

Fisheries Act 1996 Amendment Act Bill (No 2)

23 July 2008

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: FISHERIES ACT 1996 AMENDMENT ACT BILL (NO 2)

1. We have considered the Fisheries Act 1996 Amendment Bill (No 2) ('the Bill') for consistency with the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). We received a copy of this Bill on 22 July 2008. We understand that the Bill was introduced into the House of Representatives on 21 July 2008.
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion we have considered a possible inconsistency with the right to natural justice affirmed in section 27(1) of the Bill of Rights Act.

Purpose of the bill

3. The Bill amends section 13 of the Fisheries Act 1996 ('the Act') which requires the Minister of Fisheries to set a Total Allowable Catch (TAC) in respect of the quota management area relating to each quota management fish stock. In the recent case of *Antons Trawling Company Limited v The Minister of Fisheries* (High Court, Wellington, CIV 20074852199, 22 February 2008), the High Court found that before a TAC can be set, the Minister must have an estimate of both current biomass and the biomass that can produce the Maximum Sustainable Yield (MSY).
4. Information on biomass is not readily available for the majority of the 629 quota management stocks and, in practice, alternative approaches are commonly used to establish the TAC. The amendments will enable a TAC to be set, even where the current biomass and the biomass that can produce a MSY cannot be reliably estimated.
5. Clause 4 of the Bill inserts a new subsection (2A) into section 13 of the Act that requires the Minister to set a TAC even in the absence of reliable biomass estimates, and specifies how this is to be done. The Minister must have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock. These matters are already specified in section 13(2). The decision must be based on the best available information and the Minister must not set a TAC that is inconsistent with the objective of maintaining or achieving a level of stock that can sustain a MSY.

Consistency with section 27(1) of the Bill of Rights Act

6. Section 27(1) of the Bill of Rights Act affirms that every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. The right to natural justice includes the right to be heard. [1]
7. Clause 5 of the Bill contains transitional provisions which apply to consultation undertaken before the commencement of the Bill for the purposes of setting a TAC after the commencement of the Bill. Clause 5(2) provides that: *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.*
8. Section 12 of the Act requires the Minister to consult with persons or organisations that are representative of classes of persons that have an interest in the stock or the effects of fishing on the aquatic environment in the area concerned. The Minister must give the parties consulted reasons in writing for his or her decision.
9. Clause 5 appears to create the possibility that submissions made as part of a consultation exercise conducted under section 12 prior to enactment of the Bill could be based on different legal criteria to a subsequent decision made under section 13 following its enactment. We have therefore considered whether clause 5 could limit the right to natural justice affirmed in section 27(1) of the Bill of Rights Act.
10. We have concluded that clause 5 does not limit the right to natural justice. First, section 27(1) is engaged when the 'determination' in question is of an adjudicative character. It is not engaged where the decision in question has an indirect impact on the person's rights, interests or obligations. [2] Arguably, the setting of TAC by the Minister does not have the adjudicative element necessary to fall within the scope of section 27(1) because it is not a determination made directly in respect of an individual's rights, interests or obligations.
11. Secondly, clause 5 of the Bill only applies where consultation undertaken before enactment of the amendment would, if undertaken after the enactment of the amendment, comply with the requirements of section 12 of the Act. In other words, the consultation must be adequate for the purposes of a decision taken under section 13 as amended by the Bill. That adequacy includes compliance with the principles of natural justice.
12. Thirdly, section 12 of the Act imposes obligations on the Minister to consult and to provide reasons for his or her decision. It does not prescribe an exhaustive procedure for compliance with the principles of natural justice, or set out the matters that need to be taken into account as part of consultation on a decision. Clause 5 does not prevent an interested party from challenging the decision on the basis that the process for reaching that decision did not comply with the principles of natural justice.

13. Finally, we note that the Ministry of Fisheries have informed the Ministry that the amendment to section 13 of the Act is unlikely to affect the content of submissions made under section 12 had those submissions been made after that amendment. For the reasons outlined in this advice, this is not however determinative to our conclusion on the Bill of Rights issues raised by the Bill.

Conclusion

14. Based on the analysis set out above, we have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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Footnotes

1 See *Franic v Wilson* [1993] 1 NZLR 318 (HC) and *Upton v Green (No 2)* [1996] 3 HRNZ 179

2 *Chisholm v Auckland City Council* (CA/02, 29 November 2002), paragraph 32

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