
between: **Seafood New Zealand Limited**
Appellant

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

Written submissions on behalf of Appellant (**Seafood New
Zealand Limited**)

Dated: 16 February 2024

Counsel certifies that the attached submissions and appendices do not
contain suppressed information and are suitable for publication.

Reference: T D Smith (tim.smith@chapmantripp.com)

Counsel: B A Scott (bruce.scott@hawkestone.co.nz)

A Kraack (anna.kraack@southlaw.co.nz)

WRITTEN SUBMISSIONS ON BEHALF OF APPELLANT

Introduction

- 1 This appeal raises important issues concerning the Fisheries Act 1996 (**Act**) relevant to a decision by the Minister for Oceans and Fisheries (**Minister**) to vary a Total Allowable Catch (**TAC**) for the purpose of rebuilding a fish stock (biomass) to a level at or above that which will produce the maximum sustainable yield (**MSY**). The key issue is what constraints the Act imposes on the Minister's ability to take into account social, cultural and economic factors when setting such a TAC for these purposes.
- 2 The appeal arises in the context of a decision by the Minister to rebuild the East Coast tarakihi fish stock using a combination of measures. These included decisions in two consecutive fishing years¹ (2018 & 2019) to reduce the TAC (and also the Total Allowable Commercial Catch (**TACC**)) for the East Coast Stock by approximately 30%:
 - 2.1 In 2018, the Minister reduced the TACC by approximately 20%, with further measures (including additional cuts) foreshadowed in the absence of sufficient progress towards rebuild. This decision was not challenged (**2018 Decision**).
 - 2.2 In 2019, he reduced the TACC by a further 10%, alongside other measures to speed up the rate of rebuild, contained in a comprehensive rebuild plan (**Rebuild Plan**) prepared by the fishing industry which had the objective of rebuilding the stock within a 20-year period (**2019 Decision**).

Issues

- 3 The two essential issues identified and considered by the Court of Appeal (**CA**) remain before this Court:
 - Issue 1 – appropriate period*
 - 3.1 The CA's formulation of Issue 1 (the approach to setting the TAC under s 13(2)(b)), at [5] of the Judgment, is correct. The reframing of that issue at [7], however, mistakenly truncates the issue. It correctly asks whether social, cultural and economic factors can be taken into account in setting an appropriate period. It should also ask whether the appropriate period must be determined **only** by reference to the "*biological characteristics of the stock*" and "*any environmental conditions affecting the stock*" (together the **scientific factors**).

¹ The relevant fishing years commence on 1 October each year.

- 3.2 The answer to the above issue will determine the sub-issue as to the extent to which the Rebuild Plan can be taken into account by the Minister when setting the TAC.

Issue 2 – probability of rebuild

- 3.3 The correct formulation of Issue 2 remains in dispute: see Court of Appeal Majority (**Majority**) at [8]–[11]. Submit, correct formulation should be:
- (a) Does the Harvest Strategy Standard (**HSS**)² specify a default probability standard for rebuild of 70% at the time the period is considered by the Minister in setting a TAC (looking forward)? If so, is it an implied mandatory relevant consideration under s 13, following *CREEDNZ* principles, as plead by Forest and Bird (**F&B**)? Alternatively, is it open on F&B’s pleading and, if so, is it correct that the 70% probability was an express mandatory relevant consideration via the information principles in s 10 (an unplead allegation but found by the High Court (**HC**) and accepted by the Majority)?
- (b) Alternatively, is the 70% default probability of rebuild specified in the **Operational Guidelines** to the HSS an implied mandatory relevant consideration under s 13 (as plead)? It is not clear whether F&B is continuing to assert that the Operational Guidelines are the best available information for the purpose of s 10 and, as such, an express mandatory consideration.

Summary

- 4 As to **Issue 1**, when the biomass of a fish stock that is subject to the quota management system (**QMS**) has fallen below the level that will produce the MSY (**B_{MSY}**), there is a mandatory requirement in s 13(2)(b) to set a TAC that will restore that stock to (or above) the B_{MSY} .³ This requirement is a key sustainability measure.
- 5 The Majority did not consider this requirement alone sufficient to ensure sustainability (being one component of the Act’s purpose). In their view, s 13(2)(b) required (textually and purposively) two separate inquiries under each of the subparagraphs - the first

² The HSS describes itself as a “policy statement of best practice” which is intended to provide guidance to ministry officials when advising the Minister on TAC setting. It provides default metrics that can be considered in the absence of better information in respect of a particular fishery. The Operational Guidelines sit below the HSS and provide technical and implementation guidelines. See relevant extracts quoted by Minority at [185]–[195].

³ This requirement applies to all QMA stock other than: (a) rotational and highly migratory stocks (s 14); and (b) bycatch stocks (ss 14A & B). These are subject to the alternative TAC setting regime.

(subpara (i)) in respect of the *way and rate* in which the rebuild would occur, and the second (subpara (ii)) to determine an *appropriate period* within which the rebuild must occur. The second inquiry could only have regard to the two scientific factors referred to in that subpara and needed to **disregard all other factors**, including the social, cultural, and economic impacts of the rebuild period referred to in s 13(3). Although the Majority acknowledged the assessment of *way and rate* would also necessarily determine a period, they held that the second and separate inquiry as to rebuild period was the “*dominant*” one, which operated as a “*control*” and set an “*outer limit on the period within which the rebuild must occur*”.

- 6 To the contrary, the correct interpretation is that in setting a TAC the Minister must make a single composite decision that takes into account all of the express factors in s 13(2)(b) and s 11, together with relevant social, cultural and economic factors as required by s 13(3).
- 7 **First**, the Majority’s interpretation is inconsistent with both the **text** and **structure** of the relevant provisions. The criteria in the two subparagraphs within s 13(2)(b), form part of a single sentence, all are interconnected and must necessarily (both grammatically and logically) be considered in the round – which is why: (a) they are linked with a conjunctive “and”; and (b) the statutory mandate in s 13(3) (which requires the Minister to have regard to social, cultural and economic factors) references the whole of s 13(2)(b) (not just subpara (i)). Further, it is impossible to set a rebuild period by reference only to the two scientific factors. At a minimum, s 11 and logic requires an assessment of the current stock size (the effects fishing has had on the stock) in order to assess the extent of required rebuild. Further, considerations of “rate” and “period” are inextricably linked – two sides of the same coin – such that the two subparagraphs cannot be determined separately.
- 8 **Second**, the Majority’s interpretation as to the separate and dominant role of subpara (ii), is driven by the erroneous premise as to the **purpose of the Act** - specifically that: (a) the single purpose in s 8 can be bifurcated, with precedence being on the “*ensuring sustainability*” component; and (b) that sustainability can only be ensured if there is a scientifically determined outer limit on the period within which the rebuild must occur.
 - 8.1 To the contrary: (a) s 8 provides a **single** purpose with two competing, but complementary social policy objectives concerning current and future utilisation needs; and (b) this does not involve a purely scientific assessment but requires consideration of the implications for people and communities in terms of the two competing social policies and, as such, is

clearly a matter for the Minister. This interpretation is consistent with the legislative history, which confirms the obligation to return stocks to at or above the B_{MSY} as the mechanism by which sustainability is ensured.

- 8.2 Further, the Majority's interpretation robs s 13(3) of any practical utility in setting a TAC. This is of particular significance for Māori given s 13(3) was enacted, in part, to ensure Māori interests (both commercial and non-commercial) were taken into account as a result of the then recent fisheries settlement.
- 9 **Third**, the Majority's interpretation is **unworkable** and **contradictory**. It would prevent any utilisation of the fishery while the rebuild occurs. Where a fishery has fallen below the statutory target of B_{MSY} , and must be rebuilt, the only justification for rebuilding the fishery slower than would occur if all fishing were to stop, is because of the social, cultural and economic (utilisation) implications of stopping all fishing while the rebuild occurs. The logic of this proposition is recognised in the HSS, which defines the minimum rebuild period (called T_{MIN}) as being the number of years required to rebuild the stock in the absence of fishing, and which reflects the rebuild period that is determined if account is **only** taken of the biology and ecology of the stock, together with its current biomass size.
- 10 Faced with the prospect that their interpretation would require fishing to stop while the rebuild occurs, the Majority then contradict their own reasoning. They say that it was not wrong for some social, cultural, and economic factors to be taken into account in the HSS when setting a recommended maximum default rebuild period ($T_{MIN} \times 2$), as that decision was made by the expert scientists who formulated the HSS (not the Minister). However, it is the Minister's task to assess those matters, not the authors of the HSS. Also, given $T_{MIN} \times 2$ is the maximum recommended period, how is the Minister to decide what the appropriate rebuild period is within that range, if he/she cannot consider social, cultural and economic factors?
- 11 As to *the probability* of rebuild (**Issue 2**), the issue is whether the Majority was correct to find that the Minister was legally required to take account of a default minimum 70% probability of rebuild, contained in (they say) the HSS, on the basis that the HSS constituted the best available information. The Majority's finding is erroneous and the Minority is to be preferred:
- 11.1 Properly interpreted, the HSS does not include a default 70% probability of rebuild to be applied at the time the Minister is setting a TAC (looking forward) – the HSS states only that it should be an "acceptable" probability. The 70% probability

referred to in the HSS applies only to when the Minister is considering whether the fishery has rebuilt sufficiently and the TAC can be lifted (looking back). The Majority incorrectly conflate the two assessments, which are done at very different times, with different information - such that the two probabilities cannot be assumed to be the same.

- 11.2 There was no basis to determine that the HSS constitutes the best available information as: (a) this was not plead by F&B and, therefore, not addressed by any party in the evidence; and (b) the HSS is a policy document setting out guidance as to best practice to be followed by ministry officials regarding the decision making process – it does not itself constitute “*information*” given the definition of information, the text of s 10 and the wider legislative scheme which already provides which policy documents are mandatory considerations (ss 11 & 11A).

Background Context

- 12 Tarakihi is an important inshore fish stock. Commercially it is the second most valuable inshore finfish stock, behind only snapper.⁴ 80% of tarakihi is caught with several other species as part of a mixed trawl fishery and is available year-round and caught across the country. It is, therefore, central to the overall economics of the inshore trawl fleet.⁵
- 13 Tarakihi is also highly valued by recreational fishers and considered a taonga species by Māori. Both have an allowance of approximately 5% of the TAC.⁶ In addition, over a third of tarakihi quota is iwi owned. Tarakihi is also an important species for New Zealand consumers as approximately 90% of the TACC is sold domestically, mainly as fresh fish across the country and is a staple fish in the local market.⁷
- 14 Tarakihi has been managed under the QMS since the system was introduced in 1986. After numerous attempts, the first agreed comprehensive stock assessment was only completed in early 2018. It concluded that the entire east coast population of tarakihi was one discrete biological stock, incorporating several quota management areas (**QMAs**) or parts of QMAs (**East Coast Stock**). Until 1 October 2018, these QMAs were managed as separate stocks.⁸ Management as a single East Coast Stock represented a

⁴ Helson, at [7] [201.0154].

⁵ Helson, at [34]-[36] [201.0161].

⁶ 2018 Final Advice Paper, Fishery Characterisation [304.0954-5].

⁷ 2018 Final Advice Paper, at [2072] [304.0955]; IRP, at p 2 [302.0345].

⁸ The East Coast Stock is now made up of several QMAs, stretching from Northland to Otago - namely all of TAR 2 & 3 and parts of TAR 1 & TAR 7. See map in 2019 Final Advice Paper [305.1159].

significant change and could only be implemented through agreement with Industry and is a central aspect of the Rebuild Plan.

- 15 The new assessment also reported the East Coast Stock was well below (less than half) the B_{MSY} target stock size.⁹ The assessment indicated that the Stock had been below the target since the 1960s but had been relatively stable over recent decades (fluctuating between 28% and its current level since the 1970s).¹⁰
- 16 All parties agreed that the East Coast Stock needed to be rebuilt with a specific rebuilding plan. A rebuild is usually achieved by setting a new (lower) TAC (and TACC), sometimes in combination with other complementary measures, to reduce the annual catch and increase the biomass over time. Here, it also required Industry to agree to catch splitting and reporting to achieve the new east-west split.
- 17 The Ministry consulted on an appropriate TAC and rebuild plan, which included various rebuild periods ranging between 10 and 20 years for both the 2018 and 2019 Decisions.
- 18 As part of its submissions on the consultation for the 2018 Decision, Industry provided the Minister with a rebuild strategy.¹¹
- 19 Following the consultation in 2018, the Minister preferred a 10-year rebuild (with a 50% probability), however, as this would have required a 55% reduction, he instead adopted a phased approach to reductions to mitigate social and economic effects. He reduced the TAC and TACC across all QMAs; the net effect reduced the combined TACC for the East Coast Stock by approximately 20%.¹² This 2018 Decision was not challenged by F&B.
- 20 The Minister's Decision Letter made it clear that this was the first stage of the rebuild and foreshadowed further reductions the following year would most likely be required.¹³ Responding to the Industry rebuild strategy, the Decision Letter also encouraged Industry to develop a more comprehensive Rebuild Plan. The extent of future TAC reductions would, in part, depend on the additional

⁹ The stock assessment used the HSS default target stock size of 40% of the unfished stock (B_0) as the biomass at which the stock will produce the MSY. The target concept of MSY is discussed in more detail below.

¹⁰ See Figure 9 in 2019 Final Advice Paper [**305.1161**].

¹¹ Lawson, at [87]–[89] [**201.0187**].

¹² As already stated, this could only be practically implemented with Industry Agreement to voluntarily split relevant QMAs (which required both catch splitting and reporting against the new east-west divide). This was implemented in 2018 and was a central component of the Rebuild Plan in 2019.

¹³ [**303.0785**, at **303.0805-0807**]

measures being developed by Industry in the Rebuild Plan to support and speed up the rebuild.¹⁴

- 21 During 2019, Industry improved its proposed Rebuild Plan. A draft formed part of the consultation material in 2019 when the Minister again reviewed the TAC for the East Coast Stock following an update to the stock assessment.¹⁵ Modelling taken through the Fisheries New Zealand science working group indicated that the measures in the Rebuild Plan could reduce the rebuild time by approximately **12 years** if the average age of fish caught could be increased by 1 year.¹⁶
- 22 With the impact of the 20% TACC reduction in place (implemented in 2018), the 2019 stock assessment confirmed that the fishery was likely rebuilding. It was projected that, with no further management changes, the fishery would rebuild to the default 40% target stock size in 35 years.¹⁷ This projection did not take account of the other measures in the Rebuild Plan to speed up the rebuild.
- 23 At the Minister and Ministry's request (prior to varying the TAC), additional measures that supported rebuild were added to the Rebuild Plan.¹⁸ Also at the Minister's request, Industry formally committed to a maximum rebuild period of 20 years.¹⁹
- 24 In making the 2019 Decision, the Minister:
- 24.1 given the work that had been done by Industry, was satisfied that an appropriate rebuild period was 20 years (based on a rebuild to the default B_{MSY} target of 40% B_0).²⁰ This was 4 times the estimated period if fishing mortality was stopped completely (described in the HSS as T_{MIN}).²¹ The rebuild period used by the Minister, therefore, had regard to **both**:

¹⁴ The Minister stated that in the absence of additional measures forming part of a carefully considered and approved Rebuild Plan, a further 35% reduction would most likely be required: [303.0807].

¹⁵ Lawson, at [91]–[92] [201.0191]. See also Rebuild Plan [305.1206].

¹⁶ This reflects the biological characteristics of tarakihi. Although tarakihi are a relatively long-lived species, in their first 8 years they have a fast growth rate and start spawning from 6 years. See discussion of the effect of the Rebuild Plan in 2019 Final Advice Paper, Section 10, [305.1167] and reference to modelling at [305.1171]; Lawson, at [89.6] [201.0188]; Dunn, at [20] [201.0038].

¹⁷ See Figure 10, 2019 Final Advice Paper [305.1162].

¹⁸ For a summary of improvements following feedback from MPI & Minister, see 2019 Final Advice Paper, at [10.1] [305.1168].

¹⁹ 2019 Final Advice Paper, at section 10 [305.1167-8]; Minister's Decision Letter, at p7 [305.1327].

²⁰ See Minister's Decision Letter, at p7 [305.1327].

²¹ T_{MIN} describes the estimated rebuild period for stocks in the absence of fishing and is defined in the HSS as being a function of three primary characteristics – the biology of the species, prevailing environmental conditions and the extent of stock depletion: p21 [303.0651]. The HSS adopts a default rebuild period of 2 x T_{MIN} : p8 [303.0638].

(a) the rate at which the East Coast Stock would rebuild, given its biological characteristics and the environmental conditions affecting it (reflected in the concept of T_{MIN}); and
(b) the social, cultural and economic impact of the catch reduction (reflected in the multiplication of by T_{MIN} by 4);²²

24.2 adopted the Industry Rebuild Plan - which included other measures to rebuild the Stock²³ but the Minister also decided to combine it with a further TACC reduction of 10% to give him greater confidence that the rebuild would occur;²⁴ and

24.3 was made aware in the advice papers that the HSS default rebuild period was $T_{MIN} \times 2$, but not that the HSS's preferred probability of a rebuild occurring within that period was 70% (a 50% probability was used in the advice).²⁵

25 F&B successfully challenged the 2019 Decision.

Issue 1 – appropriate period

26 The appellant, now Seafood New Zealand Limited (**SNZ**),²⁶ argues that the decision of the Majority is wrong and that the Minority decision correctly interprets the relevant statutory provisions.

27 These submissions are developed:

27.1 First, by focusing on the ordinary and natural meaning of the relevant provisions.

27.2 Second, by reference to the purpose of the Act, by explaining that the Majority incorrectly bifurcated the Act's purpose (s 8), focusing **only** on "*ensuring sustainability*".

27.3 Finally, by demonstrating that the Majority's finding that the appropriate period must be determined by reference **only** to an assessment of the scientific factors is contradicted by their own reasoning and is unworkable.

²² 2019 Final Advice Paper, Option 4 [305.1167] & [305.1187].

²³ Summarised in the 2019 Final Advice Paper [305.1167-1172]. The Rebuild Plan included measures to speed up the rebuild through a number of measures designed to fish more selectively to reduce juvenile mortality in order to increase the average age of fish caught.

²⁴ Together the 2018 and 2019 TACC decisions, had the effect of reducing the TACC by 30%. Minister's 2019 Decision Letter [305.1327].

²⁵ 2019 Final Advice Paper [305.1152]; Nash, at [27] [201.0110].

²⁶ As a result of an amalgamation Seafood New Zealand Ltd has, in accordance with s 225(d) of the Companies Act 1993, assumed all of Fisheries Inshore New Zealand Ltd's right, liabilities and obligations – Lawson, at [5] [05.0105].

- 28 First, however, it is helpful to explain some of the key concepts on which the TAC setting provisions in the Act are based.

TAC, biomass, MSY within the legislative scheme

TAC, biomass and MSY

- 29 To apply s 13, it is necessary to understand clearly how altering the size of the biomass affects yield and the overall goal of achieving an MSY. Fundamentally, the TAC sets a level of catch that either maintains or moves the biomass to a target biomass. The target biomass produces a certain level of yield. Section 13(2) requires the target biomass be at least (that is, "at or above"), a level to produce the MSY.

- 30 Perhaps counterintuitively, higher biomasses do not necessarily equate to higher yields. An unfished fishery (B_0) produces no yield – it is at its carrying capacity where the natural growth occurring each year in the population (from newly spawned fish and growth of existing fish) is offset by natural mortality and the population is in equilibrium. It is only when the biomass of a fishery is fished down that the yield increases. See Dr Dunn and Mr Lawson.²⁷

- 31 Annual yield is generally maximised when a fish stock population is fished down to 30-40% of its unfished size. The HSS reflects these percentages in its default B_{MSY} targets. As Dr Dunn explains:²⁸

... when fish are abundant, but food resources remain plentiful, is the stock size that gives the fastest population growth rate, and therefore the maximum sustainable catch ("yield"). This concept is the basis for MSY.

- 32 This is shown in the following theoretical yield curve, taken from the HSS (discussed by Mr Lawson in his evidence).²⁹

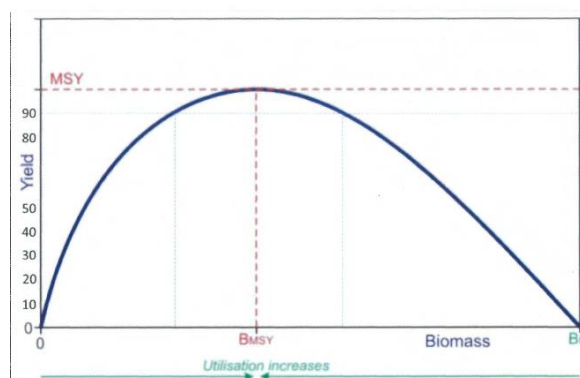


Figure 1: Theoretical curve showing Maximum Sustainable Yield (MSY)³ with 90% range super-imposed.

²⁷ Dunn, at [35]-[38] [201.0020-21]; Lawson, at [12]-[20] [201.0169-71].

²⁸ Dunn, at [36] [201.0021].

²⁹ Lawson, at [16] [201.0170].

Role of the TAC within the wider scheme of Act

- 33 The TAC setting process within s 13 sits in Part 3 of the Act (Sustainability Measures). For stocks within the QMS, TACs are a key sustainability mechanism, but are not the only means of ensuring sustainability under the Act. A range of measures (some regulated, some not) are often used in combination with a TAC to achieve the Act's single purpose - "*to provide for utilisation of fisheries resources while ensuring sustainability*".
- 34 This was understood by the CA in *Kellian v Minister of Fisheries*,³⁰ where the Court said that the Act provides a range of ways of achieving the purpose.³¹ The Rebuild Plan is a set of other measures intended to: (a) work with and enable the TAC for the new East Coast Stock to be implemented; and (b) to hasten the rebuild and thereby reduce the rebuild period.
- 35 In that context, s 11 is important as it requires that, whenever setting or varying any sustainability measure including a TAC, the Minister must first legally (and logically) consider the likely past, present and future "*effects of fishing*", "*existing controls*" and the "*natural variability of the stock*", to determine what changes, if any, are needed.³² These considerations must be taken into account when making the single composite decision that the Minister is required to make when setting a TAC – a critical factor not addressed in the Majority's reasoning. The relevance of this is discussed in more detail below.
- 36 In terms of QMS stocks, s 13 looks to ensure that fish stocks are managed in a manner that produces long term sustainable yields, for both the needs of current and future generations.³³ The construct of s 13 reflects a policy decision to require management of most QMS fish stocks *at or above* the B_{MSY} ³⁴ – this is the **control** mechanism in the section that ensures sustainability, as defined in s 8(2) of the Act (discussed in more detail later).
- 37 This is shown by the fact that s 13 requires the Minister to set a level of catch (TAC) that:
- 37.1 shifts the level of a biomass that is either above or below B_{MSY} towards that level - when *below* B_{MSY} , using s 13(2)(b) or when *above* B_{MSY} using s 13(2)(c); or

³⁰ *Kellian v Minister of Fisheries* CA 150/02, 26 September 2002 at [38].

³¹ See discussion of range of sustainability measures beyond setting TAC in Lawson, at [61]–[85] [201.0183].

³² Act, s 11(1) and s 2 (see definition of "effects").

³³ See definition of "ensuring sustainability", s 8.

³⁴ This requirement applies to all QMA stock other than: (a) rotational and highly migratory stocks (s 14); and (b) bycatch stocks (ss 14A & B). These are subject to the alternative TAC setting regime.

- 37.2 *maintains* the level of biomass at the MSY (in the case of s 13(2)(a)).
- 38 The prima facie obligation in s 13 to manage fish stock at a biomass that produces the MSY reflects orthodox international law principles and the fact that much of New Zealand's fisheries are within the Exclusive Economic Zone (Act, s 5(a)).³⁵
- 39 Article 61(3) of UNCLOS uses both MSY as a target biomass level and recognises the need to take into account both environmental and economic considerations when setting a TAC – often referred to as the “qualifiers”. It requires measures (such as the TAC) “*to be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as **qualified** by relevant environmental and economic factors ...*” (emphasis added).³⁶
- 40 The use of MSY in setting a TAC was also central to the 1983 Act (see Judgment at [18]) and remains so in s 13 of the 1996 Act, both for ordinary QMS stocks (in s 13(2)) and low knowledge QMS stocks (in s 13(2A)). The “qualifiers” in the 1983 Act (relevant environmental and economic factors) are reflected in part and expanded in s 13(3) – that is, social, cultural and economic considerations. These factors **only** become relevant when the fish stock is at that time above or below B_{MSY} (s 13(2)(b)&(c)). Where the fishery is simply being maintained at the target of B_{MSY} (s 13(2)(a)) the qualifiers do not operate because the fishery is already at the prima facie target – s 13(3) only applies to s 13(2) (b) and (c) – not (a).
- 41 Stocks managed under s 13 cannot be permanently managed using a target stock size that is below B_{MSY} – they must be “*at or above*”. Contrary to what the Majority appears to assume, this was also an implicit requirement under the 1983 legislation. However, the 1996 Act made the requirement explicit (discussed further later).
- 42 The analysis of the Act that follows seeks to demonstrate that, provided that the Minister makes a decision that will result in a TAC that returns the stock to the B_{MSY} , the Act does not otherwise restrict the Minister's ability to take into account the impacts on individuals and communities of a rebuild decision – that is, the social, cultural and economic impacts of reducing catch limits. The timeframe over which the rebuild is to occur is for the Minister to

³⁵ Confirmed in *Kellian v Minister of Fisheries* CA 150/02, 26 September 2002 at [34].

³⁶ Quoted at [18] of the Judgment [05.0009]; see more extensive references to provisions of United Nations Convention on the Law of the Sea (1982) (**UNCLOS**) in *Greenpeace New Zealand Inc v Minister of Fisheries* HC Wellington CP492/93, 27 November 1995 at pp 4–7 (**Orange Roughy case**).

decide, but the period must have regard to the biological and environmental characteristics of the fish stock.

- 43 The breadth of this discretion is unsurprising given the significance of such decisions to all sectors of New Zealand society and is consistent with the discretion having been given to a Minister – who is democratically accountable. This can be contrasted to many other provisions of the Act that have different decision makers for more mechanical or specialised decisions.³⁷

Applying s 13 – ordinary and natural meaning requires a single composite inquiry

- 44 The central issue therefore on this appeal is whether, correctly interpreted, in setting at TAC the Minister must:

44.1 make a single **composite** decision that takes into account all of the express factors in s 13(2)(b), s 13(3) and s 11 (as SNZ argues and as found by the Minority); or

44.2 make **two separate inquiries** under each of subparas (i) (way and rate) and (ii) (appropriate period), with s 13(3) considerations only being relevant to the subpara (i) inquiry, as F&B argues and found by the Majority.³⁸

- 45 The consequence of the Majority interpretation is that social, cultural and economic factors cannot be taken into account when considering the timeframe over which the rebuild is to occur - the Minister can **only** take account of the two identified scientific factors (biology of the stock and environmental conditions).

Majority interpretation not consistent with plain meaning of text

- 46 While the Majority acknowledged (at [64]) that the two subparagraphs were intended to “*work together*”, and (at [65]) that the “*way and rate*” assessment under subpara (ii) “*will necessarily produce a rebuild period*”, they found (at [92] and [94]) that they were still separate inquiries and that the second subpara (appropriate period) was the “*dominant*” inquiry and that setting an appropriate period operated as a “*control*” on considerations of way and rate and an “*outer limit within which the rebuild must occur*”. The Majority stated that this interpretation was “*clear from the text*”.³⁹

³⁷ The Chief Executive has many day-to-day discretionary decision-making powers concerning the administration of the QMS (Parts 4 – 6). Various other bodies can also be appointed to make decisions requiring particular expertise, such as Catch History Review Committee (ss 283-284); Dispute Resolution Commissioner (Part 7) and a tribunal to determine proposals to establish Taiapure (Part 9).

³⁸ CA Judgment, at [64] [05.0025].

³⁹ The Majority’s interpretation is not clear from the wording of the text – both the Minority and the full bench of the CA in the *Snapper* case reached a contradictory conclusion when assessing the ordinary meaning of the text.

47 The Majority's interpretation is contrary to the express wording of the Act, which (as explained in the next section) is driven from their erroneous bifurcation of the purpose of the Act and a misunderstanding of what ensuring sustainability requires.

48 Submit, it is clear from the text and structure that the two subparas are inextricably linked and **must be considered together**, along with ss 13(3) and 11 considerations. Specifically:

Single decision being made

48.1 The **only decision** being made under s 13(2)(b) is to decide what the new TAC will be – all factors are inputs into that **single output**.

Subparas cannot work in isolation from each other

48.2 Subpara (i) alone sets the sustainability target to be achieved by the rebuild. It directs that, in circumstances where the stock is below that which can produce MSY, the TAC must be altered to one that restores the stock to B_{MSY} . The Minister is not able to determine what the appropriate period is in subpara (ii), without reference back to the target in subpara (i). This itself tells against treating subpara (ii) as the controlling factor.

48.3 The "period appropriate to the stock" cannot be set by reference **only** to the two scientific factors referred to in subpara (ii), as found by the Majority:⁴⁰

- (a) The factors listed in both subparas are relevant to both inquiries (that is, consideration of "way and rate" and "period"). The "*interdependence of stocks*", is found only in subpara (i) but is closely linked (in many cases) to the biology of a stock (referred to in subpara (ii)) such that the two will often need to be considered together, particularly in a mixed trawl fishery such as this. This is confirmed by the environmental principles (s 9(a)), which expressly direct consideration of the need to maintain the viability of dependent species (both target and unintended catch) in all decision making.
- (b) Equally, the scientific factors in subpara (ii) are inherently relevant to considerations of the way and rate of rebuild under subpara (i) (as emphasised by the Minority at [227]).
- (c) The Minister must also take account of factors referred to in other sections of the Act. For example, in

⁴⁰ CA Judgment, at [65] [**05.0026**].

considering the appropriate rebuild period in addition to the biology and ecology of the stock, the Minister must take account of the nature and extent of the depletion of the stock below the target.⁴¹ It is not possible to set a rebuild period without first knowing the current status of the stock and the degree of rebuild required to meet the target. This assessment is mandatory under s 11 – taking account of the “*effects of fishing*” on the stock.

- (d) There will be other relevant considerations that the Minister needs to take into account when considering the rebuild period that are specific to that particular fish stock. In this case the Minister had to take account of the fact that management of the East Coast Stock extends across multiple QMAs, including two part QMAs (the eastern part of TAR 1 & TAR 7). This was a critical factor in determining an appropriate rebuild period for this stock as it was calculated on the assumption that catch (and reporting) would be voluntarily split in TAR 1 and TAR 7.

48.4 If Parliament had intended that only the scientific factors referred to in subpara (ii) were to be considered and that this alone would set the outer limit of the rebuild period, one would expect the provision to say so. At the very least, this subpara ought to have come first. To the contrary, subpara (ii) was structured as the second element within a single composite sentence.

48.5 As recognised by the Minority (at [227]), the separation of “way and rate” and “period” into two subparagraphs during the drafting phases was likely motivated by readability considerations, rather than intending that the factors be considered separately. If the Select Committee intended to make subpara (ii) into a new and separate sustainability control, over and above the need to return the stock to at or above B_{MSY} , it is logical to think that the detailed Select Committee report that addressed this section would have said so. It said nothing about the change, as this was not the purpose of separating the two subparas.⁴² In hindsight, given the interconnected nature of the factors, the separation has not produced the clarity intended.

⁴¹ This necessity to look at all three of these factors in considering a rebuild period is reflected in the HSS, at footnote 7.

⁴² See [21] of Legislative Drafting History, Appendix 2.

Period and rate – two sides of same coin

49 The fact that a single composite inquiry is required is also demonstrated by the fact that the assessment of an appropriate period is linked to considerations of the way and rate at which the stock will be restored. While rate and period are distinct concepts, they **both** have a **temporal** component.⁴³ As a matter of logic and science the rate at which a stock will be restored will be linked to decisions about the timeframe within which that outcome will be achieved – in this regard they are two sides of the same coin and need to be considered together.

50 As the Minority stated, at [216]:

Section 13(2)(b) and (4) require the Minister to make a single decision: what the new TAC should be. That single decision determines the period and rate of rebuild. These are not independent matters, that can be determined separately. They are inextricably interlinked consequences of a single decision. It is logically impossible to consider any given factor when determining the rate of rebuild, but not when determining the period of rebuild, as these cannot be determined separately from each other.

Majority wrong to read down s 13(3)

51 The Majority (at [71]) saw it as significant that s 13(3) expressly refers to the consideration of the “way” and “rate” that the stock is moved to the B_{MSY} – rather than to the period. However:

51.1 This obligation expressly applies to **all** of s 13(2)(b) – both subpara (i) (way and rate) and subpara (ii) (period).

51.2 If s 13(2)(b) is correctly interpreted as a single determination having regard to both the subpara (i) and (ii) factors (as outlined above), then (as the Minority found at [233]) it makes sense that s 13(3) references the whole of s 13(2)(b). As the Minority emphasised, if the Act intended to limit the consideration of social, cultural and economic factors to s 13(2)(b)(i) alone, it could easily have said so. It did not.

51.3 The Majority’s approach is inconsistent with the fact that s 13(2A), which contains the alternative TAC setting procedure for low knowledge stocks, contains no reference to “way” and “rate” or a requirement to consider an appropriate period, yet s 13(3) expressly states that social, cultural and economic factors must be taken into account when making that decision.

51.4 The Majority look to answer this (at [72]), by stating that it is of no consequence that s 13(2A) does not refer to way and rate, as the wording of s 13(3) limits consideration of social,

⁴³ While disputing that way and rate and period were two sides of the same coin. The CA did acknowledge that a “way and rate” assessment would necessarily produce a rebuild period (at [65]).

cultural and economic factors to only an assessment of way and rate. However, this interpretation implies that Parliament intended that, when setting a TAC under s 13(2A) the Minister is also required to **separately** consider way and rate from period, despite the section not saying so. There is nothing in s 13(2A) to suggest that such separate decision making is required. To the contrary, unlike s 13(2)(b), s 13(2A)(b) clusters together the interdependence of stock, biological and ecological factors which indicates that all of these matters are to be considered together. This is consistent with a single composite decision being made.

51.5 Section 13(2A) also highlights again that the core sustainability control in s 13, including for low knowledge stocks, is the requirement to set a TAC that moves the stock to a level at or above the level that can produce the B_{MSY} , **not** the period of rebuild. This is discussed in more detail next.

Purpose of Act does not require creation of an outer limit on the rebuild period

52 Central to the Majority's finding is their interpretation and use of the purpose provision (s 8). The Majority emphasised the "*ensuring sustainability*" component of the purpose and used this to interpret s 13(2)(b) as requiring something over and above the express direction that the stock be returned to at or above B_{MSY} . They found that it required an additional "*control*" in the form of limiting the assessment ("*outer limit*") of what an appropriate rebuild should be based on the two "*scientific factors*" alone.

53 The key passages of the Majority's reasoning are at [63] to [65], repeated at [92] to [94]. They say that:

53.1 the overarching concern of the Act is sustainability and that "*the **precedence of sustainably** over utilisation would not be achieved through a single composite decision*";

53.2 it is clear from the text of subpara (ii) that it "*operates as a **control** on the length of the rebuild period*";

53.3 looking at the scientific facts alone "*will most likely produce a shorter rebuild period*", and that "*a rebuild period based on social, cultural and economic factors can be expected to be longer than one set by reference **only to the scientific factors***";

53.4 so, they say, subpara (ii) "*can only fulfil that function [as a control] if it is determined separately*".

54 The Majority's approach to and use of s 8 and their interpretation of s 13(2)(b) is wrong for four interconnected reasons:

- 54.1 Rather than recognising that s 8 provides a **single** purpose, the Majority wrongly bifurcated it and only applied the “ensuring sustainability” component as a discrete obligation.
- 54.2 The Majority then misconstrued the essential nature of the “ensuring sustainability” obligation, treating it as requiring a purely scientific assessment of the rebuild period, rather than recognising that it requires a balancing of two competing social policies.
- 54.3 The Majority unnecessarily create an additional control (rebuild period as an outer limit) over and above the control mechanism specified by Parliament – namely the requirement that the stock be returned to the B_{MSY} , which itself ensures sustainability by ensuring the needs of both current and future generations are provided for.
- 54.4 The Majority’s interpretation robs s 13(3) of any practical utility in setting a TAC. This is of particular significance for Māori given that s 13(3) was enacted, in part, to ensure Māori interests (both commercial and non-commercial) were taken into account as a result of the then recent fisheries settlement.

Section 8 single purpose with two components

- 55 In the *Kahawai* decision this Court was clear that s 8 provides a single purpose with two “competing”, but ultimately “complementary”, “social policy” objectives.⁴⁴ As the Court emphasised, this reflects the individual definitions of utilisation and ensuring sustainability in s 8(2) which are both concerned with the ability of fish stock to be used. One focuses on current use and development (utilisation), the other on maintaining the potential of fisheries to provide for the needs of future generations (ensuring sustainability).
- 56 The existence of these two separate definitions does not mean that the single purpose of the Act can be bifurcated and applied individually as the Majority did. The two social policy objectives must be read together and, to the extent possible, balanced.
- 57 In the context of the TAC, Parliament has turned its mind to how this balance is to be achieved in s 13(2), that is, through the requirement that all stocks be managed at or above the B_{MSY} . Requiring stocks to be managed to this target level enables the needs of the current generation to be balanced against the likely needs of future generations.

⁴⁴ *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 (SC) (**Kahawai decision**), at [39]-[40].

Operating provisions provide the control mechanism

- 58 This Court in the *Kahawai* decision also emphasised that there are separate “operating provisions” in the Act which prescribe the “nature and scope of the Minister’s powers and the restrictions on them”: at [59]. The role of a purpose section, such as s 8, is more general. As this Court stated, when exercising a discretion the Minister “must bear in mind and conform with the purpose” of the Act, but it is the operating provisions (here s 13(2)(b)) that the Minister has to apply: at [59].⁴⁵
- 59 It is the obligation in s 13(2)(b) to return fish stocks that are below the B_{MSY} target to at or above that level that is the control mechanism that achieves both components of the Act’s single purpose – including ensuring sustainability. There is no need to create an additional control mechanism, as the Majority did, through interpreting subpara (ii) as requiring the Minister to separately determine the rebuild period based solely on the scientific factors such that it operates as an “outer limit” for the rebuild timeframe.
- 60 The Majority do not directly explain why sustainability can only be ensured through treating subpara (ii) as an additional control, as just described. But it appears to stem from a concern explained in the “Preliminary point” section, where the Majority defend the High Court’s finding that any other interpretation could have the effect of enabling a Minister to use a rebuild period that indefinitely postpones the return to the B_{MSY} . This assumes that the Minister cannot be relied on to exercise his/her discretion appropriately and might use an “excessively long rebuild period” that is so slow as to effectively defeat the sustainability requirement: at [63].
- 61 Three matters flow out of this:
- 61.1 The Majority incorrectly assume that ensuring sustainability in the context of setting a TAC can only be achieved by taking account of the scientific factors alone (ecology and biology) when determining the maximum rebuild period. This mistakenly assumes that what is sustainable is informed by a purely science-based inquiry. While good science (and information) is a critically important component, s 8 makes it clear the Minister’s task is much broader and requires the Minister to balance the needs of multiple generations. The operating provision itself reflects this requirement in s 13(3). That is why s 13(3) expressly states that the Minister must take account of the social, cultural and economic factors when considering all matters under s 13(2)(b) – not just subparas (i).

⁴⁵ Quoting Keith J in *Westhaven Shellfish Ltd v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158 (CA) at p 173.

- 61.2 The fact that the task of considering the factors in subparas (i) and (ii) has been given to the Minister (rather than to an expert scientific body for example) is consistent with the subpara (ii) inquiry not being limited to the scientific factors alone. Rather, it appropriately sits with the Minister who has to balance the need to restore the stock to the B_{MSY} to provide for future generations with the need to do so in a manner that does not unnecessarily disregard the social and economic impacts of transitioning the fishery back to the optimal target biomass on the current generation.
- 61.3 Finally, it is not appropriate to interpret legislation on the premise that the decision maker (here a Minister of the Crown) cannot be relied on to make a bona fide decision that has regard to the specified criteria. As always, the Minister's decision must be reasonable (rational) and have proper regard for the mandatory relevant considerations in light of the purpose of the Act.⁴⁶ The legislative process is a transparent one as the Minister must consult widely and provide written reasons for that decision (s 12). Provided that the TAC set will over time return the stock to the level at or above the B_{MSY} , it is for the Minister to determine what is an appropriate rebuild period and, in that context, whether a proposed rebuild period is excessively long or slow.
- 62 It follows that a purposive approach to interpretation of s 13(2)(b) does not require the fixing of an outer limit on the period of rebuild based solely on scientific factors and excluding social, cultural and economic factors. To the contrary, logically both sets of factors are highly relevant to the purpose of the Act and must be considered together by the Minister in order to achieve the statutory purpose.

S 13(2)(b) requiring single composite decision consistent with legislative history and case law

- 63 The Majority's interpretation drew heavily on the legislative history to justify their interpretation of subpara (ii). In fact, the legislative history demonstrates that the Select Committee did not intend any material change to the then current management practices of requiring fish stock below the B_{MSY} target to be restored to at or above that level. Nothing in the Select Committee report shows that they intended to create a new additional control mechanism (ie a separately determined maximum rebuild period based solely on scientific factors).

⁴⁶ See Kahawai decision at [59] citing *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at p 58. See also a statement to similar effect by full bench of the Court of Appeal in the *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 (**Snapper case**), at pp 15 & 22.

- 64 The Select Committee report⁴⁷ demonstrates that Parliament:
- 64.1 rejected the proposal to, in the future, allow the potential for some fisheries to be permanently managed below the B_{MSY} (applying a net national benefit test) and expressly reconfirmed that fisheries needed to be managed at or above the B_{MSY} ;
 - 64.2 acknowledged that art 61 of UNCLOS specifies that relevant economic factors should be taken into account when setting commercial catch limits and that s 13 was **consistent** with this and that this did not detract from the philosophy that setting a TAC should **primarily** be based on sustainability – **not solely** as implied by the Majority; and
 - 64.3 otherwise did not intend any other significant change to be made to the manner in which TACs were set stating that the requirements of s 13(3) recognised “*recent management practices*”.
- 65 As to those recent management practices, contemporaneous case law confirmed that fish stocks had to be managed at or above the B_{MSY} target but that the impacts on fishers (both social and economic) were to be taken into account when considering the rebuild period – as reflected in both the Ministerial and Court decisions at issue in the *Orange Roughy* case⁴⁸ and later *Snapper* case.⁴⁹
- 66 Equally, taking the social, cultural and economic factors into account when deciding to alter catch to rebuild a fishery, is orthodox internationally. Worldwide, fisheries scientists and managers have long recognised the importance of the “*human dimensions*” to successfully rebuilding any stock. Such literature shows that it would be an anathema to good fisheries management and the

⁴⁷ Quoted in Majority Judgement at [25] and elaborated on further in **Appendix 2: Legislative History** provided with these submissions.

⁴⁸ *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995 (**Orange Roughy case**), p 29. This case was determined in 1995 under the 1983 Act. The Court expressly confirmed both that the qualifiers applicable to MSY (economic and environmental factors) were relevant when determining the period; but that this did not allow a TAC to be set that would allow a fishery to be managed below the MSY.

⁴⁹ *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 (**Snapper case**), at p 13. The CA confirmed that the wording of the 1983 Act (under which the relevant decision had been made) provided a prima facie duty when setting a TAC to move a fishery to the MSY, but that the qualifiers could be taken into account including as to the period of rebuild.

success of the rebuild to look at biological and environmental factors detached from critical human dimensions.⁵⁰

- 67 Given this, if the Select Committee intended the legislation impose a new overarching sustainability requirement that limited the Minister's ability to take social, cultural and economic factors into account and made the rebuild period a separate consideration, one would have expected this to be clearly stated in the Select Committee report. It was not.

Majority's interpretation robs s 13(3) of any real role

- 68 The Majority's interpretation also largely robs, on their own analysis, the s 13(3) factors of any practical utility. Their assumption is that, taking social, cultural and economic factors into account is likely to lengthen the rebuild timeframe (at [65] & [92]). If, as they find, the rebuild period is to be determined solely by the scientific factors and that this sets the outer limit, then it follows that social, cultural and economic factors cannot be given any practical effect, especially in regard to rate. The speed of the rebuild will not be able to be slowed (taking account of social, cultural and economic factors) because slowing the rate would increase the period.

Majority's interpretation removes ability to consider Māori needs

- 69 It also follows that, because the Majority's interpretation robs s 13(3) of its practical utility, this significantly constrains the Minister's ability to take any real account of the social, cultural and economic impact on Māori of the rebuild timeframe and the consequential TAC reduction needed to achieve that.

- 70 It would seem unlikely that Parliament intended such a constraint. The 1996 Act looked to give effect to and implement key elements of the Crown's 1992 fisheries settlement with Māori, both in terms of its commercial and non-commercial elements.⁵¹ Significantly, this introduced into the 1996 Act an express requirement that Māori interests be considered in both the TAC and TACC setting processes. In terms of the TAC setting process, this was achieved through the consultation requirements (s 12(1)(a) & (b)) and through the new requirement that social and cultural factors be considered, in addition to economic factors, in s 13(3).

⁵⁰ See Food and Agriculture Organisation of the United Nations *Rebuilding of marine fisheries Part 1: Global review*, 2018, FAO Fisheries and Aquaculture Technical Paper 630/1, at 4.1 (p 97) & 9.3 (p 226).

⁵¹ While the fisheries settlement was implemented more directly through provisions of the Māori Fisheries Act 1989, which was amended following the settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries Act 1996 was enacted to contain many provisions assisting in the practical implementation of the settlement including in particular, a mechanism to allocate quota from new species entering the QMS to Māori and for the management of customary interests under pt 9 of the Act.

71 Having facilitated the Māori fisheries settlement in this way, s 13 ought not be interpreted in a manner that precludes s 13(3) having any real utility to Māori both in terms of their commercial and non-commercial interests.

72 For the avoidance of doubt, this argument is limited to the proper interpretation of the 1996 Act and does not look to raise any arguments regarding the direct enforceability of the Deed of Settlement.

Majority's interpretation unworkable and contradictory

73 The Majority judgment provides a fisheries management regime that is unworkable. It requires a rebuild period to be set based on scientific factors **alone** (biology and ecology), with no account able to be taken of utilisation considerations. The effect being that a rebuild timeframe can only be set on the assumption that no fishing is taking place.

74 The Majority's only answer to this criticism is to contradict themselves by saying (at [91] – [92]) that some limited utilisation is still possible because the scientists who developed the HSS included a general allowance for social, cultural and economic factors when recommending a default formula to calculate a rebuild period. This demonstrates the practical impossibility of trying to set a rebuild period that has no regard to social, cultural and economic factors.

75 The Act imposes a statutory obligation to move a fish stock below the MSY to at least that level. If s 13(3) considerations are precluded when setting a rebuild period and the Minister can **only** take into account the subpara (ii) scientific factors, it follows that there is no capacity to have regard to utilisation (fishing). Utilisation is necessarily a function of social, cultural and economic considerations. The only justification for using a longer period would be to consider the impact on utilisation.

76 The logic of this proposition is recognised in the HSS. The HSS defines the minimum rebuild period (called T_{MIN}) as being the number of years required to rebuild the stock in the absence of fishing. The HSS expressly recognises that this is the rebuild period that is generated if only the biology and ecology of a stock is taken into account.⁵²

77 The HSS recognises that in order to set a rebuild period longer than T_{MIN} , it is necessary to take some account of social, cultural and economic factors. It does so by setting a default rebuild period that

⁵² See definition of T_{MIN} [303.0651]. The HSS does state that a third factor is required to calculate T_{MIN} , that is the extent of the depletion of the stock.

is up to double T_{MIN} . The Operational Guidelines explain this as follows (emphasis added):⁵³

Allowing a rebuilding period **up to twice T_{MIN}** allows for some element of **socio-economic considerations** when complete closure of a fishery could create undue hardships for various fishing sectors and/or when the stock is an unavoidable bycatch of another fishery.

- 78 The Majority try to answer this criticism by stating that this issue is resolved because “*best practice*”, reflected in the HSS, builds in some allowance for socio-economic factors into the default rebuild period of between T_{MIN} and $2 * T_{MIN}$, which they say reflects the consensus of current scientific opinion (at [87] & [91]). They go on to state that the fact that scientific opinion makes some allowance for “*general social, cultural and economic factors*” in assessing the appropriate rebuild period, does not mean that the Minister is free to make some further allowance for social, cultural and economic factors specific to the relevant fishery (at [92]).
- 79 This is not an answer – the approach is contradictory and demonstrates that their interpretation is unworkable:
- 79.1 The Majority implicitly accept that if the scientific factors alone are taken into account in setting a rebuild period, that the rebuild period can **only** be T_{MIN} – being a rebuild period that makes no allowance for fishing.
- 79.2 The Majority’s reliance on the default rebuild period in the HSS, has the effect of delegating to the scientists and officials who developed that default formula in 2008 the consideration of relevant social, cultural and economic factors, when s 13(3) expressly states that this is a matter for the Minister to consider when setting the relevant TAC.
- 79.3 The Majority’s reliance on the default rebuild period in the HSS, also has the effect of rendering s 13(2) unworkable in the absence of such a separate policy document that makes an allowance for social, cultural and economic factors.
- 79.4 There is no proper basis for treating “*general socio-economic factors*” as relevant and socio-economic factors specific to the fishery as being irrelevant, as the Majority suggests. To the contrary, s 13(3) expressly requires that account be taken of social, cultural and economic factors that the Minister considers to be relevant to the fishery.
- 79.5 Finally, the Majority fail to deal with the fact that the HSS does not set a specific rebuild period - rather a range of between T_{MIN} and $2 * T_{MIN}$. How can the Minister select from

⁵³ Operational Guidelines, p 12 [303.0561].

within this range if the Minister cannot take into account social, cultural and economic factors? The scientific factors have already been taken into account in setting T_{MIN} and, using the Majority's approach, no other factors can be relied on to select within this range.

80 The Minority analysis is consistent with this - at [232] and [236].

Issue 1b – Rebuild Plan

81 Having found that the assessment of an appropriate period was limited to only scientific factors, the Majority found that the Rebuild Plan was an irrelevant consideration and therefore could not be taken into account (at [95]-[96]).

82 If the Majority's interpretation of s 13(2)(b)(ii) is incorrect, and account can be made of factors other than scientific factors, then it follows that the Minister is entitled to take account of sustainability measures included in the Rebuild Plan when considering the rebuild period – as found by the Minority (at [240(c)]).

83 Without the Rebuild Plan the newly recognised East Coast Stock cannot be managed. It alone enables catch splitting within and between QMAs. Critically it also looked to harness the biological characteristics and environmental conditions affecting the growth of Tarakihi and to adapt fishing practices in light of those characteristics to significantly hasten the rebuild. On the Majority's interpretation of s 13(2)(b)(ii) these matters are all irrelevant. Parliament cannot have intended such an outcome.

Issue 2 – probability of rebuild

84 In regard to Issue 2, F&B allege that the Minister failed to have regard to what they characterise is a "*minimum standard*" of "*acceptable probability*" that the fishery would rebuild under the decision made by the Minister. It says the minimum is a 70% probability.⁵⁴ This was the approach taken by the Majority.

85 It is not in dispute that the Minister was advised that the stock assessment modelling indicated a 50% probability of rebuild and that the Minister took this into account.⁵⁵ The issue is whether the Minister was legally required to take account of a default minimum 70% probability of rebuild contained in the HSS⁵⁶ (or, in the alternative, in the Operational Guidelines⁵⁷ that sit behind the HSS).

86 There are two legal routes through which this consideration could become mandatory. First, by well-established common-law

⁵⁴ SoC at [37(i)] [101.0015].

⁵⁵ Judgment, at [45] quoting from the Minister's affidavit [05.0019].

⁵⁶ [303.0628].

⁵⁷ [303.0548].

principles regarding implied mandatory considerations inferred by the scheme of the Act (*CREEDNZ*). This is **not** the basis on which the Majority determined this issue (at [145]-[147]) and does not appear to be pursued before this Court by F&B. Instead, the Majority found (as did the HC before it) that it was a mandatory consideration only by reason of the principle that decisions be based on the best available information (**s 10(a) principle**). This was not the basis on which the probability of rebuild issue was plead by F&B and not directly dealt with in any party's evidence.

Does the HSS specify 70% probability of rebuild?

- 87 The first issue is whether the HSS specifies a default probability standard for rebuild of 70% at the time the period is considered by the Minister in setting a TAC – or is this default probability only found in the Operational Guidelines?
- 88 The key passages of the HSS are quoted by the Minority at [185]-[196]. An additional passage, central to the Majority's reasoning, is quoted at [120].⁵⁸
- 89 The section of the HSS concerning the requirements for a rebuild period, relevantly include the following two bullet points (referred to as "*specification 3 and 4*" by the Majority at [121]-[124]):
- > 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 ...⁵⁹
- 90 The Minority (at [280]-[282]) agreed with SNZ's argument that the 70% probability is not referred to in the HSS itself when considering the rebuild period (only in the Operational Guidelines), and that the HSS says only that, when considering the appropriate period, the timeframe for the rebuild (looking forward) should have an "*acceptable probability*". That determination is left to the Minister. When the next bullet point (specification 4) refers to a 70% probability it is referring to the probability of rebuild at the **end** of the rebuild – that is, as to the likelihood that the stock has in fact been rebuilt to the target biomass (looking back).
- 91 The Majority accept that the two bullet points (specifications 3 & 4) deal with probability assessments at two different points in time:

⁵⁸ HSS, p 7, at [22] [303.0637].

⁵⁹ It is accepted that the remaining text in this bullet point is not relevant. It is not well worded and SNZ agrees that it is redundant as Dr Dunn correctly states: at [52] [201.0015]. It is, therefore, not relevant to the determination of this issue.

- 91.1 one today, looking forward trying to predict the likelihood that the measures (TAC and any other controls on the effects of fishing) will be successful; and
- 91.2 one in potentially a decade or more, depending on the length of the rebuild, looking back with the purpose of assessing how successful those measures have been - before deciding whether to lift the measures (that is, increase the TAC).
- 92 The Majority found that, despite this, the two bullet points must be read together in order to achieve the HSS's stated objective of specifying probabilities (at [120] and [122]). They say that the reference to only an "*acceptable probability*" in the third bullet point means that the HSS does not specify a probability for the rebuild timeframe, so it is necessary to infer the probability referred to in the fourth bullet point into the third. They, therefore, conclude that "*the fourth specification is supplementing or explaining the third specification*" (at [122]).
- 93 With respect, this is an erroneous interpretation (as the Minority find). When read in context, the better interpretation is that the two bullet points must be read separately:
- 93.1 The two bullet points are not conjunctive. They require two different assessments to be made at different points in time. Critically, these assessments use different assumptions and datasets which are likely to have different margins of error as one dataset is trying to predict the future and the other dataset is making an assessment of the state of the fishery at that point in time. It follows that different probabilities may well be appropriate for the two distinct decisions being made. It is logical that a greater probability would be required at the end of the rebuild period (looking back) as more certainty is desirable before the decision is made whether or not to lift the measure (that is to raise the TAC).
- 93.2 The facts of this case demonstrate this distinction. One of the elements of the Rebuild Plan was measures aimed at speeding up the rebuild by changing the age structure of the population. The modelling showed that if the average age of the stock could be increased by one year by reducing the catch of juveniles, the rebuild could be sped up by up to 12 years.⁶⁰ Modelling whether those measures might be successful looking forward is difficult, but in 20 years' time (looking back) the success or not of these measures will be known with greater certainty.

⁶⁰ See discussion of the effect of the Rebuild Plan in 2019 Final Advice Paper, Section 10, [305.1167] and reference to modelling at [305.1171]; Lawson, at [89.6] [201.0188]; Dunn, at [20] [201.0038].

- 93.3 Had the HSS intended for the third bullet point to require a 70% probability, it could easily have said so.
- 93.4 It is not correct to suggest that the third bullet point does not specify any probability (as the Majority do at [121]). It directs that the probability must be “*acceptable*”. As found by the Minority (at [276]) this would need to be at least 50% to comply with the implicit requirement of s 13(2)(b) (“*will result*”). Otherwise, the HSS leaves it to the Minister to assess what degree of probability is acceptable.
- 93.5 Equally, the Majority’s reliance on the footnote to the fourth bullet point (quoted at [116]), is not correct. As the Minority explains (at [280]-[281]), the footnote does not speak to the position today, rather to the position at the end of the rebuild – which is the subject matter of the bullet point to which the footnote relates.
- 94 In short, the HSS does not specify a default 70% probability of rebuild when making a decision to set a TAC.
- Does HSS constitute best available information and therefore a mandatory consideration?***
- 95 If the HSS does set a default probability of rebuild of 70% (which is denied), the next question is whether this guidance is a mandatory consideration when setting a TAC under s 13(2)(b).
- 96 While the Majority did find that it is a mandatory consideration, they did **not** do so on the basis that it is implied by the wording of s 13(2)(b) (in accordance with *CREEDNZ*) – nor could they, for the reasons succinctly set out by the Minority at [262] to [268].
- 97 Rather, the Majority did so on the basis that the HSS was the “*best available information*” and must be considered by the Minister in accordance with the s 10(a) principle. There was no proper basis for the Majority to make this determination.
- 98 In terms of the pleadings and evidence:
- 98.1 F&B did **not plead** that the HSS constituted the best available information, as a consequence it was not properly before the Court. Had this been plead, SNZ would have filed extensive evidence as to why the HSS was not the best available information.⁶¹ The Majority rejected this, stating that the evidence was advanced on the basis that the HSS

⁶¹ For example, Mr Lawson explains that there was evidence available that establishes that the default criteria in the HSS should not be used given the new and accepted stock assessment for Tarakihi: at [38] [201.0175]. Given s 10 was not relied on in the pleading, this evidence was not developed and put before the Court.

was a statement of “*best practice*” and assessing such evidence would naturally lead to an assessment of whether this best practice also represented the best available information (at [131]). This is not accepted. Submit, it does not follow that consideration of a policy document that purports to provide guidance as to best practice will lead to an analysis of whether that policy constitutes the best available information – for the reasons discussed next.

98.2 It cannot be assumed that the HSS constitutes the best available information (as found by the HC and Majority) given that the HSS was drafted over 15 years ago (in 2008) and itself states that:⁶²

... It is intended that the core standards [in the HSS] will not change substantively in the short term, but should be subject to review in a period not exceeding five years, based on the evolution of fisheries plans and fisheries management strategies in New Zealand, and the evolution of international best practice.

99 As to the substantive issue:

99.1 The HSS is a **policy document** providing advice to ministry officials as to standards they are expected to meet when providing advice to the Minister. This is how the HSS describes itself⁶³ and how the applicant and Ministry witnesses described it.⁶⁴ It is **not information** (as referred to in s 10(a)) on the basis of which the regulatory decision is to be made by the Minister. In this context information means evidence or facts that go to the decision needing to be made and does not include guidance as to how the decision is to be made. As the Minority correctly stated (at [272]):

The HSS is concerned with the law and its implementation. It is not a source of factual information or evidence on which to base a particular decision.

99.2 The s 2 definition of “*information*” makes it clear that information includes facts, not policy.

99.3 Equally, the fact that policy documents do not constitute information is also consistent with the way “*information*” is used in the balance of s 10. For example, it would make little sense to have an information principle requiring decision makers to be cautious when policies are uncertain, unreliable or inadequate.

⁶² HSS, p1 at [5] [303.0631].

⁶³ HSS, p1, at [2] [303.0631].

⁶⁴ Mace, at [21] [201.0099]; Dunn, at [46] [201.0022]; and K Goddard, at [25] [201.0006]; and reply, at [84] [201.0058].

99.4 To the extent that policy documents are intended to be mandatory considerations in decision making under the Act (including when setting TACs), the Act expressly identifies the policy documents that must be taken into account: s 11(2). The Act also provides a mechanism through which other policy documents (fisheries plans) can be approved, following appropriate consultation, so that they also become mandatory considerations: ss 11(2A)(b), 11A & 12(1). Such plans can include objectives and strategies relevant to TAC setting. Given this statutory scheme, “*information*” cannot be interpreted as including policies as s 10(a) would have the effect of converting all other (non-specified) policies into mandatory considerations.

99.5 The Majority’s interpretation may similarly convert policies into mandatory considerations for other legislation that use “the best available information” principle.⁶⁵

Operational Guidelines

100 The Majority did not proceed on the basis that the Operational Guidelines (which do refer to the 70% probability of rebuild) constitute the best available information and are, therefore, a mandatory consideration. It is unclear whether F&B is still pursuing such an argument. If it is, then there is no basis for making such a finding. The Guidelines state expressly that they “*do not have the same status*” as the HSS and it is intended that the Guidelines “*will continually evolve*”.⁶⁶ Further, the Guidelines are approved only by the Ministry’s Chief Executive, and not the Minister.⁶⁷ Finally, the evidence before the Court was that, while the HSS constituted best practice, the Operational Guidelines required updating (it has not been revised since 2011).⁶⁸

Remedy

101 For the reasons set out above, the appeal should be allowed and the application for review be dismissed.

Dated: 16 February 2024

B Scott / A Kraack
Counsel for Appellant

⁶⁵ See for example, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 34 and Natural and Built Environment Act 2023, s 10.

⁶⁶ See Introduction [303.0550]. This is also confirmed in the HSS itself at [5] [303.0631].

⁶⁷ HSS, at [6] [303.0632].

⁶⁸ Mace, at [16] – [18] [201.0098].

List of authorities cited

Legislation

1. Fisheries Act 1996 (**Act**), ss 1-21, 114-123, 174-186B, 283-284
2. Fisheries Act 1983 ss 2 (definition of "total allowable catch", 89 (as enacted)
3. Fisheries Amendment Act 1986, s 10 (as enacted)
4. Fisheries Amendment Act 1990, s 15 (as enacted)
5. Fisheries (Remedial Issues) Amendment Act 1998, ss 1(3), 4 (as enacted)
6. Fisheries Act 1996 Amendment Act 1999, s 8 (as enacted)
7. Māori Fisheries Act 1989 (as enacted)
8. Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (as enacted)
9. Territorial Sea and Exclusive Economic Zone Act 1977 (**TSEEZ Act**) s2 (as enacted)
10. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 34
11. Natural and Built Environment Act 2023, s 10

Cases

12. *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA)
13. *Greenpeace New Zealand Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 (**Orange Roughy case**)
14. *Kellian v Minister of Fisheries* CA 150/02, 26 September 2002
15. *New Zealand Fishing Industry Assoc (Inc) v Minister of Fisheries* CA 82/97, 22 July 1997 (**Snapper case**)
16. *New Zealand Recreational Fishing Council v Minister of Fisheries* HC Auckland CIV-2005-404-4495, 21 March 2007 (**High Court Kahawai case**)
17. *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 (**Court of Appeal Kahawai case**)
18. *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 (**Kahawai decision**)
19. *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC)
20. *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA)

Select Committee Reports and Bills

21. Fisheries Bill 1994 (No. 63-1), explanatory note, cl 2 (extracts), cl 6-11
22. Interim report on the Fisheries Bill: Report of Primary Productions Select Committee (December 1995) (Report and extracts of Bill pp. 1-4, 15-37)
23. Final Report of Select Committee on Fisheries Bill (1996) (Report pp i-xiii and extracts of Amended Bill pp 1-33)
24. Fisheries Act 1996 (as in force between 1 October 1996 to 22 June 1998), s 13
25. Fisheries (Remedial Issues) Amendment Bill: Departmental Report 27 April 1998 (pp 1 and 3-7)
26. Fisheries (Remedial Issues) Amendment Bill 1997 (No. 97-1), explanatory note extracts pp i-ii
27. Fisheries (Remedial Issues) Amendment Bill 1997 (No. 97-2), Select Committee report pp i and v
28. Food and Agriculture Organisation of the United Nations *Rebuilding of marine fisheries Part 1: Global review*, 2018, FAO Fisheries and Aquaculture Technical Paper 630/1 (pp 97-100 and 226-229)

International material

29. United Nations Convention on the Law of the Sea (1982), Articles 55-62 (**UNCLOS**)

Other

30. Deed of Settlement between Her Majesty the Queen and Māori, 23 September 1992