation to the extent sustainable.
18. We understand that rarely has the Minister been given advice from MFish to manage important inshore fisheries above B_{msy} , but is advised to always achieve an outcome that is targeted at MSY.

Kahawai case study

19. To our knowledge, the first time MFish provided advice to the Minister that management above B_{msy} was an option in a developed inshore fishery was in the IPP on Kahawai in 2005, and only because MFish thought there was agreement from all stakeholders that this was desirable.

“A consideration for this fishery would be to adopt a specific management objective for managing the stock above BMSY. MFish notes that both commercial and non-commercial submissions supported this concept in 2004.” MFish kahawai IPP 2005

20. However, commercial fishers disputed the claim that they would support any other objective other than B_{msy} .

“You also raised consideration of adopting an objective for managing kahawai above a level of biomass that can produce the maximum sustainable yield (BMSY). The IPP noted that some commercial submissions and non-commercial submissions supported this concept in 2004 (commercial submissions have since refuted the fact that they provided support for this objective and MFish accepts this to be the case). However, it is important to note that there is currently insufficient information to specify a target stock size or the catch levels necessary to achieve any particular target level. This concept can only be applied as a theoretical construct to kahawai stocks on the basis of current information.” MFish Final Advice Paper 2005.

21. Ultimately the Minister’s decision letter does not state that the management objective was to maintain the stock above B_{msy} or any other theoretical construct, rather that there was sufficient concern to warrant measures to increase certainty that kahawai stocks would remain at current levels or increase in size.

“The Minister signalled the Labour Party policy on managing important shared fisheries above BMSY. I intend to seek advice from MFish on implementation of this policy during the coming year.

“Regardless of any determination to manage kahawai above BMSY, the Minister believed there was sufficient concern to warrant reconsideration of existing TACs to provide an acceptable level of certainty that kahawai stocks will remain at current levels or increased in size.” Minister kahawai decision letter 2005.

Purpose and principles

22. Where information on a stock is uncertain, unreliable or inadequate the Minister must still make decisions ‘to achieve the purpose – section 8 - of the Act.’ It would seem unlikely that a Minister could rely on simply managing a stock to a level of choice and comply with s8.
23. Moreover the wording of the proposed amendment which borrows from the environmental (s9) and information (s10) principles the application of which is mandatory in all fisheries management decisions confuses as to which provision is to prevail and offers fertile ground for litigation.

We repeat our submission that for these reasons the proposed amendment to section 13 is neither required nor appropriate.

Will any existing section work?

24. Section 14 provides for the setting of a TAC to achieve the purpose of the Act, namely, sustainable utilisation of fisheries to enable people to provide for their social, economic and cultural wellbeing.
25. However, to give effect to the purpose of the Act the Minister must first:
 - a. Fulfill on the Minister’s obligations to Maori under the Maori Fisheries Settlement: s5;
 - b. Assess the likely environmental impacts from the proposed decision s9;
 - c. Determine what information is or is not available and, if not why: s10;
 - d. Consult to ascertain whether the TAC will enable people to provide for their wellbeing. Will there be fish for them to catch?: s12(1)(a); and
 - e. Provide for the input and participation of tangata whenua having a non-commercial interest in the fishery and/or area, and how the Minister can best have particular regard to kaitiakitanga: s12(1)(b).
26. The species in Schedule 3 currently represent a tiny minority of QMS stocks, all exhibiting extremes in biological and information characteristics. The species that have reliable B_{msy} estimates, and are subject to s13, form the other extreme minority. Between these two categories lie the vast majority of New Zealand’s QMS fishstocks.
27. It is this ‘in between’ or middle category that warrants attention as to the most appropriate method of setting a TAC in the Fisheries Act. If the Primary Production Committee finds it inappropriate to include the middle category in

Schedule 3, then we consider it equally inappropriate to include the middle category in with the group with B_{msy} estimates.

28. These circumstances, considered by the High Court in Anton, dictate caution and not undue haste to ensure that what on the face of it purports to be a minor technical amendment does not unintentionally strike at the heart of Act, the sustainability measures, and weaken the existing principled approach Ministers must take.

Aversion to using Schedule 3

29. It has been suggested that Schedule 3 is reserved for stocks that have peculiar biological characteristics, not for stocks with poor information. Squid has been used as an example.
30. A study of Schedule 3 reveals that, for the species listed, the overriding characteristic is that information needed to make a stock assessment is unable to be obtained or is unnecessary. It is the lack of ability to gain the information that sets these species apart. Whether a short life cycle, unknown reproductive parameters, unknown boundaries of the stock, or lack of money to allow research to gather the information matters not a whit.
31. None of the species in Schedule 3 have characteristics preventing yield estimates being made. They all live, breed, and die, but in a place or a manner that makes it difficult for us to gather data. It is not their biological characteristics that make it impossible to estimate MSY, it is just that we don't understand them (there may be one or two exceptions).
32. Section 14 certainly contains the flexibility a Minister needs to set a TAC when the best information fails to provide reliable B_{msy} estimates. Removing the words "because of the biological characteristics of the species" from s14(8)(b)(i) would enable the Minister to add these stocks to Schedule 3 and set lawful TAC's when faced with poor information.
33. It seems the real reason that widening Schedule 3 to 600 species is so opposed is not that this would be administratively overwhelming, but that it offers a Minister choice in setting a TAC. When setting a TAC under s14 the Minister's decision is no longer constrained by having to accept a B_{msy} estimate as a proxy for the purpose of the Act, instead he is obliged to achieve the purpose of the Act in the best possible manner considering the best information.
34. Perhaps the resistance to applying section 14 signals a move away from Ministerial discretion by requiring the Minister in the proposed amendment to s13 to always pursue a B_{msy} target even though in the absence of sufficient or adequate information his objective is unknown, invisible, and there is no measure of success or failure.
35. This leaves the Minister to simply rubber stamp MFish recommendations possibly leaving the Minister in conflict with and unable to achieve the purpose of the Act, and with consequential exposure to litigation.

B_{msy} target for all TACs with poor information – authorising the unlawful

36. As discussed, a TAC is the prime sustainability measure to meet the sustainable utilisation purpose of the Act. This requires a consideration of cultural, social and economic requirements for fish against the obligation dictated by good husbandry and guardianship to pass productive healthy fisheries to future generations of New Zealanders.
37. B_{msy} estimates are not sacrosanct and it must not be assumed that being in possession of B_{msy} estimates, however determined, will in all cases achieve the purpose of the Act, and lead to the best TAC decisions.
38. B_{msy} estimates are just that. Rough and ready estimates mainly relying on layers of assumed knowledge disclosing almost nothing as to a level of catch that enables people to provide for their cultural, social and economic wellbeing.
39. A quick glance across jurisdictions discloses that B_{msy} is described, in terms of a stock size, as anything from 10% to 50% of the original unfished stock. Clearly in a stock reduced to 10% of the original size the population will be made up of mostly small, young fish, while a stock at 50% of original size would see a more balanced population comprising many age classes.
40. An example of the effect of this management approach is in the North Island West Coast snapper fishery, Snapper (SNA8). Snapper stocks are supposedly managed between 20 and 25% of virgin stock size (B₀). However, SNA8 fell below 5% of B₀ prior to the introduction of the QMS. Over the past 22 years it has rebuilt and is now estimated to be around 8% to 12% of B₀. Non-commercial fishers have repeatedly objected to insufficient abundance and catch rates in this fishery. In comparison, commercial fishers are “satisfied” with their returns. Obviously using industrial fishing techniques assists in efficient harvesting of snapper in such a depleted fishery.
41. The usefulness of a reference point such as B_{msy} is only to serve as a lower bound when considering possible stock sizes; a Minister faced with estimates suggesting a stock is at or approaching B_{msy} is receiving information that the stock is on the verge of being overfished, and this would be reflected in any TAC decision.
42. The overriding objective is always to achieve the purpose of the Act, which requires a balance be struck between conserving, using, enhancing, and developing fisheries to enable today’s generation to provide for their cultural, social, and economic wellbeing, and the need to pass productive fisheries to future generations. For this reason suggestions that reducing all stocks to a size indicated by a B_{msy} estimate will achieve the purpose of the Act is unrealistic and invites challenge.
43. The fishing industry insists that high value inshore fish stocks are fished at B_{msy} but seldom fish low value stocks down to this level. We assume TACCs are set at levels that will maintain the stock at or move it toward B_{msy}. For some stocks the commercial catch seldom if ever reaches the TACC (Table 1). It appears the fishing industry can choose which stocks can be managed above B_{msy} by they do not want the Minister or other stakeholders to have this option.

Table 1: Combined TACCs and reported commercial catch for the 2006/07 fishing year. (source: The Atlas of Area Codes and TACCs 2007/08)

Species	TACC 2006/07	Percent caught 2006/07
Grey mullet	1,006	83%
Ghost shark, dark	3,012	67%
Red gurnard	5,047	76%
Jack mackerel	60,547	65%
Red cod	16,074	35%
Snapper	6,357	100%

An alternative amendment

44. If the Select Committee is unable to support the application of Schedule 3 in such circumstances as gave rise to the Antons case we recommend consideration of an alternative by inserting another sub-section within Section 13 to address directly and simply the matter of a Minister having to set a TAC when faced with unreliable or unavailable B_{msy} estimates.
45. This alternative could be to insert a section 13A that would apply for those stocks lacking reliable B_{msy} estimates and therefore where the particular stock does not currently fit the criteria for management in sections 13 or 14. This would enable the Minister to set a TAC using s13A. It would be available for those “middle category stocks” referred to in [26] and [27].
46. The objective of setting a TAC under s13A would be to achieve the purpose of the Act (by:
 - a. applying the mandatory obligations under sections 9 (environmental) and 10 (information), including applying a precautionary approach when information is uncertain, unreliable or inadequate; and
 - b. making full use of the information obtained by the mandatory consultative provisions in s12).
47. We provide an initial draft of section 13A (excluding any consequential amendments to associated sections) to assist the Committee. Wording for this draft has been sourced from s14(1) and refers to B_{msy} instead of Schedule 3. Legal advice on the meaning and effect of a proposed new s13A has been requested and that the right is reserved to make further submissions.

Section 13(A)

*(1) Notwithstanding anything in section 13, if in the case of a quota management stock the best information about that stock is uncertain, unreliable, or inadequate thereby preventing the Minister from determining the level of the stock size that can produce the maximum sustainable yield, the Minister may, by notice in the Gazette, set in respect of the quota management area relating to the particular quota management stock a total allowable catch for that stock that **best ensures sustainability**.*

48. Inserting section 13A, would leave both ss13 and 14 to remain in their original forms (allowing them to continue to achieve their designed functions), with no

further overlays of confusion or unforeseen consequence, while providing the Minister with a mechanism to respond to Fisheries such as Orange Roughy 1 and Bluenose (and several hundred others if need be).

49. This alternative amendment would provide the Minister with five possible mechanisms to set a TAC. The nature [or biological characteristics] of the information regarding the stock, would determine which of the five possible mechanisms the Minister would apply.
50. The five stock categories and the five provisions for setting a TAC could be:
 - a. When reliable B_{msy} estimates are available use s13.
 - b. When reliable B_{msy} estimates are unavailable use s13A.
 - c. When the following apply use s14:
 - i. Biological impossibility of estimating MSY;
 - ii. Enhanced
 - iii. Internationally allocated;
 - iv. Highly migratory.
 - d. For incidental bycatch use s14A
 - e. For accidental bycatch use s14B.

Summary

51. The purpose of the Act must remain paramount, and not be weakened by assuming that B_{msy} will serve as a universal proxy.
52. The risks associated with the MFish-proposed amendment have not been well considered. The truncated consultation process being prosecuted with this amendment exacerbates those risks.
53. The large number of fishstocks without reliable stock estimates arises from the unexpected speed at which stocks have been added to the QMS, not a dysfunction within the Act.
54. If the Committee is reluctant to recommend Schedule 3 where B_{msy} cannot be determined then the Committee needs to consider adding a *separate* TAC setting mechanism in the Act for such stocks.
55. We urge the Committee to resist the temptation to accept the MFish-proposed amendment to s13 without fully exploring the impacts of that amendment.
56. Undue haste is not warranted to introduce a new TAC setting process before October 1st 2008.
57. We urge caution to ensure that the existing strengths of the Act, the purpose and principles, are maintained, and not allow the Minister to set TACs when the information available varies so greatly in quality.
58. We recommend that the Minister be empowered to respond to the information at hand by providing alternatives, each to apply to the particular circumstance, not further constrain the Minister by mandating B_{msy} as a single target for all circumstances.

Thank you for the opportunity to submit to this amendment.

Yours sincerely,



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