SUSTAINABILITY AND THE FISHERIES ACT 1996: IS THERE REALLY A PROBLEM

BY MIKE SULLIVAN

There has been considerable huffing and puffing in political circles in recent times relating to a suggested need to amend the Fisheries Act 1996 in order to make better provision for application of the "precautionary principle". This is an internationally recognised principle of decision-making when information is of an uncertain nature.

The minister and the Ministry of Fisheries have advanced a number of reasons in support of the need for the proposed amendment currently before parliament in the form of the Fisheries Act 1996 Amendment Bill. Some of those justifications refer to a desire to avoid further humiliating losses in the courts at the hands of the fishing industry. These losses have almost invariably arisen as a consequence of poor advice from MFish, or poor decision-making by the respective ministers.

The desire to avoid further court losses should not be seen as a legitimate basis for amending legislation. It is the reasons why MFish and the minister are losing cases that are relevant, not the losses themselves.

For the purposes of this article, however, it is appropriate to examine the ultimate justification put forward for the proposed amendment. It has been said that the Fisheries Act 1996 does not properly reflect New Zealand's international obligations, and that the amendment proposed, "will better reflect the internationally accepted view of the precautionary approach to fisheries management decisions where information on sustainability is uncertain or limited". This justification is plainly wrong.

The implication is that the current provisions of the 1996 act do not reflect modern principles of international law relating to fisheries management and the application of the precautionary principle. With all due respect to the ministry and the minister, such a claim does not survive even rudimentary analysis.

But don't believe me. In a number of decisions of the High Court and the Court of Appeal, the courts have consistently stated that a precautionary approach is open to MFish and the minister:

- Northern Inshore Fisheries Co Limited v Minister of Fisheries, March 4, 2002, Ronald Young J, HC Wellington CP235/01
- Squid Fishery Management Co Limited v Minister of Fisheries, April 11, 2003, Ronald Young J, HC Wellington, CP20/03, and
- Squid Fishery Management Co Limited v Minister of Fisheries, May 22, 2004, CA39/04.

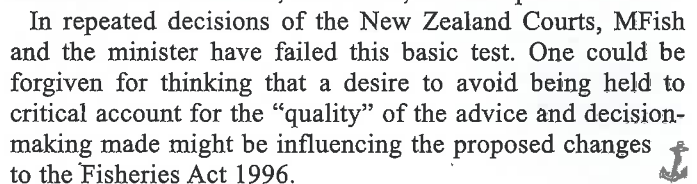
How is it then that they can claim that the present act does not adequately allow for the application of the precautionary principle?

More recently, in the well-publicised decision of the High Court (New Zealand Recreational Fishing Council Inc and Ors v Ministry of Fisheries and Ors, HC Auckland, March 21, 2007, Harrison J, CIV-2005-404-4495) regarding the contest between recreational and commercial fishing interests in respect of kahawai, the High Court accepted that while there is no hierarchy between the present objectives of the act of providing for utilisation while ensuring sustainability. The court expressly observed that utilisation should be allowed to the extent that it is sustainable, and that "on a plain reading of section eight, the bottom line is sustainability".

In addition, if there was any doubt that the information principles governing the making of decisions under the present act did not adequately provide for the application of the precautionary principle in making decisions relating to the sustainability of fish stocks, section 5(a) of the Fisheries Act 1996 puts the matter beyond doubt. That section requires that the act be interpreted (including any part of the act), and any person making a decision under any power under the act must do so, in a manner consistent with "New Zealand's international obligations relating to fishing".

In all the material seen by the writer put forward in support of the Amendment Bill and the material provided under Official Information Act requests, there does not appear to have been any in-depth analysis of why the act is said to be in breach of the precautionary principles under international law. There is merely an assertion that it is.

It is the view of the writer that the minister's position in proposing the amendment to the Fisheries Act is based on a fundamental lack of understanding of his own legislation. The section the minister is seeking to amend is one that requires that his decisions, in words of the Court of Appeal, "should be based on the best available information", but with appropriate allowances for uncertainty and caution where information is uncertain, unreliable, or inadequate.



In repeated decisions of the New Zealand Courts, MFish and the minister have failed this basic test. One could be forgiven for thinking that a desire to avoid being held to critical account for the "quality" of the advice and decision-making made might be influencing the proposed changes to the Fisheries Act 1996.

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14 New Street, PO Box 921 Nelson. Phone 64 3 548 4136, Fax 64 3 548 4195, 0800 OCEANLAW
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