

Fisheries Act 1996 Amendment Bill (No 2) 240-1 (2008), Government Bill

Explanatory note

General policy statement

This document is a dissection and rebuttal of the Minister and Ministry of Fisheries' Explanatory note and Clause by clause analysis of the Fisheries Act 1996 Amendment Bill (No.2).

The black text is the original Minister/Ministry of Fisheries' statements and marked as [MFish].

Blue text represents the early analysis of the same information by the joint submitters to the Amendment Bill, the Hokianga Accord, the New Zealand Big Game Fishing Council and option4. This analysis is marked as [Hokianga Accord].

More information is online at http://option4.co.nz/Fisheries_Mgmt/section13.htm.

[MFish] 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 *Antons Trawling Company Limited v The Minister of Fisheries* (High Court, Wellington, CIV 2007-485-2199, 22 February 2008).

[Hokianga Accord] The amendment is not technical in nature; it recasts the purpose of the Act as subservient to the purpose of achieving maximum sustainable yield for all fish stocks. This is a huge shift in legal obligation.

[MFish] 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).

Since the Act came into force, various management strategies—all consistent with the concept of MSY—have been pursued, some using modelled estimates of biomass levels and others using alternative indicators of the relative state of the stocks.

[Hokianga Accord] If this is true then it is illegal. There is no mandatory requirement to produce maximum sustainable yield; the purpose of the Act is much wider and requires a balance between conserving, using, enhancing, and developing fisheries to enable people to provide for their cultural, social, and economic wellbeing. If the Minister has been setting total allowable catches (TAC's) with the single objective of maximum sustainable yield then he is exercising powers under the Act without regard to, and likely inconsistent with the purpose of the legislation, in section 8 of the Act.

[MFish] 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.

[Hokianga Accord] Ludicrous. For many quota management system stocks MFish know little more than the spelling of the name, and to suggest that alternative indicators will be drawn upon to set a total allowable catch directed at maximum sustainable yield objectives suggests extreme recklessness. If this is truly the international norm then perhaps this provides an insight as to why so many international fish stocks have collapsed.

[MFish] The amendments will enable TAC's 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.

[Hokianga Accord] The existing management approaches have been exposed as unlawful and not simply because of some oversight by the Minister. Section 13 operates well for stocks with full information and is not designed for any others. When biomass estimates cannot be estimated reliably another section of the Act is needed to enable a total allowable catch to be set.

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 is the commencement clause. The Bill comes into force on the day after it receives the Royal assent.

Clause 3 provides that the Bill amends the Fisheries Act 1996.

Clause 4 amends section 13, which requires the Minister of Fisheries to set a TAC in respect of the quota management area relating to each quota management stock

[MFish] Subclause (1) inserts a new subsection (2A) which provides for the setting of a TAC if the Minister considers that the current level of the stock or the level that can produce a MSY is not able to be estimated reliably.

[Hokianga Accord] It is not a new subsection that is required, but a new section.

[MFish] Section 13(2) requires the Minister to form a view as to whether a stock is below, at, or above a biomass level that can produce a MSY. In circumstances where the Minister is unable to form such a view because of the absence of reliable biomass estimates, the new subsection requires the Minister to set a TAC and specifies how this is to be done.

[Hokianga Accord] This amendment proposes that, with or without reliable estimates of the biomass (stock) level required to produce maximum sustainable yield, the Minister must use the same section of the Act, within the same prescriptive constraints, and make no allowance for the fact that he has no view whatsoever as to the biomass level required to produce maximum sustainable yield for that stock.

If other information is available, but is not sufficient to form a view on the biomass level required to produce maximum sustainable yield, then the Minister should use the information to set a total allowable catch that best achieves the purpose of the Act, not to blindly pursue an unknown target such as the biomass level required to produce maximum sustainable yield.

The biomass level required to produce maximum sustainable yield is not some Holy Grail that, if in possession of, moves from a situation of uncertainty to situation of certainty.

[MFish] Paragraph (a) of new subsection (2A) reiterates the requirement in section 10(d) that the absence of, or uncertainty in, information is not to be used as a reason for postponing or failing to set a TAC.

[Hokianga Accord] Counterproductive. All the information principles in section 10 of the Act are mandatory considerations for a Minister when setting a total allowable catch. Importing a select piece into this amendment only serves to confuse which information principle applies, and offers fertile ground for litigation. By staying silent on information the amendment would ensure that all the information principles in section 10 remain as mandatory considerations when setting a total allowable catch.

[MFish] Paragraph (b) requires the Minister to have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock, being the same matters as specified in section 13(2).

[Hokianga Accord] Again, importing part into this amendment weakens the environmental principles in section 9 of the Act. It is better to remain silent and apply the full set of environmental principles to any total allowable catch decision.

[MFish] Paragraph (c)(i) reiterates the requirement in section 10(a) that a decision should be based on the best available information.

[Hokianga Accord] Same comment; only serves to weaken purpose and principles, dangerous.

[MFish] Paragraph (c)(ii) requires the Minister to set a TAC that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can sustain a MSY.

[Hokianga Accord] This is an attempt to establish maximum sustainable yield as the sole objective when setting a total allowable catch, even when this conflicts with the purpose of the Act. A more balanced phrase would be “not inconsistent with the purpose of the Act”.

This is nothing but a first shot at rewriting the Fisheries Act and signals an intention of weakening the cultural, social, and economic objectives of the purpose of the Act and replacing them with a single biological purpose.

This proposal has nothing to do with the Antons High Court judgment; it is an unprincipled attempt at using the opportunity for a quick and dirty amendment to lower the sustainability threshold and permit aggressive fishing strategies on stocks with poor information.

[MFish] Subclauses (2) and (3) make consequential amendments to section 13(3), (4), and (7).

Clause 5 is a transitional provision. It applies to consultation undertaken before the commencement of the Bill for the purposes of setting a TAC on or after the commencement of the Bill. The consultation is to be treated as complying with section 12 if, had it been undertaken after the commencement of the Bill, it would have complied with section 12.

[Hokianga Accord] Such an amendment collides head-on with the section 12 obligations to have particular regard to Kaitiakitanga. This ignores the Crown's the overarching, ongoing obligations under the Treaty of Waitangi 1840 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, to provide for the input and participation of tangata whenua into fisheries management. This demonstrates once again, bad faith and contempt for Maori, particularly tangata whenua living in regions where access to the sea for food remains extremely important.

This represents a quick and dirty process delivering a quick and dirty outcome. There is no justification for amending section 13 by inserting s13(2A).

The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Fisheries Act 1996 Amendment Act (No 2) 2008.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

3 Principal Act amended

This Act amends the Fisheries Act 1996.

4 Total allowable catch

(1) Section 13 is amended by inserting the following subsection after subsection (2):

“(2A) For the purposes of setting a total allowable catch under this section, if the Minister considers that the current level of the stock or the level of the stock that can produce the maximum sustainable yield is not able to be estimated reliably using the best available information, the Minister must—

“(a) not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for the stock; and

“(b) have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock; and

“(c) set a total allowable catch—

“(i) using the best available information; and

“(ii) that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.”

(2) Section 13(3) is amended by omitting “paragraph (b) or paragraph (c) of”.

(3) Section 13(4) and (7) are amended by omitting “subsections (2) and (3)” and substituting in each case “subsections (2), (2A) (if applicable), and (3)”.

5 Transitional provision relating to consultation

(1) This section applies to consultation undertaken before the commencement of this Act under section 12 of the principal Act for the purpose of setting or varying a total allowable catch for a quota management stock under section 13 of the principal Act after the commencement of this Act.

(2) The consultation is to be treated as complying with section 12 of the principal Act if, had it been undertaken after the commencement of this Act, it would have complied with section 12 of the principal Act.