Department of Conservation
Te Papa Atawbai

Briefing: Amending the Wildlife Act 1953 to authorise ongoing activities

To	Minister of Conservation	**Date submitted**	14 March 2025
Action sought	Update your Cabinet colleagues on options to respond to the effects of a recent court decision on the Wildlife Act 1953, and direct the Department on options to progress.	**Priority**	Very High
Reference	25-B-0107	**DocCM**	DOC-7898919
Security Level	**Legally Privileged**		

Risk Assessment	s.9(2)(g)(i) [redacted]	**Timeframe**	17 March 2025, to enable you to provide an update in Cabinet.
Attachments	Attachment A – Talking points for Cabinet		

Contacts	
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Executive summary – Whakarāpopoto ā kaiwhakahaere

1. The recent court decision on the Mt Messenger case presents a challenge to the validity of current and future authorisations granted under s 53 of the Wildlife Act 1953 (**the Act**). This has provoked public concern.
2. Action is needed to provide certainty for current and future projects depending on Wildlife Act authorisations.In the short term, we recommend issuing a statement to clarify the legislative position of s 53 authorisations. This statement could clarify that:
    - Existing authorisations remain in place and can be relied on.
    - Should authorisations be challenged, a defence already exists. This should give confidence for authorisation holders who are making best efforts, in line with the authorisations they have been granted by the Department of Conservation (**DOC**), to protect wildlife as they undertake their current activities.
    - The government is working through longer-term solutions to provide greater certainty for authorisation holders, in line with the intent of the Act.
3. There is potential to also appeal the Court's decision. s.9(2)(h) [redacted] During this time, it is important that authorisation holders have the confidence and certainty to continue with their operations.
4. Legislative changes could be progressed to address this issue more quickly.
5. If legislative change is sought, we recommend taking a targeted approach to deal with the specific issue raised while minimising any further impacts on the Act and its operation. This will reduce risks of unintended consequences and potential public opposition if more substantial changes are made to the Act without adequate consultation.
6. There are opportunities for broader changes to be made through ongoing work to repeal and replace the Act, which is now underway.
7. We have identified four potential legislative options to address this issue. These are:

    For <u>previously issued authorisations</u>:

    7..1. **either retrospectively validate previously granted authorities**, to recognise their ongoing legal status and ensure that any incidental killing of wildlife, in line with what was authorised, would not be an offence.

    7..2. **or amend the defence provisions in s 68AB(3)(a) the Act** to provide more certainty to developers that they will not be prosecuted for incidentally killing wildlife when doing otherwise consented activities

    For <u>new applications</u> for authorisations under the Act:

    7..3. **either change the authorisation provisions in s 53** to permit the Director-General of DOC to authorise incidental killing of wildlife as part of the approvals process

    7..4. **or amend the defence provisions in the Act** (as above)
8. All these options would enable the kind of activities that have been authorised in the past to continue to be able to be authorised and undertaken lawfully, without broadening this approach too widely.
9. **Greatest certainty and clarity for the public and authority holders would be provided by retrospective validation for previously authorised activities, and changing the authorisation provisions for new applications.** While this approach is

not usual best practice, in these circumstances the case is strong for the appropriateness of retrospectivity.

10. Alternatively, strengthening the defence provisions to also apply to incidental kill would mean people wanting to undertake activities affecting wildlife resulting in incidental kill will not need an authorisation, and the Department will not be able to require measures to be taken through tailored conditions to protect wildlife.
11. We seek your direction on next steps, subject to conversations you are planning to have with your colleagues.
12. We have attached draft talking points to support you at Cabinet on Monday 17 March, if you want to update your Ministerial colleagues on this issue and options for action.

We recommend that you … (Ngā tohutohu)

		Decision
1	**Agree** the Department of Conservation make a public statement to clarify the implications of the recent Court decision for current and future development projects operating under a Wildlife Act authorisation	Yes / No
2	**Indicate** if you wish to make a public statement in support	Yes / No
3	**Indicate** whether you wish to pursue legislative changes to address the issues raised**:** *Either* (preferred option) (a) Retrospectively validate previous authorisations, and change the authorisation provisions for new applications *Or* (b) Change defence provisions to have effect for both past and future authorisations.	Yes / No Yes / No
5	**Note** we will provide you with an update on appeal options and next steps, s.9(2)(h) [redacted]	Noted
6	**Agree** to forward this briefing to the Leader of the House and seek his support for any legislative changes you wish to progress.	Yes / No

s.9(2)(a) [redacted]

Date: 14 March 2025

Sam Thomas
Acting Deputy Director-General, Policy and Regulatory Services

Date: / /

Hon Tama Potaka
Minister of Conservation

Purpose – Te aronga

1. To advise you on options to amend the Wildlife Act 1953 (**the Act**) in response to a recent High Court decision, to enable current and future activities authorised under the Act to be done lawfully.
2. This advice will support you to update your Cabinet colleagues on Monday 17 March, and to direct the Department of Conservation (**DOC**) on next steps.

Background and context – Te horopaki

3. On 5 March 2025, the High Court decided on a case taken by the Environmental Law Initiative for a judicial review of the following:
    a) A decision by the Director-General of Conservation in December 2021 to grant an authority to the New Zealand Transport Agency (**NZTA**) under section 53 of the Act to catch alive and kill wildlife during construction of a new road at Mt Messenger (**the s 53 authority**); and
    b) A decision by the then Ministers of Conservation and Transport, in August 2023, to grant consent under section 71 of the Act, authorising the same activities affecting protected wildlife as the s 53 Authority intended to cover (**the s 71 consent**).
4. The Court set aside the s 53 authority to the extent it authorised the killing of wildlife. This means it was unlawful for DOC officials, under delegated authority from the Director-General of Conservation, to apply s 53 of the Act to authorise the 'incidental killing' of protected species.
5. The Court dismissed the claims relating to the s 71 consent.

This decision has provoked public concerns, and may place some development projects at risk

6. s.9(2)(h) [redacted]
7. [redacted]
8. [redacted]
9. [redacted]
10. [redacted]

s.9(2)(h)

11. [redacted]

12. [redacted]

13. [redacted]

14. [redacted]

In the short term, we recommend making a statement to clarify the legislative position of s 53 authorisations

13. A public statement, issued by DOC and/or yourself, would help to address some of the views presented in the media and calm concerns among developers. This statement could clarify the following:

    - Existing authorisations remain in place and can be relied on.
    - Should authorisations be challenged, a defence already exists. This should give confidence for authorisation holders who are making best efforts, in line with the authorisations they have been granted by DOC, to protect wildlife as they undertake their current activities.
    - The government is working through longer-term solutions to provide greater certainty for authorisation holders, in line with the intent of the Act.

s.9(2)(h)

[redacted]

Targeted changes to the Act could be made to address the effects of the Court's decision

18. If the Government wants to make changes to the Act, we recommend a targeted approach that deals directly with the effects of this Court decision on development projects. This would:

    - provide developers with current s 53 authorisations with confidence that they can continue to undertake their activities lawfully
    - allow new activities, of the kind that have been authorised in the past, to continue to be able to be authorised and undertaken lawfully.

19. The Government could consider proceeding quickly with legislative changes, which would provide the most certainty quickly. Note, however, that moving swiftly introduces risks that there could be unanticipated consequences (e.g. impacts on the effectiveness of the regulatory regime).

We have identified options for targeted legislative changes

20. These options to cover the situations of previous authorisations made under s 53 of the Act, and future situations when developers seek authorisation for activities under s 53 that would include incidental killing.

For current authorisations, there are options to adjust defence provisions or provide retrospective validation

21. Changes for existing authorisation holders will need to focus on providing developers with confidence that they can continue their current activities lawfully.

22. This could be done by either:

- **Retrospectively validating previously issued authorisations**, to recognise their ongoing legal status and ensure that any incidental killing of wildlife, in line with what was authorised, would not be an offence.

  This would provide the most explicit certainty to existing authorisations. s.9(2)(h) [redacted] However, this approach would require careful design to ensure it does not validate actions that would exceed the current authorities granted.

- **Amending the defence provisions in the Act**, to expand the existing section 68AB(3)(a) defence for a defendant not having intended to commit the offence to explicitly cover death or injury caused incidentally.

  This would be in line with provisions relating to marine wildlife in section 68B of the Act, which provides an existing precedent. It could be designed in such a way to cover activities in the past that have not been prosecuted. While this would not explicitly authorise existing activities that may result in incidental killing, it would provide a more robust defence that developers could rely on. However, though more robust, this would not provide the same 'guarantee' to existing authorisations as the option above. Further, this defence provision could potentially apply to all activities (i.e. not just for activities authorised by DOC), which could create a risk that some developers may not seek authorisation for activities because they could just rely on this legal defence if they are challenged instead.

For current and future applications, there are options to adjust defence provisions or change the authorisation provision

23. Current and future applicants will need to understand the parameters they can operate within, and to have confidence that they will be able to lawfully undertake their activities once an authorisation is granted.

24. This could be done by either:

- **Changing the s 53 authorisation provisions to permit the Director-General of DOC to authorise incidental killing** of wildlife as part of the approvals process.

  This would explicitly provide for incidental killing to occur and could be designed in such a way to require any authorisations to depend on applicants taking all reasonable steps to avoid incidentally killing wildlife. This would be important to ensure consistency with the Act's purpose, as there is a risk that, if not well

designed, this change could unintentionally lead to developers not building appropriate processes into their projects to minimise the potential risk to wildlife.

- **Amending the defence provisions in the Act –** in line with the option set out above for current holders of Wildlife Act authorisations.

  As indicated, this would create an explicit defence in line with existing provisions in the Act while continuing to encourage good behaviour. However, it could have unintended effects by creating a risk that some developers may not seek authorisation for activities because they could just rely on this legal defence if they are challenged instead**.**

These options all present viable pathways to resolve this issue

25. All these options may enable the kind of projects that have been authorised in the past to continue to be able to be authorised and undertaken lawfully.

26. In assessing these options, we particularly considered the extent to which they would provide certainty for those relying on s 53 authorisations and enable existing activities (or future activities of the same type/scale) to occur. This is set out in the table below.

Table 1: Comparison of options

Option	**Will this provide certainty for authorisation holders?**	**Will this enable activity of the kind currently permitted to occur?**
For existing permits already granted under s 53		
1. Retrospectively validate past authorisation decisions	This would provide the greatest level of certainty as it would explicitly empower incidental killing, but carries some risks given its retrospective impact and potential to contravene the Act's purpose if not well-designed.	Retrospective validation would ensure that current authorisation holders have assurance that their actions, if in line with the existing authorisation, would be lawful and can continue.
2. Change defence provisions	This will provide some increased certainty as actors would be able to rely on an explicit defence should their actions be subject to prosecution, provided they make reasonable efforts to avoid incidentally killing wildlife.	The availability of a robust and specific defence would give authorisation holders the confidence they need to continue with their existing activities.
For new or future applications		
1. Change the authorisation provisions	This would enable new authorisations to be granted on the basis that incidental kill may occur, giving holders certainty that their actions are explicitly lawful.	This would enable activities in line with those currently authorised to continue to be authorised.
2. Change defence provisions	As above.	As above.

If your objective is to provide maximum certainty and the swiftest response, we would recommend retrospectively validating past authorisations and changing the authorisation provisions for the future

27. Retrospective validation would provide the most certainty for existing permit holders, but this approach also carries a risk that it would attract criticism as passing legislation with retrospective effect.

28. The option to change the authorisation provisions for future applications is more in line with the approach that DOC has taken in the past for authorising applications (on the assumption that it could authorise incidental killing) and therefore may be more appropriate if an urgent, targeted response is needed.

Broader issues with the Act could be addressed on a longer-term timeframe

29. As you are aware, DOC is currently reviewing the Act to inform the future repeal and replacement of this legislation. One of the issues being investigated as part of that review is the approach for authorising the incidental killing of protected species.

30. There may be other ways to improve how activities are approved under the Act. For instance, we could investigate an option of amending s 71 and Schedule 9 of the Act, to consider if this could be used as an alternative pathway for approving activities that involve incidental killing of protected species. At this stage we are not proposing this approach. Should you decide to make legislative change at a reduced pace, we could consider potential changes.

Risk assessment – Aronga tūraru

31. If the Government decides to proceed with wider, non-targeted changes to the Act for wider policy reasons, or depart substantially from existing settings within the Act, this would require significant work. This would limit the ability to make any rapid changes to the Act. It would also risk creating other unintended legal issues, especially due to the Act's age and complexity. We consider the best course of action is focusing on targeted changes that directly address the effects of the decision on the types of activities that have previously been authorised. The options set out in this advice are intended to provide that specific focus.

32. If the Government decides to broaden the scope of defence provisions in the Act to include a clear defence for incidental killing of protected species, there is a risk that this could lead to less approved activities. Developers may not seek authorisation for activities and they would just rely on this legal defence. We would need to carefully analyse approaches to avoid or mitigate this risk, if you want to pursue this option.

33. Legislative changes are likely to attract significant attention from stakeholders, and there could be a backlash from some groups if they perceive the Government to be over-riding a recent legal decision to make it easier to kill protected species. This could be mitigated by ensuring that the approach is intended to maintain past government practice, which it had interpreted to be legal under the Act.

34. Retrospective legislation is generally not best practice and carries greater risk that it would be struck down by the courts, especially if the policy justification for the intervention is not clear – which is more likely when changes are progressed at pace. The Legislation Design Advisory Committee notes that legislation should not have retrospective effect. However, it also notes that Parliament "*may wish to amend the law in light of a judgment given in court proceedings – including where judicial interpretations of a provision differ from previous understanding or practice*." As the Committee notes, "*The starting point is that Parliament is entitled and empowered to act in this way*."[1] Taking a targeted approach to any change would mitigate this risk by focusing only on the specific issue presented by this court decision.

Treaty principles (section 4) – Ngā mātāpono Tiriti (section 4)

35. Treaty partners have signalled long standing interest in updating the Wildlife Act. One issue that has been raised is changing policy and the legislation to allow customary kill, take and possession. It is possible that Treaty partners would see any targeted

[1] The Legislation Design and Advisory Committee, Chapter 12 Affecting existing rights, duties, and situations and addressing past conduct

changes as not providing them with the opportunity to seek broader change. However, broader change would require significant policy work and is more appropriately considered in the review of the Act that has been planned.

Consultation – Kōrero whakawhiti

36. s.9(2)(h) [redacted]

37. No further consultation has been undertaken on this advice, given timeframes.

38. Any actions taken forward on this advice are likely to be of strong interest to existing and future authorisation holders, and the wider public. At this stage there is no plan to actively consult on changes. This would need to be integrated into any next steps directed.

Financial implications – Te hīraunga pūtea

39. There are no direct financial implications of these proposals.

Legal implications – Te hīraunga a ture

40. DOC's legal team has reviewed this briefing.

Next steps – Ngā tāwhaitanga

41. We recommend that you forward this brief to Minister Bishop as Leader of the House and seek his support for any legislative fix you wish to progress.

42. We understand that you may wish to update your Ministerial colleagues on this issue and the options for action at Cabinet on Monday 17 March. We have attached draft talking points to support your discussion.

43. We are investigating potential legislative vehicles to quickly make changes to the Act (e.g. through upcoming Bills, or a stand-along Bill), if Cabinet supports making changes. We will update you on these options as soon as they have been determined.

ENDS

Attachment A – Talking points for Cabinet on Monday 17 March

- The recent court decision on the Mt Messenger case presents a challenge to the validity of current and future authorisations granted under s 53 of the Wildlife Act 1953 (the Act).
- This has provoked public concern. As you will have seen in the media, some existing authorisation holders have raised questions about whether their current activities have the legal backing to continue.
- Action is needed now, following this decision, to provide certainty for current and future projects that depend on a Wildlife Act authorisation.
- My officials are working with Crown Law to investigate the potential to appeal this case and I expect to receive advice on this in coming weeks.
- Even if an appeal is taken, it is uncertain if it would be successful. In the meantime, the Court's decision stands as the law.
- Legislative changes could be progressed to address this issue quickly.
- My officials have identified two core sets of options for legislative change:
    - We could retrospectively validate previously granted authorisations. At the same time, we can change the authorisation provisions to provide a fix for future applicants (specifically, in section 53 of the Act).
    - We could amend the "defence" provisions in the Act to provide more certainty to developers that they will not be prosecuted for "incidentally" killing wildlife when doing otherwise consented activities.
- I consider that the greatest certainty and clarity would be provided by the first of these options – retrospective validation and changing authorisation provisions.
- The issues this case raises are fixable. They occurred because the Wildlife Act is old, has been amended over time, and some parts more than others are now not fit for purpose. That is why I confirmed to my Department last year that the review of the Wildlife Act, initiated by the last government, should continue.
- Ahead of that review, we will do what's needed to make sure that the kinds of projects and activities that have been authorised in the past can be undertaken lawfully in the future.
- Officials will be giving me advice on actions we can take now so that:
    - infrastructure projects (and others) can continue lawfully, and
    - businesses have certainty and clarity about their projects.
- Fast-track approvals are not affected by the decision in this Court case.