

IN THE SUPREME COURT OF NEW ZEALAND

SC 99/2023

I TE KŌTI MATUA NUI

BETWEEN

SEAFOOD NEW ZEALAND LTD

Appellant

AND

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

First Respondent

AND

MINISTER FOR OCEANS AND FISHERIES

Second Respondent

AND

TE OHU KAI MOANA TRUSTEE LTD

Third Respondent

**OUTLINE OF ORAL ARGUMENT FOR FIRST RESPONDENT (ROYAL FOREST &
BIRD PROTECTION SOCIETY OF NEW ZEALAND INC)**

DATED 18 APRIL 2024

COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS DOCUMENT CONTAINS NO SUPPRESSED INFORMATION AND IS
SUITABLE FOR PUBLICATION

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DECISION PAPERS

2018 advice and decision -

Fisheries NZ 2018 Briefing	304.0911
Fisheries NZ Review of Sustainability Measures for 2018/2019	304.0921
- recommendations and 2018 decision	304.0998
2018 decision letter: "rebuild timeframe" of 10 years, at 50% probability required 55% TACC reduction, Minister chose phased implementation with 20% TACC reduction in 2018 and further reduction in 2019 of 35% (but dependent on effectiveness of measures to be developed by industry)	305.1102 @1120-1124

2019 advice and decision

Fisheries NZ October 2019 Sustainability Round Decisions briefing	305.1126
Minister's 2019 decisions	305.1190 @1191
Aide Memoire	305.1337
2019 decision letter: 10 % reduction to TACC and implementation of IRP, 20 year rebuild timeframe	305.1320 @ 1326 – 1328
Affidavit of Minister Stuart Nash at [26]-[32] and [38]-[46]: 20 years was longer than favoured in 2018, but likely to be 'worst case scenario', and there was a 'genuine mood for change' in the industry.	201.0110

FIRST ISSUE

Section 13 interpretation – text and purpose

FA s 13(2)(b) – way, rate, within a period appropriate to the stock...	App BOA 1
FA s 13 scenarios: (2)(b), (2)(c),	
FA s 13(3) "way and rate", relevance of s 13(2A)	
FA s 9, "utilisation", "ensuring sustainability", "aquatic environment", FA s 10	
<i>Kahawai</i> (SC)	App BOA 18
OG Fig 1 B _{MSY}	303.0551
T _{MIN} – Minority analysis [230] – [236].	05.0083 – 0085
Stocks below "hard limit" (collapsed)	303.0648

Section 13 context – international obligations

FA s 5	App BOA 1
UNCLOS Articles 61, 62: optimum utilisation "without prejudice" to ensuring living resources not endangered by over-exploitation, maintain or restore to MSY as qualified by relevant environmental and economic factors	App BOA 29

Māori dimension as relevant to s 13 interpretation

FA s 5	App BOA 1
Deed of Settlement 1992 – Māori had claimed QMS unlawful or no application to māori fisheries – Crown to promulgate regulations – acquisition of Sealords – Māori endorse QMS	App BOA 30
Treaty of Waitangi (Fisheries Claims) Settlement Act s 9 commercial, s 10 non-commercial	App BOA 8
FA "utilisation" - cultural wellbeing and s 13(3) "cultural factors" as "way and rate" inputs	App BOA 1
Concept of MSY: provides for ≥60% of a stock to be utilised.	
Benefits of restoring overfished stock: more accessible to customary and commercial fishers	305.1183
FA ss 20, 21: TACC	

FA Part 9 taiapure-local fisheries, s 186 regulations relating to customary fishing	
Practical measures: Iwi Fisheries Forums and check on alignment with Iwi Fisheries Forum plans	305.1185
FA s 12: provide for input of tangata whenua non-commercial interest, have particular regard to "kaitiakitanga"	
Other contextual supports	
FA s 11: environmental, statutory and policy context	App BOA 1
Choice of decision-maker not indicative s 13 involves a political trade-off. Discretion within limits is common: Conservation Act s 17U, RMA ss46A, 43A(3)	First Resp BOA 1, 3
Legislative history s 13	
Fisheries Act 1983 – "qualifiers" within TAC definition.	App BOA 2
Fisheries Amendment Act 1986 introduced QMS	App BOA 3
<i>Orange Roughy</i> and <i>Snapper</i> decisions	App BOA 13 App BOA 15
Fisheries Bill (1994) cl 11: earliest reference to "within a period appropriate to the stock", qualified by "the net national benefit" (inter alia).	App BOA 21
Interim Report on the Fisheries Bill: "substantial change to the fisheries management system". Removed "net national benefit" approach.	App BOA 22
Primary Production Committee Final Report on Fisheries Bill (1996) "substantial changes to the bill" – TAC as the main environmental standard – no change to provision for taiapure and customary fishing – how agreements reached in the Deed of Settlement and Treaty of Waitangi (Fisheries Claims) Settlement Act achieved – purpose of the Bill – sustainability concerns should be the key factor used to determine a TAC - social, cultural economic considerations are relevant to way and rate.	App BOA 23
Fisheries Act 1996 s 13 "within a period appropriate to the stock and its biological characteristics"	App BOA 24
Fisheries (Remedial Issues) Amendment Bill 1997 (97-1) explanatory note – "amends errors and omissions"	App BOA 26
Fisheries (Remedial Issues) Amendment Bill 1998 Departmental Report – "technical amendments" only - five changes to s 13 - one moved the reference to "environmental factors" from (i) to (ii) – "key issue": transient environmental conditions should not be used to modify the target stock level (MSY)	App BOA 25
Fisheries (Remedial Issues) Amendment Bill 1998 Primary Production Committee Report: "errors and omissions primarily of a technical nature" - s 13 change not addressed.	App BOA 27
Fisheries Act 1996 Amendment Act 2008 4- inserted s 2A	First Resp BOA 2
Authorities	
<i>Orange Roughy</i> , <i>Snapper</i> not decided under 1996 Act, 1983 Act did not refer to "period appropriate to the stock", brief obiter in <i>Snapper</i> not on this issue	App BOA 13, 15
<i>Kahawai</i> (HC): social, cultural and economic factors only relevant in structuring the stock's return to maximum sustainable yield (at [49]-[50]). Grounds of appeal did not challenge s 13 findings.	App BOA 16

Kahawai (CA): s 13(3) is limited in scope, only relevant to way and rate (at 50]. *Kahawai* (SC) "some flexibility" to consider fishing sectors' aspirations for utilisation (at [44])

App BOA 17, 18

Summary: First issue

In 2019, the Minister did not turn his mind to a rebuild period appropriate to the stock. He set the rebuild period based on social and economic impacts. He doubled the period from 2018 in reliance on industry's commitment to a 20 year rebuild period and the IRP. That was an incorrect interpretation of s 13, which does not enable the period to be set by reference to social, cultural, economic factors. The IRP was not relevant to the period appropriate to the stock.

SECOND ISSUE

Default 70% probability (and reasons) as mandatory consideration - interpretation

HSS – 70% default probability. Need to rebuild age structure. 303.0628

70% default applies to rebuild plans. HSS objective ("specifications") and definition of "rebuilt".

OG is consistent with HSS 303.0548

"Best practice" – Mace [18], [21] 201.0098

Default 70% probability (and reasons) as mandatory consideration - duty to be adequately informed

ELI First Resp BOA 6

Bushell "collective knowledge" Sec Resp BOA 7

Air Nelson "fair, accurate and adequate report" Sec Resp BOA 3

c.f. Fisheries NZ advice to Minister 305.1152, 1161

Fisheries NZ did not advise Minister that 50% probability of rebuilding was "considered acceptable" 305.1182

Default 70% probability (and reasons) as mandatory consideration - duty to be adequately informed

FA s 10(a): "Best available information" App BOA 1

ELI: importance somewhat elevated First Resp BOA 6

Default probability and reasons for it are "information"

Pleadings challenge – not required to plead law

Default 70% probability (and reasons) as mandatory consideration - duty to consider uncertainty

FA s 10(b): probability relevant to uncertainty in rebuild trajectories App BOA 1

Summary: second issue

Probability is integral to setting a TAC. HSS and OG both specify a default 70% probability for rebuilding stocks below the soft limit. That information was a mandatory relevant consideration due to the duty to be adequately informed, and under the FA information principles (a) and (b).