

Background and context – Wildlife Act, ELI vs DG, DOC Court case

- The Wildlife Act was passed in 1953, which means it's more than 70 years old – and it's now difficult to use and some parts more than others are not fit for purpose.
- **The Act regulates human interactions with protected wildlife. Under the Act, it is unlawful to kill protected wildlife except with lawful authority.**
- The previous government agreed to replace the Act, and following confirmation from the Minister of Conservation that this work remains a priority, the Department of Conservation (DOC) is working to review the Act. This review is looking at a wide range of issues that need attention.
- The Act will not be repealed and replaced this term. That does not limit the Government from making an urgent amendment to the current Act.
- DOC provides authorisations to 'incidentally kill' protected wildlife (i.e. kill species while doing an otherwise lawful activity) under two sections of the Wildlife Act – s 53 and s 71. The Mt Messenger decision has found that this is an incorrect use of s 53.
 - **Section 53 provides for the Director-General to authorise the taking or killing of wildlife for an approved purpose.** It also specifies that conditions can be applied to the authorisation (for example, the method of taking or killing, the areas in which the authorisation applies, and the timeframe for which it is valid).
 - **Section 71 enables specified Ministers to authorise and regulate incidental killing (and other effects to wildlife) that might occur during projects** carried out under an Act specified in Schedule 9 of the Wildlife Act (including the Government Roding Powers Act, which is used by NZTA for building roads). Joint consent of the Minister of Conservation and the Minister responsible for the relevant Act is needed for acts in respect of protected wildlife.
- **The Judge held that s 71 applied in this case.**
- DOC and the Ministry of Transport have been considering s 71 applications made by NZTA for roading projects since the Mt Messenger case was lodged with the Court. **Roding projects involving State highways that impact wildlife can still be regulated, under s 71.**
- **But s 71 only covers a limited set of Acts.** So, this is not a pathway at present for many developments that would require lawful authorisation – for example, projects requiring resource consent such as sub-divisions and other infrastructure projects.
- It is also an onerous process, requiring joint Ministerial sign off for every application, and wouldn't be fit for purpose for all authorisations.
- While the Resource Management Act 1991 can regulate effects on wildlife, resource consents cannot authorise the killing of wildlife.
- **The issues this case has highlighted are fixable.** Appealing the Court's judgment is a potential option – but are yet to confirm that with Crown Law.
- Policy and legislative options are being investigated to ensure:
 - that the kind of projects that have previously been authorised under the Wildlife Act can be undertaken lawfully in the future.

- that there is certainty and clarity for projects that have previously been authorised.
- **A range of policy and legislative options may be appropriate**, including looking at what we have done in the Fast Track Approvals Act. Amending the legislation will provide a more certain and timely solution. Options for this include:
 - amending s 53;
 - introducing a separate power to regulate killing for other purposes;
 - amending the defence provision; or
 - expanding the scope of s 71.
- DOC officials will provide further advice to the Minister of Conservation on these options.
- DOC is continuing to process applications following the court's judgment, but no decisions will be made on these applications until we have a clear path forward. This must be addressed quickly.

Suggested media lines

- DOC has received the court's decision and is considering what it means for how it manages its Wildlife Act permissions responsibilities.
- 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 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 and approvals under s71 can still be made.

Possible Q and A responses

Does this mean that some projects are now unlawful?

- The decision applies to the s 53 authority that was granted to NZTA, but has implications for other s 53 authorisations, granted to other developers.
- DOC is continuing to process new applications following the court's judgment, but no decisions will be made on these applications until we have a clear path forward.
- We are looking at remedies to give developers and other businesses confidence their projects can continue.

What options has DOC put forward to fix this?

- DOC is providing me with a range of legal options to fix this.
- I can't talk about s9(2)(g)(i) options until we have properly worked through them.

How long will this take to fix?

- We will fix this as quickly as we can.
- First we need to make sure that we take the most appropriate legal approach to fix it.

How many current development projects could this affect?

- I do not have specific figures on this at the moment.
- 85 permits have been issued in the last 12 months for projects that required authorisation under section 53 of the Wildlife Act.
- 315 projects are currently awaiting permission for activities under section 53 of the Wildlife Act.
- However, not all of these applications are for development projects. Many are for other projects – such as community groups seeking permission to relocate protected species for a restoration project.

What does this mean for projects that are currently waiting for permission?

- DOC will need to look at applications waiting for permission to make sure that it only authorises activities that it can legally do.
- We will look at options for urgent legal remedies to make sure that the kinds of projects that have been authorised in the past can continue to be authorised.

What about future projects?

- DOC is currently looking at how best to regulate incidental killing of wildlife – “Incidental” means killing wildlife while doing a lawful activity.
- We will do what’s needed to make sure that the kinds of projects and activities that have been authorised in the past can continue to be lawfully undertaken.

Will this decision have an impact on the Government’s fast-track approvals projects?

- No. We do not consider this decision will impact decisions made under the Fast-Track Approvals Act. Section 53 authorisations are not sought nor granted under that Act.

What is the economic impact of this?

- We understand that this will create uncertainty for businesses that have received permits under the Wildlife Act in the past, or may need permission in the future.
- That is why we will fix this as soon as possible.

What animals are protected by the Wildlife Act?

- It protects all but two native birds, and all native bats, reptiles, and frogs. It also protects a few invertebrates, such as threatened snails, and nine marine fish.
- It also regulates game bird hunting.
- The Act has tools to authorise activities that may harm these species – but as this case shows, the law has some problems that need fixing.

Will the Government reduce protections for native species?

- We are currently focused on this specific legal issue that needs fixing, so that the kinds of activities that have been authorised in the past can continue to be allowed in the future.

How are you balancing your responsibilities to look out for biodiversity as Conservation Minister with your government commitment to growth?

- The government continues to look out for biodiversity while promoting economic growth.
- For decades the government has been authorising activities under the Wildlife Act for projects that support growth.
- This court case shows that there are problems with the current Act that need fixing so that similar activities can be undertaken lawfully in the future.