
IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 99/2023

BETWEEN

SEAFOOD NEW ZEALAND LIMITED

Applicant

AND

**ROYAL FOREST & BIRD PROTECTION
SOCIETY OF NEW ZEALAND INCORPORATED**

First Respondent

AND

MINISTER FOR OCEANS AND FISHERIES

Second Respondent

AND

TE OHU KAI MOANA TRUSTEE LIMITED

Third Respondent

SUBMISSIONS ON BEHALF OF THE MINISTER FOR OCEANS AND FISHERIES

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Introduction

1. This appeal concerns the obligations of the Minister for Oceans and Fisheries (**Minister**) under s 13(2)(b) of the Fisheries Act 1996 (**Act**) in setting a total allowable catch (**TAC**) to rebuild depleted fish stocks managed under the quota management system (**QMS**). The TAC giving rise to the appeal applied to East Coast tarakihi and has since been superseded. But the issues on appeal have implications for fisheries management more generally and, in turn, the sustainability of fish stocks and the wellbeing of the communities that rely on them.

Issues

2. **Issue 1** concerns the scope of the Minister's discretion in assessing whether a TAC under s 13(2)(b) of the Act will enable the stock to rebuild "within a period appropriate to the stock". In particular, whether (as the majority of the Court of Appeal concluded) the Minister must:
 - 2.1 determine the (maximum) rebuild period appropriate to the stock separately from the way and rate at which the rebuild is projected to be achieved; and
 - 2.2 make that determination "by reference solely to the scientific factors specified in s 13(2)(b)(ii)" (and without taking into account social, cultural and economic factors).
3. A related issue is whether the Industry Rebuild Plan (**IRP**) considered by the Minister, which the parties agree fell within the description of social, cultural and economic factors, was relevant in assessing whether the rebuild would occur within a period appropriate to the stock (**Issue 1b**).
4. **Issue 2** concerns the interpretation and status of guidance in government policy documents – the Harvest Strategy Standard (**HSS**) and supporting Operational Guidelines – outlining best practice for rebuilding depleted stocks. Specifically, whether those documents contain a minimum probability of rebuild the Minister was personally required to consider.

Summary of argument

Issue 1 – Assessing the period appropriate to the stock provides a qualitative cross-check of TACs projected to achieve the rebuild

5. Section 13(2)(b) of the Act requires the Minister to set a TAC that enables a depleted stock to rebuild, with sufficient certainty, to a level at or above that which can produce the maximum sustainable yield (**MSY**). The Minister has discretion as to the way and rate of rebuild (considering relevant social, cultural and economic factors) but must ultimately be satisfied the rebuild will occur “within a period appropriate to the stock”.
6. The fact a proposed TAC is projected to achieve the rebuild is not enough. Achievement must be suitably timely for the stock. This is consistent with the wording of s 13(2) and the ultimate priority in the Act – utilisation is to be provided for, but sustainability is to be ensured.
7. However, the Act does not require a maximum rebuild period appropriate to the stock be determined by reference solely to the “scientific factors” listed in s 13(2)(b)(ii) (as found by the majority). These factors do not simply come together to produce a maximum period. Judgement is inevitably required as to the extent to which utilisation can or should be allowed, and without any consideration of the factors justifying utilisation a maximum period will be arbitrary in nature.
8. The Minister instead considers s 13(2)(b)(ii) operates as a qualitative cross-check on the TACs projected to achieve the rebuild objective (resulting from the way and rate analysis) and requires the Minister to be satisfied, based on advice, the TAC preferred will rebuild the stock within a period suitable to that stock considering the factors listed in that subparagraph.
9. On this approach, the Minister is not required to ignore, or artificially compartmentalise, the factors justifying different levels of utilisation (and hence different periods of rebuild). But the Minister must nevertheless be satisfied the preferred timeframe is appropriate given the stock’s current state, its capacity to rebuild and resilience to fishing, as well as the

advantages (to the stock) of it being at or above the target level (as considerations arising in connection with the factors listed in s 13(2)(b)(ii)).

Issue 1b – Industry Rebuild Plan not relevant in assessing whether rebuild will be achieved within a period appropriate to the stock

10. The Minister does not consider the IRP is relevant to the cross-check envisaged by s 13(2)(b)(ii). It does not affect whether any given rebuild period is “appropriate to the stock”. But such a plan would be a permissive consideration in determining the way and rate of rebuild and may give the Minister confidence the rebuild will, in fact, occur within the preferred period. It could therefore be taken into account in choosing the timeframe for rebuild provided the cross-check is also undertaken.

Issue 2 – Guidance on acceptable probability not a mandatory relevant consideration

11. The HSS, and particularly its core elements, is an important consideration in making TAC decisions. However, as a matter of interpretation, the Minister disagrees with the majority’s finding that the HSS specifies a default rebuild probability of 70 per cent.
12. And, while the Minister accepts the need to understand the likelihood of a rebuild being achieved (as was the case here), the guidance regarding an acceptable level of probability in the supporting Operational Guidelines is not a mandatory relevant consideration. The Minister is entitled to rely on the collective knowledge of his departmental officials on matters of such fine technical detail.
13. Section 10 of the Act does not alter matters. Section 10(a), in particular, reflects ordinary public law requirements – a decision-maker must be sufficiently informed of material facts; but is not required to be personally informed of every fact or detail that may be relevant to a decision.
14. The majority's approach to Issue 2 risks (unnecessarily) opening up highly technical and complex fisheries management decisions to challenge by requiring Ministers to be personally across matters of forensic detail and analysis.

Facts and legal findings in the courts below

15. There is no dispute about the facts, which are accurately described at paragraphs [35] to [45] of the Court of Appeal’s judgment.¹ The key findings of the Court of Appeal are outlined in relation to each issue below.

Providing for utilisation while ensuring sustainability – key provisions, concepts and considerations

Statutory purpose

16. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability.² Section 8(2) elaborates that:

ensuring sustainability means—

- (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
- (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment

utilisation means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

17. As this Court recognised in *New Zealand Recreational Fishing Council Inc v Sanford Ltd*, the statutory purpose is that both policies are to be accommodated as far as practicable, but (emphasis added):³

... in the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability. **Fisheries are to be utilised, but sustainability is to be ensured.**

18. The Minister must exercise his discretionary powers to promote the policy and objects of the Act⁴ — that is, he must “bear in mind and conform with the purposes of the legislation”.⁵ Subject to that constraint (and those discussed further below), “the nature and scope of the Minister’s powers

¹ CA Judgment [05.0001, at 05.0016-05.05.0019].

² Fisheries Act 1996 (Act), s 8(1).

³ *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [39] [Sanford].

⁴ *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 (SC) at 58.

⁵ *Sanford*, above n 3, at [59], citing *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at 173.

and the restrictions on them are as is provided for in the operating provisions of the Act.”⁶

Environmental and information principles

19. The statutory purpose is supported by high level decision-making principles in ss 9 (environmental principles) and 10 (information principles) of the Act. Of relevance here, s 10 requires decision-makers to take into account that:
- (a) decisions should be based on the best available information:
 - (b) decision makers should consider any uncertainty in the information available in any case:
 - (c) decision makers should be cautious when information is uncertain, unreliable, or inadequate:
 - (d) the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.
20. “Information” is defined to include “scientific, customary Māori, social, or economic information” and “any analysis of such information”.⁷ “Best available information” is defined as the “best information that, in the particular circumstances, is available without unreasonable cost, effort, or time”.⁸
21. The wording of the information principles reflects the importance of environmental precaution — “the idea that it is better to be safe than sorry when the effects of activities are uncertain.”⁹

Part 3 – sustainability measures

Sections 11 and 12

22. Part 3 of the Act provides for the setting of sustainability measures.
23. Section 11(1)–(2A) of the Act set out a number of mandatory considerations in setting or varying any sustainability measure — including

⁶ *Sanford*, above n 3, at [59].

⁷ Act, s 2(1).

⁸ Act, s 2(1).

⁹ Catherine J Iorns Magallanes and Greg Severinsen “Diving in the Deep End: Precaution and Seabed Mining in New Zealand’s Exclusive Economic Zone” (2015) 13 NZJIL 201 at 201. Cited with approval in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [107].

a TAC. In particular, s 11(1) requires the Minister to take into account:

- (a) any effects of fishing on any stock and the aquatic environment; and
- (b) any existing controls under this Act that apply to the stock or area concerned; and
- (c) the natural variability of the stock concerned.

24. The Minister is also required to have regard to relevant provisions of other statutes and legislative instruments that apply to the coastal marine area¹⁰ and take into account any conservation services or fisheries services, any decision not to require such services, and any relevant fisheries plan.¹¹
25. Before setting or varying a TAC, s 12(1) of the Act requires the Minister to consult with interested persons and provide for the input and participation of tangata whenua having a non-commercial interest in the stock concerned or an interest in the effects of fishing on the aquatic environment in the area.

Section 13 – the key operative provision for ensuring sustainability

26. Section 13 is the key operative provision for ensuring sustainability in the administration of the QMS.¹² For each stock, s 13(1) requires the Minister to set a TAC that applies to a particular quota management area. The TAC is a “sustainability measure”, being a measure set or varied under pt 3 of the Act for the purpose of ensuring sustainability.¹³ Once set, the TAC continues to apply in future fishing years until varied.¹⁴
27. In broad terms, s 13(2) requires the Minister to set a TAC that either maintains or moves the level of stock (**biomass**) to the level that produces the MSY. Exploring these key terms further:

27.1 The TAC regulates the amount of total removals (generally by weight) that can be taken from a quota management stock on an

¹⁰ Act, s 11(2).

¹¹ Act, s 11(2A).

¹² *Sanford*, above n 3, at [41].

¹³ Act, s 2(1) definition of “sustainability measure”.

¹⁴ Act, s 13(1) and (4).

annual basis. Within the TAC, allowances are made for recreational and customary fishing, and all other mortality caused by fishing. The remainder is the total allowable commercial catch (**TACC**) which limits the amount of fish that can be caught by commercial fishers.¹⁵

27.2 The MSY is defined, in relation to any stock, as “the greatest yield that can be achieved over time while maintaining the stock’s productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock”.¹⁶ To put it another way, it is the maximum use that the resource can sustain without impairing its renewability through natural growth and reproduction.

27.3 Biomass refers to the size of the stock in units of weight.¹⁷ The biomass that can produce MSY is referred to as **B_{MSY}**. Maintaining a stock at **B_{MSY}** requires the stock to be reduced to the level giving the fastest population growth rate (where fish are abundant, and food resources are plentiful).¹⁸

28. Sustainability is the guiding criterion,¹⁹ with s 13(2) establishing **B_{MSY}** as the minimum level at which a stock must be managed. While there is discretion for the Minister to manage stocks above **B_{MSY}**, the courts have previously held — in light of the purpose of the Act and New Zealand’s international

¹⁵ *Sanford*, above n 3, at [53].

¹⁶ Act, s 2(1) definition of “maximum sustainable yield”.

¹⁷ HSS at 17 [303.0628, at 303.0647]. Biomass can be expressed in several different ways. In particular, it may refer to the spawning biomass, which is the total weight of sexually mature fish in a stock that spawn in a given year; or the recruited biomass (also known as the exploitable or vulnerable biomass), which is the portion of a stock’s biomass that is available to the fishery (i.e., those fish above legal size limits). In the case of East Coast tarakihi, biomass reference points are usually expressed in terms of spawning biomass: Mace affidavit at fn 1 [201.0093, at 201.0099].

¹⁸ Dunn affidavit at [36]-[37] [201.0015, at 201.0020-201.0021]; Lawson affidavit at [15]-[17] [201.0164, at 201.0169-201.0170]. As observed by the Court of Appeal (per Courtney J at [15] [05.0007]), population growth is not necessarily highest when there is no fishing because a large population competing for limited food will have poor reproductive performance. However, when a stock has become depleted, a reduction in fishing may be needed to allow the stock to recover to that level.

¹⁹ *Sanford*, above n 3, at [43]. In considering the clause that became s 13, the Primary Production Committee observed that “sustainability concerns should be the key factor used to determine a TAC”: Fisheries Bill 1996 (63-2) (select committee report) at xi.

obligations — that “the Minister’s objective when setting a TAC must be utilisation to the extent sustainable”.²⁰

29. Importantly, s 13(3) of the Act states that in considering the way and rate at which a stock is moved towards or above B_{MSY} under (among other provisions)²¹ s 13(2)(b), “the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.” This Court has previously observed s 13(3) affords the Minister flexibility to consider the aspirations of the communities that rely on the stock and imports into the process a key aspect of the definition of “utilisation” in s 8(2).²²

The Harvest Strategy Standard and Operational Guidelines

The Harvest Strategy Standard

30. The HSS is a technical standard published by the (then) Minister of Fisheries in 2008. It is a statement of best practice in relation to the setting of targets and limits for the management of fish stocks under the QMS, to be used by the Ministry when providing advice to the Minister.²³ In developing the HSS, best practice approaches of international fisheries organisations and other countries were considered and adapted to suit New Zealand’s management system.²⁴ It is focused on single species biological considerations and related uncertainties, and “includes only limited consideration of economic, social, cultural or ecosystem issues”.²⁵
31. The HSS consists of three core elements to guide decision-makers:
- 31.1 A specified target about which a fishery or stock should fluctuate. For stocks managed under s 13, the target is based on MSY

²⁰ *Antons Trawling Company*, HC Wellington CIV-2007-485-2199, 22 February 2008, at [12], citing ss 8 and 13(2)(c) of the Act, as well as art 62 of the United Nations Convention on the Law of the Sea (set out below). See also *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries*, above n 5, at [46]: “In terms of their purpose, the Acts ... recognise or even emphasise that fisheries are to be used”.

²¹ The other provisions to which s 13(3) applies are s 13(2)(c) and s 13(2A), but neither of those provisions imposes a requirement for the relevant alterations to stock levels to occur within a “period appropriate to the stock”.

²² *Sanford*, above n 3, at [41].

²³ HSS at [2] and 22 [303.0631] and [303.0652].

²⁴ HSS, foreword at ii [303.0629].

²⁵ HSS at [9] [303.0633].

compatible reference points or better, with a 50% probability of achieving the target.²⁶

- 31.2 A “soft limit” that triggers a requirement for a formal, time-constrained rebuilding target (the default soft limit is $\frac{1}{2} B_{MSY}$ or 20% of unfished biomass (B_0)²⁷ of the stock, whichever is higher).
- 31.3 A “hard limit” below which fisheries should be considered for closure (the default hard limit is $\frac{1}{4} B_{MSY}$ or 10% B_0 , whichever is higher).²⁸
32. The soft and hard limits are intended to act as upper bounds on the zone where depensation (and associated ecosystem effects) may occur.²⁹ Depensation is a situation where depleted populations may start to decline at an accelerated rate due to factors such as an inability to find mates, impaired breeding success, competition and predation.³⁰ It is for this reason that the primary concern of fisheries scientists in developing a rebuilding plan is to take decisive action to move the stock sufficiently far above these limits within a reasonable period.³¹
33. The minimum period within which a stock is projected to rebuild (in the absence of all fishing) is known as T_{min} .³² T_{min} reflects the extent to which the stock has fallen below the target, the biological characteristics of the stock (e.g., productivity and natural mortality) and the prevailing environmental conditions (e.g., climate change, habitat degradation, competition) that limit the potential rate of rebuilding.³³ Even in the absence of fishing, a depleted stock can only rebuild as quickly as these factors allow.

²⁶ HSS at 7 [303.0637].

²⁷ B_0 refers to the unfished biomass of a fish stock (or equivalently the state of the stock at time zero, before fishing began): Mace affidavit at fn 1 [201.0099]

²⁸ HSS at 9 [303.0639].

²⁹ Operational Guidelines at 9 [303.0548, at 303.0558]. See also Dunn affidavit at [48] [201.0022-201.0023].

³⁰ Operational Guidelines at 9, fn 11; [303.0558].

³¹ Mace affidavit at [24] [201.0100]; Griffiths affidavit at [42] [201.0082, at 201.0091].

³² Dunn affidavit at [50] [201.0023]; Operational Guidelines at 12 [303.0561].

³³ Operational Guidelines at 12 [303.0561].

34. The HSS stipulates that – to give effect to its stated policy objective of rebuilding stocks in a “timely manner”³⁴ – stocks below the soft limit *should* be rebuilt to at least the target level in a timeframe between T_{\min} and $2 \times T_{\min}$ with an acceptable probability; and stocks below the hard limit should be considered for closure (until such time as they rebuild to the soft limit).³⁵ The HSS also states that these metrics are defaults (i.e., they should be applied in most situations) and management options departing from them must be adequately justified in the circumstances.³⁶

Operational Guidelines

35. The Operational Guidelines for New Zealand’s Harvest Strategy Standard (**Operational Guidelines**) is a companion document to the HSS. It contains both technical and implementation guidelines, including tables for considering the productivity of a stock and suggested default targets as a function of the productivity level.
36. The Operational Guidelines provide that a rebuilding plan consists of the rebuild target (in this case B_{MSY}), the period within which the rebuild is to occur and a minimum acceptable probability of achieving the rebuild target, together with a set of management actions to achieve the desired rebuild.³⁷ In discussing rebuilding depleted stocks, the Operational Guidelines indicate the minimum standard for rebuilding a stock below the soft limit is that 70 percent of the projected trajectories will achieve the target level within a period between T_{\min} to $2 \times T_{\min}$.³⁸
37. Neither the HSS nor the Operational Guidelines are expressly contemplated by the Act. They are discussed further below in addressing Issue 2.

³⁴ HSS at [22] [303.0637].

³⁵ HSS at 8-9 [303.0638-303.0639].

³⁶ HSS at [3] [303.0631]; Mace affidavit at [21] and [23] [201.0099-201.0100].

³⁷ Operational Guidelines at 11 [303.0560].

³⁸ Operational Guidelines at 12 [303.0561].

The impact of rebuilding a stock to B_{MSY}

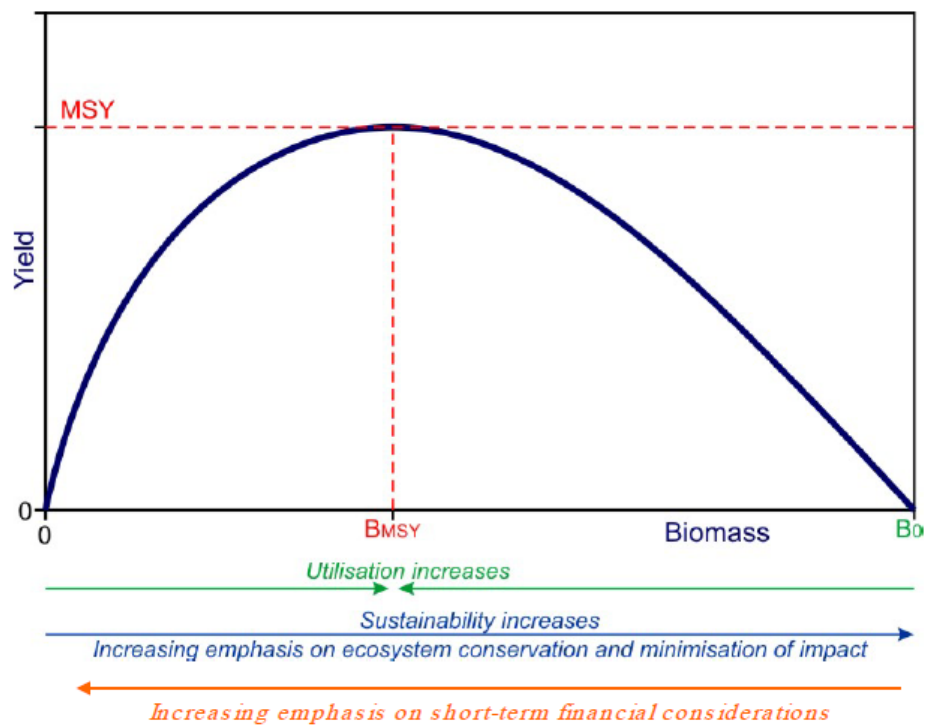


Figure 1. The long-term average (equilibrium) implications of providing for utilisation while ensuring sustainability in an MSY context. Arrows underneath the figure show that utilisation and sustainability considerations act in the same direction when biomass is below B_{MSY} , but in opposite directions when it is above.

38. The long-term relationship between biomass and yield is shown in Figure 1 above.³⁹ As the arrows under Figure 1 indicate, it is beneficial from both a utilisation and sustainability perspective over time to maintain stocks near or somewhat above B_{MSY} . From a utilisation perspective: the benefits of rebuilding a depleted stock to B_{MSY} include: a greater yield at lesser cost (due to increased encounters with the stock), resulting in higher revenue and profits for industry;⁴⁰ and increased accessibility to the stock for recreational and customary fishers. From a sustainability perspective: a stock that is near or somewhat above B_{MSY} will have greater resilience to adverse impacts (such as those associated with climate change), reducing the risk of stock collapse; and such a stock will make a greater contribution to the ecosystem of which it is part (for example, an increased contribution

³⁹ Operational Guidelines, at 2 [303.0551].

⁴⁰ Mace affidavit at [26] [201.0101].

in sustaining multiple predator-prey relationships that enable ecosystem persistence).⁴¹

39. However, achieving these longer-term benefits has socio-economic costs in the shorter-term associated with a loss of revenue during the rebuild period, including the potential for business closures.⁴² And while increasing the biomass has sustainability benefits, the fact a stock is below B_{MSY} does not necessarily mean that the stock or fishery is unsustainable at current yields.⁴³ Rather, the requirement to manage the stock at B_{MSY} (unless one of the exceptions in ss 14 to 14B applies)⁴⁴ reflects the generational equity implicit in the purpose of the Act – enabling current users of the fishery to take the *maximum* (sustainable) harvest without compromising the potential for future generations to do the same.

Issue 1: The “period appropriate to the stock”

Key findings in the Court of Appeal

Majority findings on Issue 1

40. On Issue 1, the majority of the Court of Appeal (Brown and Courtney JJ) concluded that:⁴⁵
- 40.1 When setting a TAC under s 13(2)(b), the Minister is required to determine the “period appropriate to the stock” by reference solely to the scientific factors specified in s 13(2)(b)(ii), and separately from the way and rate of rebuild.
- 40.2 While the Minister is not required to decide on the “period appropriate to the stock” before determining the “way in which

⁴¹ Ibid.

⁴² Mace affidavit at [27] [201.0101]; Helson affidavit at [34]-[36] [201.0152, at 201.0161].

⁴³ A yield is sustainable if it can be removed over an indefinite period without causing a further reduction in the biomass: HSS at 20 [303.0650].

⁴⁴ Section 14 authorises the Minister to set an alternative TAC that “he or she considers appropriate to achieve the purpose of the Act” in relation to stocks specified in Sch 3. A stock may only be added to Sch 3 if: because of the biological characteristics of the species, it is not possible to estimate MSY; a national allocation for New Zealand has been determined as part of an international agreement; the stock is managed on a rotational or enhanced basis; or the stock comprises one or more highly migratory species (s 13(8)). Sections 14A and 14B relate to stocks taken primarily as bycatch.

⁴⁵ CA Judgment (Majority) at [151] [05.0055].

and rate at which” the stock is moved towards B_{MSY} , doing so is likely to be more practical.

41. More specifically, the majority held that:
- 41.1 Section 13(2)(b)(ii) operates as a control on the periods resulting from the selection of a way and rate of rebuild under s 13(2)(b)(i). It can only fulfil that function if it is determined separately – because the more limited “scientific” factors in s 13(2)(b)(ii) will likely produce a shorter period than the social, cultural and economic factors that are relevant to way and rate.⁴⁶
- 41.2 The factors listed in s 13(2)(b)(ii) are “a statement of the criteria to be taken into account in determining an appropriate period within which the rebuild must occur”, not matters the Minister can consider and disregard.⁴⁷
- 41.3 The “only sensible interpretation” of s 13(3) is that it is limited to consideration of the way and rate at which the stock is moved towards the requisite level.⁴⁸
- 41.4 A period appropriate to the stock under s 13(2)(b)(ii) will necessarily be based on expert scientific opinion. While opinions may differ, the consensus of scientific opinion as to best practice is reflected in the HSS, which builds in an allowance for some fishing to recognise general social, cultural and economic factors.⁴⁹ However, the fact that scientific opinion makes some allowance for “general” social, cultural and economic factors does not mean that, in selecting the appropriate period under s 13(2)(b)(ii), the Minister is able to make further allowance for social, cultural and economic factors specific to the case at hand.⁵⁰

⁴⁶ CA Judgment (Majority) at [65] [05.0026].

⁴⁷ CA Judgment (Majority) at [68] [05.0027].

⁴⁸ CA Judgment (Majority) at [71] [05.0028].

⁴⁹ CA Judgment (Majority) at [91] [05.0035].

⁵⁰ CA Judgment (Majority) at [92] [05.0035-05.0036].

41.5 The period appropriate to the stock is “the dominant enquiry because it provides the outer limit within which the rebuild can occur”. Once this is understood, it does not matter whether the period is fixed first or used as a cross-check.⁵¹

42. The majority expressed concern that if social, cultural and economic factors could be considered in determining whether a period is appropriate to the stock, this could result in “an excessively long rebuild period”.⁵²

Minority findings on Issue 1

43. In contrast, Goddard J (in the minority) concluded that based on a reading of s 13(2)(b) as a coherent textual whole, in light of its place in the statutory scheme and purpose, it follows that:⁵³

- (a) The period referred to in subpara (ii) is the period of expected rebuild that would result from the Minister’s TAC decision, not a maximum period within which the (potentially shorter) expected rebuild period must fall.
- (b) That period must be appropriate to the stock: so the Minister needs to identify the expected rebuild period associated with a proposed TAC and consider whether that period is appropriate to the stock.
- (c) In considering whether the rebuild period is appropriate to the stock, the Minister must have regard to the biological characteristics of the stock and relevant environmental considerations.
- (d) However these are not the only matters that may be taken into account in determining what the rebuild period should be.

44. Goddard J agreed with the majority that the factors listed in s 13(2)(b)(ii) need to be considered and acted upon.⁵⁴ But his Honour reasoned that:⁵⁵

The Minister can select a TAC that results in a rebuild period greater than T_{min} only if the Minister takes into account social, economic and cultural factors, and decides how much weight to give to those factors. The more the weight, the greater the departure from T_{min} . The less weight, the less departure from T_{min} . But if these factors are

⁵¹ CA Judgment (Majority) at [94] [05.0036].

⁵² CA Judgment (Majority) at [63] [05.0025].

⁵³ CA Judgment (Minority) at [230] [05.0082].

⁵⁴ CA Judgment (Minority) at [231] [05.0082].

⁵⁵ CA Judgment (Minority) at [236](b) [05.0084].

not in the mix, then the period chosen must necessarily be T_{\min} not $1.5 * T_{\min}$ or $2 * T_{\min}$ or $5 * T_{\min}$. And if those factors are in the mix, then the Judge was wrong to say they are irrelevant considerations when it comes to determining an appropriate rebuild period.

45. Goddard J did not consider this approach would involve excessively long rebuild periods, noting the TAC must still be expected to enable the stock to rebuild to B_{MSY} with a probability of at least 50 percent, within a period appropriate to the stock.⁵⁶

Minister's position

46. The Minister does not agree with the majority that a *maximum* rebuild period appropriate to the stock needs to be determined by reference solely to the “scientific factors” listed in s 13(2)(b)(ii).
47. As noted above, the Minister instead submits s 13(2)(b)(ii) operates as a cross-check on the TACs projected to achieve the rebuild objective (resulting from the way and rate analysis) and requires the Minister to be satisfied, based on advice, the TAC preferred will rebuild the stock within a period suitable to that stock considering the factors listed in that subparagraph.
48. This requires a qualitative assessment based on judgement, rather than scientific precision. Achievement of the objective must be suitably timely for the stock given its biological characteristics and the environmental conditions it faces. This will, in turn, require consideration of the stock's current state, its capacity to rebuild and resilience to fishing, as well as the advantages (to the stock) of it being at or above the target level.
49. The Minister's approach does not enable the rebuild to be extended beyond what is appropriate. Sustainability must not be jeopardised. Equally though, it does not require the discrete determination of an arbitrary maximum period, nor the complete compartmentalisation of the factors that justify utilisation.

⁵⁶ CA Judgment (Minority) at [235] [05.0083-05.0084].

50. As expanded upon below, the Minister considers this approach is supported by an examination of the statutory text in light of its purpose and context.

Textual analysis

51. Section 13(2) requires the Minister to set a TAC based on the position of the stock in relation to B_{MSY} . As noted above, the objective is to either maintain the stock at or above B_{MSY} (s 13(2)(a)) or move it towards that level (s 13(2)(b) and (c)).⁵⁷ Section 13(2)(b) applies where the level of the stock is below B_{MSY} and requires the Minister to set a TAC that:

... enables [the level of the stock] to be altered –

- (i) in a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and
 - (ii) within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock
52. The use of the word “enables”⁵⁸ recognises that rebuilding the stock depends not only on the total amount of removals year-on-year, but on the productive capacity of the stock (as affected by population dynamics and environmental factors). It also recognises that measures beside the TAC can affect the rebuild.⁵⁹

The dual requirements of s 13(2)(b)

53. Importantly, subparagraphs (i) and (ii) are conjunctive – forming an integrated whole.⁶⁰

53.1 The subparagraphs operate together rather than in isolation – if subparagraph (i) is removed, the rebuilding objective disappears; if

⁵⁷ There does not appear to be any argument that the position is different when the Minister decides, as in this case, to vary the TAC under s 13(4).

⁵⁸ The Shorter Oxford Dictionary (6th ed, Oxford University Press) defines “enable” as “Give power to; strengthen; make adequate or competent” and “Make able, give the means to, to be or to do something”.

⁵⁹ As reflected in the requirement under s 11(1)(a) and (b) for the Minister, before setting or varying any sustainability measure (including a TAC), to take into account the effects (including future effects) of fishing and any existing controls under the Act that apply to the stock or area concerned.

⁶⁰ As Lord Hoffman stated in *R v Brown* [1960] 1 All ER 545 at 560: “The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole.”

subparagraph (ii) is removed, there is no limit on the period within which the objective is to be achieved.

- 53.2 The composite nature of s 13(2)(b) is reflected in the relationship between “rate” and “period” – the rate at which the stock rebuilds affects the period within which the rebuild objective is achieved; and the period of rebuild chosen defines the minimum rate at which it must occur. At least in this regard, rate and period are “two sides of the same coin”.⁶¹
- 53.3 Subparagraphs (i) and (ii) can also be considered mutually reinforcing. Given rebuilding relies on natural processes, the higher the probability the TAC “will result” in the desired rebuild, the more likely the rebuild period will be appropriate to the stock (and vice versa). Modelling the rebuild options will therefore usually result in a range of periods that can properly be considered appropriate to the stock.
54. Subparagraph (i) contains the main objective – rebuilding the stock to B_{MSY} . However, the requirement in subparagraph (ii) is *additional* to that in (i). On a plain reading, s 13(2)(b) requires the Minister to be satisfied that the TAC will both achieve the rebuild objective *and* do so within a period appropriate to the stock. Had Parliament been content for a rebuild to occur over any timeframe, subparagraph (ii) would be unnecessary. Instead, it is notable the phrase “within a period appropriate to the stock” appears exclusively in the one provision concerned with setting a TAC for a stock estimated to be below B_{MSY} .
55. Given this context (and the statutory purpose), it can reasonably be inferred that Parliament intended to ensure that depleted stocks be rebuilt in a timely fashion. The relevant question is therefore how timeliness, or the “period appropriate to the stock”, is to be assessed.

⁶¹ CA Judgment (Minority) at [203], [214], [232] and [237]; [05.0074, 05.0077, 05.0083, and 05.0085].

Relevant considerations – assessing the “period appropriate to the stock”

56. In setting a TAC under s 13(2)(b), the Minister is required to assess, weigh and act upon multiple considerations – some express and others implicit.
57. In addition to the requirements of ss 9-12 (referred to above), s 13(2) is premised on the Minister having a reliable estimate of both the current stock level and B_{MSY} .⁶² With this information, the stock’s biological characteristics and other factors can then be used to model (to various probabilities) how the biomass will rebuild at different catch levels.⁶³
58. As noted above, s 13(3) provides that:
- In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under subsection (2)(b) or (c), or (2A) (if applicable), the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.
59. As the majority recognised,⁶⁴ the opening words of s 13(3) make clear that it is engaged when the Minister is considering the way and rate of rebuilding the stock under s 13(2)(b)(i).
60. Of course, any decision regarding the rate of rebuild will affect the period over which the rebuild is achieved. If socio-economic factors are relevant to one, they are relevant to both. Such factors provide the justification for utilisation of the stock and are relevant to the Minister in choosing a rebuild rate *and* associated period. But, as discussed below, it does not follow that socio-economic factors are relevant to *assessing* whether a given rebuild period is *appropriate to the stock* (as opposed to those utilising it) in terms of s 13(2)(b)(ii).
61. Section 13(2)(b)(ii) requires the Minister to be satisfied the rebuild will be achieved “within a period appropriate to the stock, having regard to the

⁶² *Antons Trawling Company v Ministry of Fisheries*, above n 19 at [56]. This can be compared with s 13(2A), which applies where the current biomass or B_{MSY} cannot be estimated reliably using the best available information. Section 13(2A) does not apply to East Coast tarakihi.

⁶³ Dunn affidavit at [57]-[62] [201.0024-201.0025]; Griffiths affidavit at [24]-[35] [201.0087-201.0089].

⁶⁴ CA Judgment (Majority) at [71] [05.0028].

biological characteristics of the stock and any environmental conditions affecting the stock”.

61.1 The sequencing of subparagraphs (i) and (ii) indicate that what is being assessed is the period, or periods, of rebuild arising from the preceding way and rate analysis (as opposed to the abstract determination of a maximum period).

61.2 The use of the evaluative term “appropriate” (i.e., suitable⁶⁵) makes clear that a qualitative assessment is required. While the assessment is ultimately for the Minister to make, the nature of the listed factors suggests supporting advice will be necessary.

61.3 There is no requirement to adopt the period *most appropriate* to the stock. While there may be rare cases in which a fishery needs to be closed, there is nothing to suggest T_{\min} is the starting point.

61.4 The Minister is instead directed to assess appropriateness “having regard to” listed factors. Such a directive is usually understood as requiring genuine thought and consideration be given to the listed factors, while leaving the decision-maker to determine the weight (if any) to be afforded them.⁶⁶ And subparagraph (ii) does not stipulate that the listed factors are exhaustive. But context is everything.⁶⁷ What is being evaluated is the suitability of the period “to the stock” (i.e., the species being managed), not those having an interest in it. Such a focus is consistent with the stock-specific nature of the listed factors, which all members of the Court of Appeal agreed must be acted upon (not merely

⁶⁵ See *Rational Transport Society v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].

⁶⁶ See, for example, *Sanford Ltd v New Zealand Recreational Fishing Council* [2008] NZCA 160 at [94]-[95], citing with approval *NZ Fishing Industry Assn Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

⁶⁷ See, for example, *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 at 548 per Lord Steyn. This point is reinforced by the inclusion of context in s 10(1) of the Legislation Act 2019.

considered),⁶⁸ and suggests socio-economic considerations are not directly relevant to this part of the analysis.

61.5 However, it is important to recognise the listed factors do not simply come together to produce a maximum appropriate period. They dictate how quickly the stock can grow at different levels of utilisation and combine with the stock's current biomass to determine T_{\min} . They may also be useful indicators of resilience to, and the risks involved with, various levels of fishing pressure. But assuming a proposed TAC is projected (with sufficient certainty) to rebuild the stock, how long is too long – and correspondingly, how much utilisation is too much – is a matter of judgement, not scientific precision.⁶⁹ It is for this reason that the metrics in the HSS are described as default settings (that can be departed from in particular circumstances), rather than fixed requirements in any given case.⁷⁰

62. Drawing the threads together, the text suggests s 13(2)(b)(ii) acts as an evaluative cross-check on the TACs projected to rebuild the stock with the necessary level of certainty. It does not preclude social, cultural or economic factors influencing the choice of rebuild period but is intended to ensure the rebuild is suitably timely from a sustainability perspective. There is no magic formula and judgement will inevitably be required.

Legislative history

63. The Court of Appeal judgments each discuss the legislative history to s 13.⁷¹ The Minister submits the following key points emerge from the materials:

63.1 First, Parliament chose B_{MSY} as the optimal level to give effect to the Act's purpose (effectively treating B_{MSY} as a proxy for a sustainably managed stock). It specifically rejected the proposal, reflected in the Fisheries Bill as introduced, that the Minister be

⁶⁸ CA Judgment (Majority) at [68] and (Minority) [231]; [05.0027 and 05.0082].

⁶⁹ Mace affidavit at [28]-[29] [201.0101]; Griffiths affidavit at [42]-[43] [201.0091].

⁷⁰ HSS at [3] [303.0631]; Mace affidavit at [21] and [23] [201.0099-201.0100].

⁷¹ CA Judgment (Majority) at [17]-[26] [05.0009-05.0013]; and (Minority) at [237] [05.0085].

authorised to manage a stock below B_{MSY} if to do so would provide a “net national benefit”;⁷² with the Primary Production Committee observing that “sustainability concerns should be the key factor used to determine a TAC.”⁷³ The Committee instead recommended the inclusion of what is now s 13(3), requiring the Minister to have regard to relevant social, cultural and economic factors in determining the way and rate of rebuild, without “[detracting] from the philosophy that setting a TAC should be primarily based on sustainability concerns.”⁷⁴

63.2 Secondly, as outlined by Courtney J,⁷⁵ the history of amendments to what is now s 13(2)(b) appear to demonstrate an intention to ensure the appropriateness of any given rebuild period to the stock be assessed by reference to scientific considerations (as opposed to social, cultural or economic factors).

Minister’s interpretation is consistent with purpose

64. The Minister’s approach is consistent with both the purpose of the Act and the role of s 13 in achieving it. It enables utilisation values to influence the selection of a rebuild period, while ensuring sustainability by requiring the Minister be satisfied – based on advice – that the rebuild will be suitably timely for the stock.

65. Not every stock below B_{MSY} is at significant risk of further, or accelerated, decline. Some stocks may, quite appropriately, be rebuilt over reasonably lengthy periods. But, at least where stocks are below the hard or soft limits,

⁷² The Select Committee produced an interim reporting attaching proposed amendments to the Bill. The proposed amendments removed the reference to “net national benefit”: Primary Production Select Committee *Interim Report on the Fisheries Bill: Report of the Primary Production Committee [1993-1996]* I AJHR 11A at 36-37.

⁷³ Fisheries Bill 1996 (63-2) (select committee report), at xi.

⁷⁴ Ibid.

⁷⁵ CA Judgment (Majority) at [17]-[26] [05.0009-05.0013].

drawn out rebuilds may present unacceptable risks to the sustainability of the stock.⁷⁶

66. The requirement in s 13(2)(b)(ii) for a period to be appropriate to the stock is intended to prevent those risks becoming a reality. It recognises that – depending on the circumstances – there may be some timeframes that cannot reasonably be supported in light of the listed factors. Its efficacy is not dependent on determining an abstract maximum period, but the rigour of the qualitative assessment it demands.

Minister’s interpretation is consistent with case law and UNCLOS

67. The Minister agrees with the Court of Appeal that the cases cited by the appellant regarding the interpretation of s 13 are of limited assistance to the matters at issue.⁷⁷ But, to the extent they are relevant, the Minister’s interpretation of s 13(2)(b) is consistent with the thrust of authorities available.⁷⁸ It gives a clear role to social, cultural and economic factors in choosing a rebuild period, but not to the extent it jeopardises sustainability.
68. For the same reason, the Minister submits his interpretation is consistent with art 61(3) of the United Nations Convention on the Law of the Sea.

Issue 1b: Industry Rebuild Plan

Key findings in the Court of Appeal

69. The majority held that the IRP was an irrelevant consideration in determining the appropriate period under s 13(2)(b)(ii), as it did not fall within the scientific factors listed in that subparagraph.⁷⁹ Goddard J did not expressly address the issue.

⁷⁶ To the extent longer-term rebuilds rely on a comparatively small increase to the biomass year on year, they are inherently more susceptible to natural variations and shocks (for example, changes to recruitment levels). However, this concern will be mitigated the further removed stocks become from the hard and soft limits, and may also be addressed by frequent stock assessments, which enable corrective management actions to be taken.

⁷⁷ CA Judgment (Majority) at [73] [05.0028-05.0029]; and (Minority) at [238] [05.0085].

⁷⁸ See, in particular, *New Zealand Fishing Industry Association Inc v Minister of Fisheries* CA82/97, CA83/97, CA96/97, 22 July 1997 at 14 (there, a Full Court of the Court of Appeal considered s 13 to provide some assistance to the Minister and parties for the upcoming 1997 decision); and *Greenpeace v Minister of Fisheries* HC Wellington CP.492/93, 27 November 1995 at 24 and 29.

⁷⁹ CA Judgment (Majority) at [95]-[96] [05.0037].

Minister’s position – IRP can affect the rebuild period chosen but not whether it is appropriate to the stock

70. The Minister does not consider the IRP is relevant to the cross-check envisaged by s 13(2)(b)(ii). It does not affect whether any given rebuild period is “appropriate to the stock”. However, the Minister considers such a plan would be a permissive consideration in determining the way and rate of rebuild and may give the Minister confidence the rebuild will occur within the chosen period. It could therefore be taken into account in choosing a timeframe for rebuild provided the cross-check is also undertaken.

Issue 2: Guidance on acceptable probability

Key findings in the Court of Appeal

Majority findings on Issue 2

71. On Issue 2, Brown and Courtney JJ found (1) the HSS specified a default probability standard for rebuild of 70 per cent for stocks below the soft limit;⁸⁰ and (2) the absence of direct consideration by the Minister of that 70 per cent, and the reasons for it, was unlawful as it was “best available information” and therefore a mandatory relevant consideration pursuant to s 10(a) of the Act.⁸¹

Minority findings on Issue 2

72. Goddard J held it could not be implied that, as a matter of legal obligation, the Minister was required to have regard to an informal planning document such as the HSS.⁸² There was a distinction between information and guidance on best practice decision-making. The HSS is the latter; it is not a source of factual information or evidence.⁸³ There was no justification (either in public law or s 10) for requiring a decision maker to consider guidance on best practice decision-making.⁸⁴

⁸⁰ CA Judgment (Majority) at [124] [05.0046].

⁸¹ CA Judgment (Majority) at [147], [150] and [152] [05.0054-05.0055].

⁸² CA Judgment (Minority) at [268] [05.0093].

⁸³ CA Judgment (Minority) at [272] [05.0094].

⁸⁴ CA Judgment (Minority) at [273]-[275] [05.0094-05.0095].

73. His Honour considered the Minister was required by implication to consider the probability of rebuild associated with a proposed TAC reduction and did so. To require the Minister to expressly consider a 70 percent default probability would add “nothing material to this” and “intrudes further than can be justified into the fine detail” of the Minister’s decision-making under s 13(2).⁸⁵
74. For completeness, Goddard J concluded that the HSS does not specify a default probability of 70 per cent for rebuilding depleted stocks. Rather, the reference to 70 per cent in the HSS sets out a test to be applied in determining whether a stock *has been* fully rebuilt.⁸⁶ While the Operational Guidelines do refer to a probability of 70 per cent as the minimum standard for rebuilding plans, this was not a mandatory relevant consideration for the Minister.⁸⁷

Minister’s position

75. The Minister acknowledges the importance of the HSS when it comes to rebuilding depleted stocks. Given its provenance and the purpose for which it was produced, it would likely be irrational not to consider its core elements in setting a TAC under s 13(2)(b).⁸⁸ Those elements represent best practice for rebuilding depleted stocks and arguably constitute part of the best available information for the purposes of s 10(a).
76. But, properly interpreted, the HSS does not include a default probability level for rebuilding depleted stocks. Rather, it simply requires depleted stocks be rebuilt to the target level applying an “acceptable probability”.
77. Most significantly, the Minister says the majority wrongly determined that a matter of such technical detail was a mandatory consideration capable of impugning the challenged decisions. While the Minister needed to be satisfied that the probability of rebuild was suitable, he was entitled to rely

⁸⁵ CA Judgment (Minority) at [277]-[278] [05.0095].

⁸⁶ CA Judgment (Minority) at [279]-[280] [05.0096].

⁸⁷ CA Judgment (Minority) at [283] [05.0097].

⁸⁸ Alternatively, it may be argued there is a legitimate expectation the HSS will be considered given its status. In a different context, see *Attorney-General v E* [2000] 3 NZLR 257 at [106]; *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [309] (and also at [35]).

on advice as to what was required. The reference to 70 per cent probability in the Operational Guidelines was not a matter the Act expressly or impliedly identified as being required to be taken into account, nor a matter of such obvious importance that it would have been irrational for the Minister not to expressly consider.

78. Section 10 requires decision-makers to take into account specified information principles. These principles reflect the uncertainty of fisheries information and the need to avoid delayed decision-making as result. Section 10(a) goes no further than ordinary public law requirements.

Mandatory relevant considerations

79. In *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, Lord Greene MR held:⁸⁹

The exercise of [statutory] discretion must be a real exercise of discretion. If in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.

80. Cooke P referred to this passage in *CREEDNZ Inc v Governor-General* before stating:⁹⁰

What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be considered by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that is one which many people, including the Court itself, would have taken into account if they had to make the decision.

...

Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be considered.

81. In *CREEDNZ*, Richardson J also recognised that if relevant considerations are to be taken into account, “decision makers should not be misinformed as to

⁸⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, [1947] 2 All ER 680 (CA) at 228.

⁹⁰ *CREEDNZ Inc v Governor-General* [1981] NZLR 172 (CA) at 183.

established and material facts”⁹¹

82. Importantly though, in *Bushell v Secretary of State for the Environment*, Lord Diplock stated “the collective knowledge, technical as well as factual” of departmental officials and “their collective expertise is to be treated as the Minister’s own knowledge, his own expertise.”⁹² As such, ministerial decision-makers must be sufficiently informed of material factors but need not be personally across all facts and “minutiae” that may be relevant to a decision.⁹³ As the High Court of Australia has similarly noted:⁹⁴

... A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.

[...]

... Part of a Department’s function is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard or to which the Minister may wish to have regard in making decisions. ... Reliance on the departmental appreciation is not tantamount to an impermissible delegation of ministerial function. ...

83. Subsequently, it has been observed there are two routes available to determine whether a consideration is one a decision maker is required to take it into account:⁹⁵ (1) “those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had”; and (2) to demonstrate it is “obviously material to the matter at hand”.⁹⁶ The latter has been often framed as one of rationality such as to ask whether “the matter was so ‘obviously material’ that it [would] be

⁹¹ *CREEDNZ* at 200.

⁹² *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) at [95]; *CREEDNZ* at 201; recently affirmed in *Rangitara Developments Ltd v Sage* [2020] NZHC 1503 at [161].

⁹³ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [48]; Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2001) at 1048.

⁹⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40, (1986) 66 ALR 299 at 325 and 328-329 per Brennan J (preceding a discussion on the constructive knowledge dictum in *Bushell*) and also 302 per Gibbs CJ. See also *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80 (FCA) at [95] and [170] per Brennan J.

⁹⁵ Ivan Hare KC and others (eds) *De Smith’s Judicial Review* (9th ed, Thomson Reuters, London, 2023) at [5-103]-[5-107]; *R. (on the application of Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 976 at [118]-[119].

⁹⁶ *De Smith’s Judicial Review* at [5-107]; *CREEDNZ* at 183.

irrational not to [take] it into account”.⁹⁷

Probability guidance in the HSS and Operational Guidelines

84. As outlined above, the HSS is a policy statement for the setting of targets and limits for fish stocks under the QMS.⁹⁸ It specifies a small number of standards, with the majority of the technical, interpretation and implementation aspects set out in the associated Operational Guidelines.⁹⁹ Neither the HSS nor the Operational Guidelines is expressly contemplated by the Act.

85. Regarding probability, the HSS states that stocks below the soft limit should be rebuilt with an “acceptable probability”.¹⁰⁰

- The soft limit will be considered to have been breached when the probability that stock biomass is below the soft limit is greater than 50%.
- Stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a time frame between T_{min} and $2 * T_{min}$ with an acceptable probability.
- Stocks will be considered to have been fully rebuilt when it can be demonstrated that there is at least a 70% probability that the target has been achieved^[footnote] and there is at least a 50% probability that the stock is above the soft limit.

86. The footnote after the word “achieved” in the bullet point immediately above states:

Use of a probability level greater than 50% ensures that rebuilding plans are not abandoned too soon; in addition, for a stock that has been depleted below the soft limit, there is a need to rebuild the age structure as well as the biomass, and this may not be achieved using a probability as low as 50%.

87. The Minister agrees with Goddard J that the HSS addresses two distinct issues in respect of the probability of rebuild:¹⁰¹

⁹⁷ *R. (on the application of Friends of the Earth) v Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All ER 976 at [118]-[119]; *R. (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHRC 1303 (Admin) at [99].

⁹⁸ HSS at [2] and 22; [303.0631] and [303.0652].

⁹⁹ HSS at [5] [303.0631].

¹⁰⁰ HSS at 8 [303.0638].

¹⁰¹ CA Judgment (Minority) at [279] [05.0096].

- 87.1 the probability with which a rebuilding plan must be expected to achieve its target; and
- 87.2 the identification of the point in time at which a stock has been fully rebuilt to the relevant target.
88. The reference to “70% probability” in the HSS refers to the latter – to prevent the rebuilding of a stock from being abandoned too soon; not the probability at which a rebuilding plan must be expected to reach its target when the Minister sets a TAC under s 13(2)(b).
89. The Minister accepts the 70 per cent probability in the Operational Guidelines refers to both the probability with which a rebuilding plan must be expected to reach its target, and the identification of the point in time when a stock has been fully rebuilt.¹⁰²

No failure to consider a mandatory relevant consideration

90. Most fundamentally, however, the 70 per cent probability of rebuild specified in the Operational Guidelines (or, if this Court disagrees with the Minister’s interpretation above, the HSS) was not a material matter capable of impugning the Minister’s decision if he failed to directly consider it in the circumstances. It was not a factor expressly or impliedly identified by the legislation as being a mandatory consideration, nor was it a matter “so obviously material” that it would have been irrational for the Minister not to expressly consider it.
91. While the Minister accepts it was important to know the projected probability of rebuild within the target period (as occurred here), the Minister says it was permissible to rely on the advice of the department as to the “acceptable probability” of achievement.¹⁰³
92. The (then) Minister was provided with a lengthy advice document accompanied by full submissions on all of the proposals.¹⁰⁴ It set out an

¹⁰² Operational Guidelines at 12 [303.0561].

¹⁰³ October 2019 Sustainability Round Decisions [302.0462, at 302.0488].

¹⁰⁴ [302.0462].

overview of the HSS, including that the HSS provides that stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a timeframe between T_{\min} and $2 * T_{\min}$. It recorded that some submitters, including the first respondent, preferred larger catch reductions to ensure a rebuild timeframe of 10 years “which aligns with the [HSS]”.¹⁰⁵ The advice noted that options 1 and 2, which provided for rebuild timeframes of 11 and 12 years respectively, were considered to be broadly consistent with the HSS.¹⁰⁶ The paper advised that projections suggested a 50 per cent probability of rebuilding to B_{MSY} within five years in the absence of fishing. A 50 per cent probability of reaching that target was considered acceptable, “due to the natural variation caused by fluctuations in recruitment and environmental conditions”.¹⁰⁷ The paper expressly recorded that options 3 and 4 were outside of the HSS recommendations in relation to the period of rebuild.¹⁰⁸

93. Accordingly, the Minister was acutely aware that the TAC chosen was outside of the default guidelines of the HSS (and Operational Guidelines). He was fairly and sufficiently informed of all material factors. In the circumstances of this case, the specified 70 per cent probability of rebuild in the Operational Guidelines (and/or HSS) was not sufficiently material to impugn the Minister’s decision if not personally considered.

Section 10(a) does not impose a stronger obligation that ordinary public law requirements

94. Section 10 requires decision-makers to “take into account” the specified information principles, which reflect the uncertainty of fisheries information and the need to avoid delayed decision-making as a result.
95. Parliament specifically decided not to impose a greater obligation, such as requiring decision-makers under the Act to “recognise and provide for” the

¹⁰⁵ [302.0485].

¹⁰⁶ [302.0485], [302.0490], and [302.0491].

¹⁰⁷ [302.0488].

¹⁰⁸ [302.0490].

listed principles.¹⁰⁹

96. Section 10(a) requires decision-makers to take into account the principle that decisions should be based on the best available information. This can be contrasted with the stronger language adopted in s 34 (an information principles provision) of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, which requires decision makers to “base decisions on the best available information.”
97. The Minister submits s 10(a) goes no further than ordinary public law requirements.¹¹⁰ As noted above, a decision-maker must be sufficiently and fairly informed of material facts; but is not personally required to consider every fact or minutiae that may be relevant to a decision.
98. Given the above, the Minister respectfully submits the majority's approach to Issue 2 risks (unnecessarily) opening up highly technical and complex fisheries management decisions¹¹¹ to challenge by requiring Ministers to be personally across matters of forensic detail and analysis.¹¹²

Conclusion

99. The Minister submits the majority erred in its determination of Issues 1 and 2 and therefore submits the appeal should be allowed on the terms outlined above.

8 March 2023

N C Anderson / K F Gaskell
Counsel for the second respondent

¹⁰⁹ The Primary Production Committee specifically concluded that “recognise and provide for” placed too strong an obligation on persons exercising functions under the Act and that “take into account” provided “more appropriate discretion for the decision-maker, while clearly setting out his or her responsibility”: Fisheries Bill 1994 (63-2) (Select Committee Report) at viii and ix.

¹¹⁰ See *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* Wellington HC CIV-2008-485-2016, 23 February 2010 (per Mallon J) at [27]-[41].

¹¹¹ *Greenpeace v Minister of Fisheries* HC Wellington CP.492/93, 27 November 1995 at 15.

¹¹² See also: Catherine Iorns Magallanes “The Precautionary Principle in the New Zealand Fisheries Act: Challenges in the New Zealand Court of Appeal” (2014) VUWLRP 59, referencing three decisions where conservation measures were successfully challenged in reliance on s 10(a): *Squid Fishery Management Company Ltd v Minister of Fisheries* CA39/04, 7 April 2004; *Northern Inshore Fisheries Co v Minister of Fisheries* [2002] Wellington HC Wellington CP235/01, 4 March 2002; *Squid Fishery Management Company Ltd v Minister of Fisheries* Wellington HC CP20/03, 11 April 2003.

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