

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

**WRITTEN SUBMISSIONS ON BEHALF OF FIRST RESPONDENT (ROYAL
FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INC)**

DATED 22 MARCH 2024

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT THIS SUBMISSION CONTAINS NO SUPPRESSED
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WRITTEN SUBMISSIONS ON BEHALF OF FIRST RESPONDENT

1. INTRODUCTION

- 1.1 The purpose of the Fisheries Act 1996 (“**Act**”) is to enable utilisation while ensuring sustainability. Overfished stocks are detrimental for both the fishery and the aquatic environment. Stock reproduction and sustainability may be impaired and serious ecosystem impacts can occur when stocks are overfished,¹ where-as a rebuilt stock confers significant benefits to the fishery and fishers, as well as to ecosystems.²
- 1.2 For marine species that are managed as stocks under the Act’s Quota Management System (“**QMS**”), managing abundance so the stock fluctuates around maximum sustainable yield (“**MSY**”), or rebuilds to MSY where the stock is depleted, is fundamental to achieving the Act’s purpose. Setting a limit on the amount of a stock that can fished (the total allowable catch or “**TAC**”) is the key mechanism to maintain, or rebuild to, MSY. It is the primary sustainability measure on which quota management is based.³
- 1.3 The 2018 and 2019 stock assessments for East Coast tarakihi confirmed it was significantly overfished. In both years, s 13(2)(b) of the Act required the Minister to set a TAC that would ensure the stock would rebuild to MSY. In 2018, the Minister decided that the stock should be rebuilt within 10 years. He reduced the TAC, but not by the amount that would enable the rebuild within 10 years, on the basis that he wished to take a ‘phased approach’ where a further TAC reduction would be made in the 2019 TAC decision to achieve the 10 year rebuild period. In 2019, the fishing industry presented an Industry Rebuild Plan (“**IRP**”) and a ‘commitment’ to rebuild the stock within 20 years using measures in the IRP. Relying on that commitment and IRP, the Minister did not make the reduction foreshadowed in 2018. He set a TAC that would rebuild the stock in 20 to 30+ years.⁴

¹ Affidavit of Matthew Dunn at [12] [201.0017](#)

² Affidavit of Pamela Mace at [26] [201.0101](#)

³ *New Zealand Recreational Fishing Council and Ors v Sanford Ltd and Ors and Minister of Fisheries* [2009] NZSC 54 (SC) (Elias J dissenting judgment) (“**Supreme Court Kahawai case**”) **Appellant BOA 18**; *New Zealand Recreational Fishing Council and Ors v Sanford Ltd and Ors and Minister of Fisheries* CIV-2005-404-4495, Harrison J, 21 March 2007, Auckland (“**HC Kahawai case**”) **Appellant BOA 16**.

⁴ Based on the ‘commitment’, the period would be 20 years. Based on modelling the effect of the TAC reduction, the rebuild would take 25 years with 50% probability or more than 30 years with 70% probability.

1.4 The first respondent challenged the Minister’s 2019 decision. The challenge concerned his approach to the s 13(2)(b) requirement to rebuild to MSY “within a period appropriate to the stock”, his reliance on the IRP to extend the period, and his failure to have regard to the minimum standard of rebuild probability (and the reasons for that minimum standard). The High Court held the Minister’s decision was affected by material errors.⁵ The Court of Appeal agreed, and dismissed the appeal.⁶ The Supreme Court granted leave on the question of whether the Court of Appeal was correct to dismiss the appeal.⁷

2. ISSUES AND FIRST RESPONDENT’S POSITION

2.1 The first issue is: Is the “appropriate period” within which the rebuild must occur under s 13(2)(b)(ii) of the Act to be determined separately from the way in which and rate at which the rebuild occurs, and can social, cultural and economic factors can be taken into account in determining the “appropriate period”?⁸

2.2 A sub-issue, the answer to which follows from the first issue, is whether the IRP can be taken into account in determining the period appropriate to the stock.

2.3 The second issue is:⁹

- a. Does the Harvest Strategy Standard (“**HSS**”) specify a 70 per cent default probability of rebuild (and reasons for that default probability) that is relevant to rebuilding plans relating to stocks below the ‘soft limit’?
- b. Was the 70 per cent probability of rebuild and the reasons for that probability specified as the default probability in the Operational Guidelines (“**OG**”) (and, if the answer to (a) is yes, the HSS) a mandatory relevant consideration when the Minister decided to set the TACs for East Coast tarakihi in 2019?

2.4 On the first issue, the correct answer is yes: the “appropriate period” within which the rebuild must occur is the period “appropriate to the stock, having regard to its biological characteristics and any

⁵ *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 1427 (“**High Court decision**”) [101.0061](#)

⁶ *Fisheries Inshore New Zealand Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2023] NZCA 359 (“**Court of Appeal decision**”) [05.0001](#)

⁷ *Seafood New Zealand Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2023] NZSC 154 [05.0139](#)

⁸ Court of Appeal decision at [7] [05.0005](#)

⁹ Court of Appeal decision at [8]-[9] [05.0005](#)

environmental conditions affecting the stock". Where social, cultural and economic factors may be relevant is in determining the "way" and "rate" of rebuild, and consequently in deciding what TAC correlates with achieving the rebuild within the appropriate period. Social, cultural and economic factors are not relevant to determining what rebuild period is appropriate to the stock.

2.5 The Minister failed to determine what period would be appropriate to the stock when setting the TAC in 2019. He doubled (at least) the period that he had considered appropriate in 2018, based on social, cultural and economic considerations and his reliance on the IRP and industry commitment to a 20 year rebuild. That was an error of law.

2.6 On the second issue, the answers are:

a. Yes: the HSS specifies a default 70 per cent probability for rebuilding stocks that are below the soft limit, and gives reasons for using a 70 per cent probability. The OG does likewise.

b. Yes. Probability is an integral component of setting a TAC. Fisheries NZ rebuild period predictions (including the 25 year prediction for Option 4, adopted by the Minister) were based on a 50 per cent probability.¹⁰ Fisheries NZ did not advise the Minister of reasons for using a higher probability. Fisheries NZ advised the Minister that when a stock declines below the soft limit the HSS recommends rebuilding "with a 50% probability".¹¹ That advice did not correctly convey the HSS (or OG) content relating to probability. In that context, the 70 per cent minimum standard probability for rebuilding depleted stocks specified in the HSS and OG, and the reasons for using that probability rather than 50 per cent, were "so obviously material ... that anything short of direct consideration of them by the Minister ... would not be in accordance with the intention of the Act".¹² The failure to provide a "fair, accurate and adequate report"¹³ of the guidance on probability meant the Minister failed to have regard to a mandatory relevant consideration. The 70 per cent probability and reasons for it were also mandatory relevant considerations pursuant to the information principles relating to use

¹⁰ Exhibit DP8 [305.1126](#) at [305.1167](#); Affidavit of Marc Griffith at 31.1 [201.0088](#)

¹¹ Exhibit DP8 [305.1126](#) at [305.1161](#)

¹² *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 (CA), per Cooke J, at 183 **Appellant's BOA 12**

¹³ *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at 53 – 54 **Second**

Respondent BOA 3

of the best available information¹⁴ and consideration of uncertainty in information.¹⁵

3. FACTS/DECISION DOCUMENTS

- 3.1 The facts are set out in the Court of Appeal's decision. The key advice and decision documents (with key documents in bold) are:¹⁶
- a. For 2018: Fisheries NZ October 2018 Sustainability Round Decisions briefing¹⁷ (attaching **Fisheries NZ Review of Sustainability Measures for the October 2018/2019 Fishing Year Decision Paper**¹⁸ which records the **Minister's 2018 decisions and intended 2019 changes for East Coast tarakihi**¹⁹); Aide-Memoire October Sustainability Round from Fisheries NZ to Minister,²⁰ East coast tarakihi management arrangements for 1 October 2018 and beyond briefing²¹, Fisheries NZ Supplementary Information to Support Decisions for the October 2018 Sustainability Round²² and **Minister of Fisheries Decision Letter**.²³
 - b. For 2019: **Fisheries NZ October 2019 Sustainability Round Decisions**²⁴ which records the **Minister's 2019 decisions for East Coast tarakihi**,²⁵ Aide-memoire from Fisheries NZ (on board cameras)²⁶; Aide-memoire from Fisheries NZ (industry rebuild plan),²⁷ and **Minister of Fisheries Decision letter**.²⁸

4. FISHERIES ACT

- 4.1 The Minister's submissions as to the key statutory provisions (purpose, environmental and information principles, sustainability measures) and scheme²⁹ are respectfully adopted. Section 13 is the operative provision

¹⁴ [Section 10\(a\) Appellant's BOA 1](#)

¹⁵ [Section 10\(b\) Appellant's BOA 1](#)

¹⁶ Although the 2018 decision is not under challenge, its "phased approach" provides important context for the 2019 decision.

¹⁷ Exhibit DP3 [304.0911](#)

¹⁸ Exhibit DP3 [304.0921](#)

¹⁹ Exhibit DP3 [304.0998 – 304.1005](#)

²⁰ Exhibit DP4 [304.1077](#)

²¹ Exhibit DP5 [304.1083](#)

²² Exhibit DP6 [304.1094](#)

²³ Exhibit DP7 [305.1102](#)

²⁴ Exhibit DP8 [305.1126](#)

²⁵ Exhibit DP8 [305.1190-305.1191](#)

²⁶ Exhibit DP9 [305.1318](#)

²⁷ Exhibit DP11 [305.1337](#)

²⁸ Exhibit DP10 [305.1320](#)

²⁹ [At 16 – 29.](#)

for setting the TAC so that stocks fluctuate around MSY or a rebuilt to MSY where they have been overfished. MSY is defined in s2 as:

in relation to any stock, means 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.

- 4.2 Where, as in the case of tarakihi, the current level of the stock is below that which can produce the MSY, s13(2)(b) applies and s13(3) is relevant:

13 Total allowable catch

(1) Subject to this section, the Minister shall, by notice in the Gazette, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.

(2) The Minister shall set a total allowable catch that—

(a) maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or

(b) enables the level of any stock whose current level is below that which can produce the maximum sustainable yield 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; or

(c) enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

(3) 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.

- 4.3 In setting the total allowable commercial catch ("**TACC**") the Minister must make an allowance from the TAC for Māori customary non-commercial fishing interests, recreational interests, and all other

mortality caused by fishing. The remaining portion is allocated to the TACC.³⁰ The TACC is “ultimately determined by a calculation”.³¹

5. FIRST ISSUE ON APPEAL

Section 13(2)(b)

- 5.1 The majority of the Court of Appeal concluded that when setting the TAC under s 13, 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), separately from the way and rate of rebuild. The Minister is not entitled to take social, cultural or economic factors into account. Those factors are relevant only to the way and rate of rebuild.³²
- 5.2 The appellant says that “provided the Minister makes a decision that will result in a TAC that returns the stock to MSY, the Act does not otherwise restrict the Minister’s ability to take into account social, cultural and economic impacts. The timeframe is for the Minister to decide but the period must have regard to the biological and environmental characteristics of the fish stock”.³³ That interpretation is not supported by the text of s 13 or its purpose and context.

Text

- 5.3 Setting a TAC requires the Minister to first decide what level of the stock can produce MSY. This is expressed as a percentage of unfished biomass³⁴ (% B₀ or SB₀) or as B_{MSY}. Where a stock is below MSY, s13(2)(b) requires the Minister to set a TAC that enables the level of tarakihi stock to be altered:
- a. in a way and at a rate that will result in the stock being restored to or above a level that can produce MSY, having regard to the interdependence of stocks (s 13(2)(b)(i)); and
 - b. within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock (s 13(2)(b)(ii)).
- 5.4 The Act does not define way, rate, or period. It is appropriate to rely on these terms’ normal meaning (as the High Court did³⁵). Period is the

³⁰ Sections 20 and 21. The TACC is “ultimately determined by a calculation”: Supreme Court Kahawai case, above, n 3, at [52] and [53].

³¹ Supreme Court Kahawai case, above, n 3, at [53].

³² Court of Appeal decision at [151] **05.0055**

³³ At [42].

³⁴ The population that would exist in the absence of fishing.

³⁵ At [71] **101.0085**.

length of time within which MSY is to be reached. Way refers to measures used to reach MSY. Rate refers to the relative speed at which MSY is reached within the period (which could vary within the period).

- 5.5 “Appropriate” usually means “right, or suitable”.³⁶ It is affected by context³⁷ – its meaning is ascertained by relating it to something that provides the standard of appropriateness. Here, that is “the stock” (which is East Coast tarakihi;³⁸ the rebuild period must be appropriate “to the stock”, not to fishers or fishing), with regard to its biological characteristics, and environmental considerations affecting it. The requirement to have regard to those factors reinforces the natural meaning of “appropriate to the stock”. They are “a statement of the criteria to be taken into account in determining an appropriate period within which the rebuild must occur”.^{39 40}
- 5.6 This meaning is reinforced by the immediate statutory context. Section 13 covers four scenarios: where the stock level is around MSY;⁴¹ where the stock level is below MSY;⁴² where the stock level is above MSY;⁴³ and lastly the subs (2A) scenario where either the current level of stock or the level of stock that can produce MSY is not able to be estimated reliably. Only the second scenario, when a stock is below MSY, contains the phrase “within a period appropriate to the stock”. When a stock is above MSY, its level is to be altered down towards MSY, but over any timeframe.⁴⁴ It is not necessary for the Act to direct that the alteration

³⁶ [Collins New Zealand Dictionary, First Edition 2017](#) **First Respondent BOA 11**

³⁷ *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 38 at [100], addressing the words “appropriate” and “inappropriate” in s 6 RMA and the New Zealand Coastal Policy Statement 2010 (at [100]). The Supreme Court rejected the view that appropriateness is determined on a case by case basis (at [40] and [104] – [105]) and held that the feature referred to in the statutory provision that uses the term “inappropriate” provides the standard for assessing whether something is inappropriate: “...the word inappropriate appears to relate back to the preservation of the natural character of the coastal environment: it is preservation of natural character that provides the standard for assessing whether particular subdivisions, uses or developments are “inappropriate” (at [47]). In other words, “inappropriateness” should be assessed by reference to what it is that is sought to be protected” (at [101]); see also [70], [100] – [105]. **First Respondent BOA 5**

³⁸ “Stock” is defined in s 2 as any fish, aquatic life, or seaweed of 1 or more species that are treated as a unit for the purposes of fisheries management. **Appellant BOA 1**

³⁹ Court of Appeal decision at [68] **05.0027**. The minority judgement agrees with this particular finding in the majority judgement at [231] **05.0082**

⁴⁰ In this context, “having regard to” does not mean the Minister must consider the factors but they need not influence his decision, c.f. the meaning this phrase has been given, in different statutory contexts, in other authorities e.g. *Pacific Trawling Ltd v Minister of Fisheries* HC Napier CIV 2007-441-1016, 29 August 2008 at [83]-[84] (regarding the requirement to “have regard to” a list of criteria in s 75(2)(b), which concerns the setting of interim deemed value rates). **First Respondent BOA 8**

⁴¹ Subsection 13(2)(a) **Appellant BOA 1**

⁴² Subsection 13(2)(b) **Appellant BOA 1**

⁴³ Subsection 13(2)(c) **Appellant BOA 1**

⁴⁴ Subsection 13(2)(c) **Appellant BOA 1**

downwards must happen within a period appropriate to the stock, because the stock's level is sustainable. The distinction between subs (2)(b) and (2)(c) is deliberate and meaningful. It indicates that (2)(b) is not simply concerned with moving towards MSY over any timeframe. A period is specified to ensure sustainability, and the considerations relevant to setting the period reflect that.

- 5.7 If deciding the way and rate of rebuild also decided the period of rebuild by implication (as the Minority held),⁴⁵ the requirement to rebuild “within a period appropriate to the stock” would add nothing to the provision. The same meaning could be achieved by (2)(b) simply requiring (as (2)(c) does) that the TAC must enable the level to be altered towards MSY.
- 5.8 Section 13(2)(b)(ii) can only fulfil a function if it is determined separately from social, cultural and economic factors.⁴⁶ Otherwise, the concept of rebuilding “within a period appropriate to the stock” becomes meaningless.
- 5.9 Of course, the rate at which something is done affects the period over which it happens. But the period is not simply the consequence of the chosen rate of rebuild, in the sense that any rate may be chosen. Subsection (ii) operates as a control on the rebuild period. The rate may be quicker or it may vary over the rebuild period, but must not be so slow that the rebuild period would exceed a period appropriate to (that is, be inappropriate to) the stock. The term “within”, which means “before (a period of time) has passed”, or “not beyond”⁴⁷ reinforces this.
- 5.10 Subsections (2)(b)(i) and (ii) are meant to work together. It is not possible to read (2)(b)(ii) in isolation from (2)(b)(i), because the objective of the rebuild (MSY) is in (i) and together both clauses result in the setting of a single TAC. However, as the Majority found,⁴⁸ this does not mean that a single composite enquiry is envisaged where the Minister has a wide discretion to decide on the TAC provided he has regard to all relevant considerations. The TAC must ensure the rebuild occurs in a way and at a rate that restores the stock to MSY, and the rebuild must occur within a period appropriate to the stock.⁴⁹
- 5.11 Section 13(3) requires the Minister to have regard to social, cultural, and economic factors in considering “the way in which and rate at which” a

⁴⁵ Court of Appeal decision at [230] [05.0082](#), [236(a)] [05.0084](#)

⁴⁶ Court of Appeal decision at [65] [05.0026](#)

⁴⁷ [Collins New Zealand Dictionary, First Edition 2017](#) **First Respondent BOA 12**

⁴⁸ Court of Appeal decision at [64] [05.0025](#)

⁴⁹ Court of Appeal decision at [65] [05.0026](#)

stock is moved towards or above a level that can produce MSY. The phrase “the way in which and rate at which” in s 13(3) is a direct reference to s 13(2)(b)(i) and is deliberate. If Parliament had intended those factors to be relevant to determining the rebuild period, s13(3) would also refer to the period.

- 5.12 “Social, cultural and economic factors” are a broad church. The phrase covers both methods, and impacts. It makes sense to provide for those factors to be taken into account as part of the “way or rate of rebuild” aspect of a TAC decision. If a social, cultural or economic method will assist in rebuilding a stock, the TAC reduction need not be as deep as it would otherwise need to be. It is the TAC that is affected by taking those factors into account as part of the way or rate, not the rebuild period. If a social, cultural or economic impact is of concern, it may support a slower rate of rebuild than would otherwise be applied, provided it is not so slow that it would go beyond the period appropriate to the stock.
- 5.13 The appellant relies on s 13(2A) to support its interpretation that s 13(3) applies to the overall TAC decision including determination of the rebuild period (because s 13(3) applies to subs (2A) even though (2A) does not use the terms “way” or “rate”).⁵⁰ Subsection (2A) was introduced in 2008⁵¹ and is concerned with stocks whose current or MSY-compatible level is not able to be estimated reliably. It would not be possible to determine a rebuild period appropriate to the stock, and it would be difficult to predict the rate of rebuild, for a species whose current level and/or MSY-compatible level cannot be known. As a result, subs (2A) does not use the term “way and rate” or “period appropriate to the stock”. The TAC decision for such stocks is more discretionary: it is to set a TAC that is “not inconsistent with the objective of” moving the stock towards or above MSY. Where it is possible to consider the way and rate of rebuild as part of that assessment, s 13(3) applies (hence 13(3) refers to “(2A) (if applicable)”). The relationship between s 13(3) and s 13(2A) does not support the appellant’s interpretation.
- 5.14 The appellant also relies on the placement of “interdependence of stocks” in (b)(i).⁵² The second respondent disagrees that this counts against the Majority’s interpretation. Reducing the TAC for a stock can impact on other stocks (i.e the fish themselves) and/or fishers’ ability to exploit their annual catch entitlement (“**ACE**”) for another stock, and it is

⁵⁰ At [51.3]-[51.5]

⁵¹ Fisheries Act 1996 Amendment Act 2008. **First Respondent BOA 2**

⁵² At [48.3(a)]

appropriate to consider those impacts when considering the way and rate of rebuild. That concept is not relevant to assessing what rebuild period is appropriate for a stock. If it were part of the s 13(2)(b)(ii) assessment, it would enable a rebuild period to be set that is longer than would otherwise be appropriate to the stock, on the basis that a shorter period would impact fishers' ability to exploit their ACE for other stocks (essentially a socio-economic consideration).⁵³ The placement of "interdependence of stocks" in subs 2(b)(i) is intentional.

Purpose

5.15 The Majority's interpretation is supported by the purpose of the Act and the purpose of s 13. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability. "Ensuring sustainability" means "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations"; and "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.⁵⁴

5.16 The appellant's submission that the definitions of utilisation and ensuring sustainability are both concerned with the ability of fish stocks to be used, now (utilisation) and in the future (sustainability), are only partly accurate.⁵⁵ "Utilisation" is concerned not only with using fisheries resources but also with conserving, enhancing and developing them. The Supreme Court Kahawai case⁵⁶ highlighted the importance of "conserving"⁵⁷ in the definition of utilisation.⁵⁸ "Ensuring sustainability" is not only concerned with a stock's ability to persist and thus provide for future generations' fishing needs,⁵⁹ but also with fishing's effects on the aquatic environment.⁶⁰ The aquatic environment is "the natural and biological resources comprising any aquatic ecosystem", and includes

⁵³ This issue arose in a recent preliminary ruling by the International Court of Justice following a request from the High Court (Ireland): *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine* ECLI:EU:C:2024:19 in which considerations relating to the interdependence of stocks resulted in a decision not to follow advice that a zero-catch limit should be set in order to achieve the requirement in Article 2(2) of Regulation 1380/2013 for a MSY-compatible exploitation rate to be achieved by 2020. **First Respondent BOA 7**

⁵⁴ [Section 8 Appellant's BOA 1](#)

⁵⁵ Appellant's submissions at [\[55\]](#)

⁵⁶ Above, n 3, at [\[40\]](#). **Appellant's BOA 18**

⁵⁷ Defined in [s 2](#) as maintenance or restoration of fisheries resources for their future use

Appellant's BOA 1

⁵⁸ Supreme Court Kahawai case, above, n 3, at [\[39\] - \[40\]](#) **Appellant's BOA 18**

⁵⁹ [Section 8\(2\)\(a\) Appellant's BOA 1](#)

⁶⁰ [Section 8\(2\)\(b\) Appellant's BOA 1](#)

“all aquatic life and the oceans, seas, coastal areas, inter-tidal areas, estuaries, rivers, lakes, and other places where aquatic life exists”.⁶¹ The tension that the Act seeks to address is not just between short-term and longer-term utilisation,⁶² but also between fishing⁶³ and the health of the aquatic environment. The environmental principles⁶⁴ reinforce this.

- 5.17 The appellant’s submission that the two social policy objectives in the purpose must be “balanced” is also incorrect. The implication is that both objectives carry equal weight. This ignores the language of s 8. Utilisation is to be provided for while sustainability is to be ensured. That does not connote a balance, but rather a higher weighting (or “ultimate priority”⁶⁵) for sustainability.^{66,67} That precedence of sustainability over utilisation would not be achieved through a simple composite decision under s 13(2)(b).⁶⁸ Rebuilding within a period that is biologically and environmentally appropriate to the stock is necessary to ensure sustainability.
- 5.18 The relationship between utilisation, sustainability and MSY is illustrated in Figure 1 in the Minister’s submissions⁶⁹ (note the version of this figure reproduced in the appellant’s submissions⁷⁰ is incomplete, as it omits the reference to sustainability). At MSY, 60% of the unfished tarakihi biomass is removed by fishing, i.e. dedicated to the “use” component of utilisation. Where a stock’s level is below MSY due to overfishing, too much “use” has been allowed at the expense of sustainability. The purpose of s 13 is to require that the TAC maintains the correct relationship between utilisation and sustainability or restores that relationship where it has gone awry.

⁶¹ [Section 2 Appellant’s BOA 1](#)

⁶² C.f. Minority judgment at [169] [05.0060](#)

⁶³ In summary, the catching taking or harvesting. [See s 2 for full definition. Appellant’s BOA 1](#)

⁶⁴ [Section 9 Appellant’s BOA 1](#)

⁶⁵ Supreme Court Kahawai case, above, n 3, at [40] [Appellant’s BOA 18](#)

⁶⁶ That approach is consistent with UNCLOS, which provides for optimum utilisation in [Art 62](#) “without prejudice to” the requirement in [Art 61](#) to ensure living resources are not endangered by over-exploitation. [Appellant’s BOA 29](#)

⁶⁷ In *Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 the Court described the purpose of the Act as broadly “to create and environmental “bottom-line” of sustainability” at [11]. [First Respondent’s BOA 6](#)

⁶⁸ Court of Appeal decision at [64] [05.0026](#)

⁶⁹ [At \[37\]](#).

⁷⁰ [At \[32\]](#).

5.19 The submission that the Majority focussed only on the sustainability part of the purpose⁷¹ is clearly incorrect,⁷² as is the submission that the Majority implied setting a TAC should be solely based on sustainability.⁷³

Context

Section 5 of the Act: International obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act

5.20 The majority's interpretation is consistent with international obligations. The United Nations Convention on the Law of the Sea ("**UNCLOS**") Art 61 (Conservation of the living resources) and Art 62 (Utilisation of the living resources) are relevant. Under Art 61, coastal states determine the allowable catch of living resources in their economic zones.⁷⁴ Coastal states, taking into account the best scientific evidence available, must ensure through proper conservation and management measures that maintenance of the living resources in their exclusive economic zone is not endangered by over-exploitation.⁷⁵ Such measures must also be designed to maintain or restore populations of harvested species at levels which can produce the MSY, as qualified by relevant environmental and economic factors.⁷⁶

5.21 Under Art 62, coastal states must promote the objective of optimum utilisation "without prejudice to article 61".⁷⁷ Thus UNCLOS preferences conservation over utilisation where the two would conflict. When and where economic factors are made relevant is up to the coastal state. The framing of s 13(2)(b), in which the maximum rebuild period is based on biological and environmental considerations, and the way and rate of achieving the rebuild within that period takes into account economic factors, is consistent with Art 61(3) and 62, and provides for Art 61(2).

5.22 The Majority's interpretation is consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act. The Settlement Act is to be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement 1992.⁷⁸ A core feature of the Deed was Māori endorsement of the QMS and acknowledgement "that it is a lawful and appropriate

⁷¹ Appellant's submissions at [27.2], [54].

⁷² See Court of Appeal decision at [12]-[14], [27], [64], [72], and [77] where the Majority correctly discusses the relationship between utilisation and sustainability in the Act's purpose. [05.0006](#), [05.0013](#), [05.0026](#), [05.0028](#), [05.0030](#)

⁷³ Appellant's submissions at [64.3]

⁷⁴ [Art 61\(1\) Appellant BOA 29](#)

⁷⁵ [Art 61\(2\) Appellant BOA 29](#)

⁷⁶ [Art 61\(3\) Appellant BOA 29](#)

⁷⁷ [Art 62\(1\) Appellant BOA 8](#)

⁷⁸ Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, [s 3 Appellant's BOA 8](#)

regime for the sustainable management of commercial fishing in New Zealand".⁷⁹ Rebuilding overfished stocks within a period appropriate to the stock is part of the QMS. In return for provision of quota and an interest in Sealords, the Settlement Act declared commercial fishing claims to be acknowledged and satisfied.⁸⁰ In terms of non-commercial fishing, the Settlement Act acknowledges that Treaty obligations on the Crown continue, and provides (inter alia) for regulations to recognise and provide for customary takes.⁸¹ Nothing in the Settlement Act or the Deed of Settlement that underlies it infers that cultural, economic or social considerations must be taken into account in determining what rebuild period is appropriate to a stock under s 13(2)(b).

5.23 The appellant says s 13(3) has no real utility to Māori commercial and non-commercial interests if it only applies to the way and rate of rebuild, which is not consistent with s 13(3)'s role in ensuring Māori interests are taken into account as a result of the fisheries settlement.⁸² The first respondent disagrees that interpreting s 13(3) according to its terms has no real utility for Māori. To the contrary, cultural factors have the ability to significantly alter a TAC. For example, methods with their origin in te ao Māori (such as rāhui and mataitai) could form part of the "way" of rebuild, assisting with the rebuild and enabling a smaller TAC reduction than would otherwise be required. Lastly, the first respondent disagrees with the implication⁸³ that Māori interests would always support a longer rebuild period than is otherwise appropriate to the stock.

Section 11 of the Act: sustainability measures

5.24 A TAC is a sustainability measure⁸⁴, so s 11 applies. In essence, s 11 requires the Minister to consider the environmental, statutory and policy context within which their decision is made. The matters in s 11, including past and current effects of fishing are, of course, relevant context for a TAC decision.⁸⁵ They are (logically, and according to s 11) matters to be taken into account at the front end of decision-making, when deciding if a sustainability measure, like a TAC needs to be set or

⁷⁹ 1992 Deed of Settlement, [Clause 4.2](#). **Appellant BOA 30**

⁸⁰ [Section 9](#). **Appellant BOA 1**

⁸¹ [Section 10](#). **Appellant BOA 1**

⁸² At [71].

⁸³ Appellant's submissions at [69]-[70].

⁸⁴ [Section 11\(3\)\(a\)](#). **Appellant BOA 1**

⁸⁵ Primarily to assessing "the level of any stock whose current level is below..." in s 13(2)(b)), and how future fishing effects on a stock will affect the rate of rebuild under s 13(2)(b)(i).

varied.⁸⁶ But the effects of fishing are not relevant to, or used for establishing, a rebuild period appropriate to the stock. The need to understand the current level of the stock as part of a s 13(2) decision and as an effect of fishing under s 11 does not mean that deciding on a rebuild period inevitably involves social or economic factors.⁸⁷ Nothing in s 11 is inconsistent with the Majority's interpretation.

Relevance that decision is made by the Minister

- 5.25 Goddard J found support for his interpretation from the choice of decision-maker in s 13.⁸⁸ He inferred that the Minister makes TAC decisions because the decisions "involve difficult trade-offs ... [which] are quintessentially political decisions ... for which he is politically accountable".⁸⁹
- 5.26 The first respondent accepts that the choice of decision-maker can be relevant context for interpretation of a statutory power of decision,⁹⁰ but disagrees that statutory decision-making powers given to Ministers are always trade-offs involving broad discretion, or that it can be inferred that s 13(2)(b) specifically involves a trade-off/political decision with broad discretion.
- 5.27 The Minister's s13 decision is administrative, undertaken in his executive role. The judiciary's role is to interpret and apply the law. This separation of the Court's role and powers from those of the executive (and legislature) is intended to prevent abuses of power, as each branch acts as a check on the other. For the Court to treat a statutory power of decision as involving a political trade-off, without very clear indications to that effect, is constitutionally unattractive.⁹¹ The Minister cannot decline to rebuild to MSY on the basis that he prefers a trade-off that

⁸⁶ Section 11(1) empowers the Minister to set or vary a sustainability measure "after taking into account" the matters in (1)(a)-(c). Similarly, subs (2) "Before" setting or varying any sustainability measure the Minister "shall have regard to any provisions" of listed plans, regulations, and statutes.

⁸⁷ C.f. appellant's submissions at [7] and [48.3].

⁸⁸ The appellant makes submissions to the same effect at [43] and [61.2].

⁸⁹ Court of Appeal decision at [162] **05.0058**

⁹⁰ For example, where the decision involves expert or specialist judgments (although the decision-maker's identity is likely to be more relevant to the breadth of mandatory relevant considerations and to the extent of Court deference (e.g. as in *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 (SC) at [55]) than to the resolution of two competing interpretations of specific words in a provision). **Appellant BOA 19**

⁹¹ C.f. *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington, CP237/95, 24 April 1997 at pg 107: "The courts will not attempt to control questions of introduction, content, passage, or amendment of legislation. That is political country, and Parliament's world ... Once the legislation is passed, the courts will strictly enforce its terms as finally set down...."

would maintain stocks below MSY. It is not apparent why other parts of the s 13 decision would nonetheless be a political trade-off.

- 5.28 It is common for statutory powers of decision to involve the exercise of a discretion within limits,⁹² and this is particularly common in statutes that manage human use of, and impacts on, natural resources. The latter generally require a range of human and environmental factors to be taken into account and often provide a significant degree of discretion, but within parameters designed to avoid inappropriate impacts. That framework applies even where the Minister is the decision-maker.⁹³
- 5.29 Statutory powers of decision must be exercised in accordance with the Act's purpose,⁹⁴ which here preferences sustainability over utilisation. Decisions according with that prioritisation are not trade-offs.

Legislative history

- 5.30 The first respondent relies on the Majority's analysis of the legislative history. The approach to setting the TAC was discussed by the Primary Production Committee when the Fisheries Bill 1996 was being considered.⁹⁵ The Committee considered a provision in the Bill that would have enabled the Minister to set a TAC below that which would produce MSY. The Committee recommended that the clause be deleted, on the basis that this provision could result in unsustainable catch limits being set. It considered that sustainability concerns should be the key factor used to determine a TAC and that social, cultural and economic factors should only be relevant to the way and rate of moving towards a sustainable level. The Select Committee considered this would be consistent with UNCLOS, does not detract from the philosophy that

⁹² For example, the power to make and review rates under the Rating Powers Act 1998 (repealed), where local authorities had very wide rating powers to carry out their functions for the benefit of the community and "the legislation proceeds on the premise that the wider substantive judgments are made by the popularly elected representatives exercising a broad political assessment", the broad discretion is nonetheless subject to "statutory limits on the maximum general rate and percentage limits on uniform charges": *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) at 544-545 **First Respondent BOA 10**

⁹³ E.g. Resource Management Act ss46A and 43A (Minister's power to make national environmental standards) involve a broad discretion, subject to a limit that activities with significant adverse effects on the environment must not be allowed by a national environmental standard (s 43A(3)) **First Respondent BOA 3**; Conservation Act 1987 s 17U (broad power to grant or decline a concession after having regard to evaluative considerations (s 17U(1)) is subject to limitation the Minister must not grant an application if the activity is contrary to the purpose for which the land is held (s 17U(3)) **First Respondent BOA 1**

⁹⁴ *Unison Networks* above, n 90, at [50]. **Appellant BOA 19**

⁹⁵ Primary Production Committee, "Report on the Fisheries Bill", 1996 **Appellant BOA 23**

setting a TAC should be primarily based on sustainability concerns, and would recognise recent management practice.^{96,97}

- 5.31 The original text of s 13(2)(b)(ii)⁹⁸ was “within a period appropriate to the stock and its biological characteristics.” In this version, it was even clearer that the period is determined by reference to the stock and its biological characteristics . At that stage, “environmental conditions” was part of s 13(2)(b)(i). However, there was a concern that this could be interpreted as meaning that environmental conditions qualified MSY itself.⁹⁹ The Departmental Report explains that “environmental conditions” was moved to s 13(2)(b)(ii) in order to clarify that environmental conditions qualify the period of rebuild not MSY (“the target stock level”).¹⁰⁰
- 5.32 The language was changed to refer to “having regard to” biological and environmental considerations at the same time. The intention in so doing was clearly to provide a workable syntax, not to provide for additional considerations to be taken into account.
- 5.33 The Minority judgment relies on a reference in the explanatory note to the Fisheries (Remedial Issues) Amendment Bill 1997 on this change. The passage refers to “the rate at which a stock size will change” in relation to subs (2)(b)(ii).¹⁰¹ The inference drawn is that rate and period were recognised as being two sides of the same coin. Respectfully, this takes too much from the explanatory note. The point being made in the Bill is the same as the issue discussed in the Departmental Report: that “environmental conditions” might be thought to qualify MSY itself if it remained in subs (i).

Authorities

- 5.34 The first respondent relies on the Majority’s analysis of the relevant authorities at [73] – [85]¹⁰² and its conclusion that, to the extent previous cases have included observations about the interpretation of s 13(3), the

⁹⁶ Primary Production Committee, [“Report on the Fisheries Bill”, 1996 at xi](#) **Appellant BOA 23**

⁹⁷ The appellant seeks to infer that the Select Committee’s reference to “recent management practice” meant taking social, cultural and economic factors into account in determining the rebuild period (at 65). The Select Committee does not mention the “period appropriate to the stock”, it refers only to the way and rate, and this is in the context of reviewing a proposal to allow a stock’s level to be maintained below MSY. This inference is not supported by the text.

⁹⁸ [Fisheries Act historic version](#) (1 October 1996 to 22 June 1998) **Appellant BOA 24**

⁹⁹ Fisheries (Remedial Issues) Amendment Bill: Departmental Report [at paragraph 41](#): “transient environmental conditions should not be used to modify the target stock level.” **Appellant BOA 25**

¹⁰⁰ Fisheries (Remedial Issues) Amendment Bill: Departmental Report [at paragraph 39](#) **Appellant BOA 25**

¹⁰¹ At [237] **05.0085** referencing Fisheries (Remedial Issues) Amendment Bill (No. 97-1) [at clause 5](#) **Appellant BOA 26**

¹⁰² Court of Appeal decision **05.0029**

observations support the High Court's¹⁰³ (and Majority's) interpretation. The authorities relied on by the appellant do not assist it.¹⁰⁴ The Orange Roughy case¹⁰⁵ was decided under different legislation that did not contain any reference to the period appropriate to the stock and the Snapper¹⁰⁶ case does not say that social and economic impacts are able to be taken into account when considering the rebuild period.

Minority's interpretation

- 5.35 The Minority analysis proceeds on the basis that if regard is had only to the biological characteristics of the stock and any environmental conditions affecting the stock, "a period appropriate to the stock" *must* equate to T_{min} , and 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 those factors.¹⁰⁷
- 5.36 T_{min} refers to the theoretical number of years in which a stock could be rebuilt to MSY in the absence of fishing. A rebuild period that is appropriate to a stock, having regard to biology and environmental conditions, does not necessarily equate to T_{min} . It is simply the period beyond which it would be *inappropriate*, having regard to the stock's biology and environmental conditions, to prolong the return to B_{MSY} . Section 13(2)(b)(ii) does not say "within the shortest possible rebuild period having regard to biological characteristics and environmental conditions".
- 5.37 Having assessed T_{min} as the only possible interpretation of "period appropriate to the stock, having regard to the biological characteristics of the stock...", and determining this to be incompatible with taking social, cultural and economic factors into account, the Minority judgment then reasons that the Minister's decision simply requires them to have regard to a suite of relevant considerations when deciding the TAC.¹⁰⁸ On that basis, the "period appropriate to the stock" is the expected number of years that results from the TAC decision, not a maximum period.¹⁰⁹

¹⁰³ At [82] – [91] [101.0089 - 101.0092](#)

¹⁰⁴ C.f. appellant's submissions at [65]

¹⁰⁵ *Greenpeace New Zealand Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 **Appellant BOA 13**

¹⁰⁶ *New Zealand Fishing Industry Assoc (Inc) v Minister of Fisheries* CA 82/97, 22 July 1997 **Appellant BOA 15**

¹⁰⁷ At [232] [05.0083](#) and [236] [05.0084](#). The Appellant also takes this position.

¹⁰⁸ At [239] [05.0085](#)

¹⁰⁹ At [230(a)] [05.0082](#)

- 5.38 There are several difficulties with this analysis. First, it makes the selection of a TAC the determinative step, with the rebuild period being merely an output of that selection, whereas the framing of s 13 indicates the available TAC is an output of the Minister's consideration and application of s 13(2)(b)(i) and (ii) and 13(3). Second, it converts the direction to set a TAC that "enables" the rebuild "within a period appropriate to the stock" into a requirement to *have regard to T_{min}* alongside other relevant considerations. That is a major departure from the language of s 13. Third, it provides no standard for "appropriate", other than "the period the Minister chooses", making s 13(2)(b)(ii) redundant.
- 5.39 The Minority purports to give subs (2)(b)(ii) a role in the TAC decision by stating that the Minister needs to identify the expected rebuild period, generated from the way and rate determination, and consider whether it is appropriate to the stock.¹¹⁰ This, according to the Minority, means an appropriate period taking biological, environmental, social, cultural and economic considerations into account.¹¹¹ However, biological and environmental considerations "do not indicate factors that the Minister may or may not treat as influential ... the Minister is required to consider and act on those factors").¹¹²
- 5.40 Respectfully, however, there is a logical inconsistency in this analysis, which stems from the Minority's approach to T_{min} . If, as the Minority judgment initially found, the period appropriate to the stock having regard exclusively to biological and environmental conditions could only be T_{min} , then a rebuild period greater than T_{min} cannot be appropriate to the stock having regard to biological and environmental considerations – those considerations will not have been treated as influential, nor will they have been "acted on". They will have been considered but overridden by other considerations.

Other parties' submissions

Minister's submissions

- 5.41 The Minister's interpretation accords in substance with the Majority's findings and the first respondent's position. The Minister agrees that the period must not be longer than would be supported by biological and environmental considerations¹¹³, but prefers that this be assessed by

¹¹⁰ At [230(b)] [05.0082](#)

¹¹¹ At [230] [05.0082](#)

¹¹² At [231] [05.0082](#)

¹¹³ At [47].

cross-checking against the period produced by the desired way and rate. This accords with the Majority's findings, though the Majority considered identifying the period first would be more practical.¹¹⁴ It is thus unclear why the Minister seeks that the appeal is allowed.

Appellant's submissions

- 5.42 The appellant says the Majority's interpretation is unworkable and contradictory because it prevents any utilisation while the rebuild occurs.¹¹⁵ That is based on the premise that the period appropriate to the stock without taking social, economic and cultural factors into account is T_{\min} (addressed above in response to the Minority). The Majority did not "implicitly accept" that if only scientific factors taken into account, the period is T_{\min} .¹¹⁶
- 5.43 The appellant criticises the Majority's observation that the consensus of scientific opinion as to best practice for a rebuild period is reflected in the HSS, which builds in an allowance for some fishing to recognise general social, cultural and economic factors ($2 * T_{\min}$), but this does not authorise the Minister to make further allowance for those factors specific to the case at hand.¹¹⁷ The first respondent respectfully also disagrees with this part of the Majority's reasoning. If those considerations are irrelevant, they are not legitimised because of scientific consensus. On this issue, the HSS represents best practice within the legal framework that was understood, by Fisheries NZ scientists and policy-makers to apply to rebuild periods.¹¹⁸ The rebuild period appropriate to the stock should be determined on the basis of a stock's biology and environmental conditions affecting it.
- 5.44 The appellant infers that the Majority was motivated by its concern that an "excessively long rebuild period" could be set,¹¹⁹ and says interpretation should not be based on assuming a decision maker cannot be relied on to make a bona fide decision that has regard to the specified criteria.¹²⁰ The Majority's interpretation was premised on the text of s 13 in light of its purpose and context, not on impugning future

¹¹⁴ Decision at [94] [05.0036](#)

¹¹⁵ At [9], [27.3], [73], [79].

¹¹⁶ At [79.1].

¹¹⁷ At [87] – [91].

¹¹⁸ That is not to say that period up to $2 * T_{\min}$ is not "appropriate to the stock" having regard only to biological and environmental factors. It may well be scientifically justifiable on those considerations only. There is a difference between a period that is determined scientifically but has an outcome of permitting fishing while a rebuild occurs, and a period that is set for the purpose of allowing fishing to occur.

¹¹⁹ At [60].

¹²⁰ At [61.3].

Ministerial decisions. Preferencing an interpretation that would not enable excessively long rebuild periods is consistent with the Act's purpose.

- 5.45 The statement about global practices at [66] is evidence from the bar and should be disregarded. The remainder of the appellant's submissions have been addressed above.

The Minister's decision

- 5.46 For both the 2018 and 2019 TAC/TACC decisions, the Minister decided that MSY for tarakihi was 40% SB₀ based on best available information.¹²¹
- 5.47 In 2018, the Minister decided that the appropriate period to rebuild the East Coast tarakihi stock was 10 years. He recorded that this would require a 55% reduction in TACC. However, the Minister did not reduce the TAC or TACC by that amount; instead he decided to take a "phased approach" to mitigate the impact on the commercial sector. He reduced the TACC by 20% for each East Coast tarakihi FMA but indicated that a further 35% in commercial catch reduction would most likely be required in 2019 in order to rebuild within 10 years.¹²² The Minister noted 50% was "not a particularly high probability of rebuild" but rebuilding with more certainty would "require even larger reductions". He considered a probability of 50% reasonable given the status of the stock, the size of the rebuild required, and the socio-economic impact associated with achieving a rebuild with greater certainty.^{123, 124}
- 5.48 In 2019, the Minister decided to adopt an approach involving a 10% decrease in the TACC¹²⁵ and adoption of the IRP, plus on-board cameras.¹²⁶ Based on the TAC, the rebuild timeframe would be 25 years with 50% probability. Although not addressed in the advice, relying on that TAC reduction to rebuild to MSY with a 70% probability would have taken more than 30 years (a precise period cannot be given as projections beyond 30 years were not reported).¹²⁷ Fisheries NZ could not give a timeframe on rebuild if the IRP was taken into account, but stated: "There is uncertainty as to whether the IRP will deliver an

¹²¹ Exhibit DP7 [305.1121](#), Exhibit DP10 [305.1328](#)

¹²² Exhibit DP7 [305.1122](#)

¹²³ Exhibit DP7 [305.1122](#)

¹²⁴ The Minister confirms this approach in his affidavit at [27] [201.0110](#)

¹²⁵ Equating to a reduction of 6.4% in the TACC

¹²⁶ Exhibit DP8 [305.1191](#)

¹²⁷ Affidavit of Mark Griffith at [31.1] [201.0088](#)

accelerated rate of rebuild. However, to provide certainty, industry have committed to a maximum 20 year rebuild timeframe...¹²⁸

- 5.49 Fisheries NZ did not provide advice on what rebuild period would be appropriate to the stock. The Minister did not say what rebuild period would be appropriate for the stock, but noted the IRP committed to a timeframe of 20 years.^{129,130}
- 5.50 Addressing the change from a 10 year to a 20 (or more) year rebuild period in his affidavit, the Minister said:¹³¹

The science advice indicated the further TAC and TACC reductions in 2019 (alone) would have a 50% probability of rebuilding East Coast tarakihi within 25 years. However in addition to the TAC and TACC cuts the [IRP] commits to a maximum rebuild timeframe of 20 years. Although this is a longer time period than I favoured in 2018, and a departure from the HSS, I concluded that by working in partnership with key industry participants, and acknowledging the innovative measures the government had either introduced, or was seeking to introduce, this time frame was likely to be a 'worst case scenario'. I also concluded that a genuine 'mood for change' had occurred within the industry and the vast majority of participants sought to proactively adopt, and in many cases, fast-track, technologies and fishing practices that would, in my mind at least, ensure continuity of employment and fishery rebuild.

- 5.51 In deciding the 2019 TAC, the Minister did not determine an appropriate rebuild period for tarakihi having regard to biological characteristics of tarakihi and any environmental factors affecting tarakihi. He did not turn his mind to what the "appropriate" rebuild period should be. The Minister's 2019 decision shows he considered that he was entitled to take social, cultural and economic considerations into account and balance¹³² those factors alongside sustainability in setting a rebuild period. The Minister at least doubled the rebuild period from 2018 to 2019. He did not give reasons based on biology or environmental conditions for doubling the rebuild period; he considered he was able to do so by reference to social and economic considerations and his perception of industry's 'mood for change'. That approach reflected an

¹²⁸ Exhibit DP8 [305.1168](#)

¹²⁹ Exhibit DP10 [305.1327](#)

¹³⁰ C.f. Appellant's submissions at [\[24.1\]](#) that the Minister "was satisfied that an appropriate rebuild period was 20 years".

¹³¹ Affidavit of Stuart Nash [201.0114](#)

¹³² The Minister's decision refers to "balanc[ing]" economic impacts with the sustainability of the fishery: [305.1328](#)

incorrect interpretation of s 13(2)(b), as found by the High Court¹³³ and the Majority.¹³⁴

5.52 In making the 2019 TAC decision, the Minister relied on the IRP and industry's "commitment" to a 20 year rebuild timeframe. The IRP is not relevant to determining a period appropriate to the stock having regard to biology and environmental considerations. Some of the measures in the IRP might assist in rebuilding the stock (for example, it includes research projects that have the potential to assist with rebuild in the future). Those measures could be relevant to the "way and rate" of rebuild and could be relied on in setting a TAC if the Minister were sufficiently certain that they would enable (assist) the rebuild. The measures in the IRP are not relevant to the rebuild period appropriate to the stock. Even if the IRP is effective in rebuilding the stock, its adoption does not explain the doubling of the rebuild period compared to 2018. The Majority's finding that the IRP was irrelevant in determining the appropriate period under s 13(2)(b)(ii) was correct.

6. ISSUE 2

6.1 The Minister failed to have regard to the minimum standard of "acceptable probability" of 70% in the HSS and supporting OG for rebuilding stocks that have been depleted below the "soft limit", and the reasons given for that higher probability, when those matters were mandatory relevant considerations.

6.2 Probability is an integral component of setting a TAC. The probability of a stock being at MSY at the end of the rebuild affects the rebuild period. The higher the probability, the longer the period to achieve MSY (it will take longer to reach MSY with a 70% probability than with a 50% probability). For a given period, a larger TAC reduction will be needed if a higher probability is used (the TAC that enables rebuild to MSY within 20 years with 70% probability will be lower than the TAC that enables that rebuild with 50% probability).^{135, 136}

¹³³ At [109] [101.0096](#)

¹³⁴ At [94] [05.0036](#)

¹³⁵ Probability in this context is described by Dr Dunn at [62] to [65] of his affidavit, and shown diagrammatically in his Figure 1 [201.0025 – 201.0026](#)

¹³⁶ Dr Mace's evidence for the Minister also explains what probability means in this context: When referring to the probability of rebuild, a 50% probability does not mean a 50% chance of rebuild versus a 50% chance of not rebuilding at all. Rather, the 50% probability level should be thought of as the median of a distribution around the target, rather like a bell-curve (although usually a slightly different shape). In other words, there will be a 49% probability of being somewhat above the target and a 49% chance of being somewhat below. There will also be a 20% probability of being well above and a 20% chance of being well below: Affidavit of Dr Pamela Mace at [30] [201.0102](#)

- 6.3 Fisheries NZ advised the Minister that the rebuild period for Option 4 based on the TAC would be 25 years.¹³⁷ That was the rebuild period using a 50 per cent probability.¹³⁸ A 50% probability equates to the rebuild being “about as likely as not”.¹³⁹ Although not stated in the advice, rebuilding to MSY with a 70% probability under Option 4 would take “more than 30 years” (a precise period could not be given as projections beyond 30 years were not reported).¹⁴⁰
- 6.4 Fisheries NZ advised the Minister that when a stock declines below the soft limit the HSS recommends a formal, time-constrained, rebuilding plan that aims to restore the stock to the target within a time period of T_{\min} to $2 * T_{\min}$ with a 50 per cent probability.¹⁴¹ That advice was given alongside Fisheries NZ advice that the HSS is “a policy statement of best practice” that is “intended to provide guidance as to how fisheries law will be applied in practice by establishing a consistent and transparent framework for decision-making” that “outlines the Ministry’s approach to relevant sections of the Fisheries Act”.¹⁴²
- 6.5 The HSS and the OG provide that a 70 per cent probability should be used where a stock is depleted below the soft limit, and give reasons for that probability rather than 50 per cent.¹⁴³ That information was, in the context of this decision and the HSS information provided by Fisheries NZ, a mandatory relevant consideration.
- 6.6 The 70 per cent probability and reasons for it also had to be considered due to the information principles in s 10(1) and (2).

Issue 2(a): Interpretation of HSS

- 6.7 The appellant says that a 70% probability is not referred to in the HSS, which only says that the timeframe should have an “acceptable probability”, and that the reference to 70% in the HSS deals with “the position at the end of the rebuild”.¹⁴⁴ That is an incorrect interpretation.
- 6.8 Under the heading “Core Elements of the Harvest Strategy Standard”, the HSS objective is (emphasis added):¹⁴⁵

¹³⁷ Exhibit DP8 [305.1167](#)

¹³⁸ Affidavit of Marc Griffith at 31.1 [201.0088](#)

¹³⁹ Affidavit of Dr Dunn at [73] [201.0028](#)

¹⁴⁰ Affidavit of Mark Griffith at [31.1] [201.0088](#)

¹⁴¹ Exhibit DP8 [305.1126](#) at [305.1161](#)

¹⁴² Exhibit DP8 [305.1126](#) at [305.1152](#)

¹⁴³ As set out in detail at paragraphs 6.7 – 6.13 below.

¹⁴⁴ At [90].

¹⁴⁵ Exhibit MD3 [303.0628](#)

... to provide a consistent and transparent framework for setting fishery and stock targets and limits and associated fisheries management measures, so that there is a high probability of achieving targets, a very low probability of breaching limits, **and acceptable probabilities of rebuilding stocks that nevertheless become depleted**, in a timely manner. **The Harvest Strategy Standard specifies appropriate probabilities that will achieve each of these outcomes.**

6.9 The HSS provides that when a stock drops below the soft limit a formal, time-constrained, rebuilding plan is required. It includes the following Specifications:¹⁴⁶

- Stocks that have fallen below the soft limit should be rebuilt within a time period between T_{\min} and $2 * T_{\min}$ with an acceptable probability. [third specification]
- 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 *and* there is at least a 50% probability that the stock is above the soft limit. [fourth specification]

[As a footnote to the Specification above:] 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 by using a probability as low as 50%.

6.10 The Court of Appeal found that the HSS specifies a default minimum acceptable probability standard for a rebuild plan of 70 per cent. It reached that interpretation on the basis that reading the fourth specification as supplementing or explaining the third specification is the more natural construction, would fulfil the stated objective of the HSS, would be consistent with the format of the first and second specifications, and would be consistent with the prospective view taken in the explanatory footnote.¹⁴⁷

6.11 The first respondent supports the Majority's interpretation, and also submits that it would be illogical to read the 70% probability specification as applying only at the end of a rebuild. The HSS defines "rebuilt" as having 70% probability of being at least at the target level. The position at the end of the rebuild is affected by the trajectory chosen at the start of the rebuild. If the chosen TAC would enable a stock to rebuild in 10 years with a 50 per cent probability, at year 10 there will still be several more years (say 5) of further rebuilding required before it is rebuilt with 70 per cent probability. That constitutes a plan to rebuild within 15 years,

¹⁴⁶ Exhibit MD3, clause 22 [303.0637](#)

¹⁴⁷ Court of Appeal decision at [120] – [122] [05.0045](#)

not 10 years. The requirement to rebuild with an acceptable probability cannot be divorced from the specification that “rebuilt” means it can be demonstrated that there is at least a 70% probability that the target has been achieved.

6.12 The OG confirms that interpretation. Consistent with the HSS, the OG says (emphasis added):¹⁴⁸

For both limits [soft limit and hard limit], the ultimate goal is to ensure full rebuilding of the stock to the biomass target **with an acceptable probability (70%)** The reason for requiring a probability level greater than 50% is that a stock that has been severely depleted is likely to have a distorted age structure (an over-reliance on juvenile fish, with relatively few large, highly fecund fish). In such instances it is necessary to rebuild both the biomass and the age composition.

...

... **The minimum standard for a rebuilding plan is that 70% of the projected trajectories will result in the achievement of a target based on MSY-compatible reference points or better** within the timeframe of T_{MIN} to $2 * T_{MIN}$. This **equates to a probability of 70% that the stock will be above the target level at the end of the timeframe.**

6.13 The OG refers to 70 per cent as “the minimum standard for a rebuilding plan” which “equates to” a 70 per cent probability at the end of the rebuild. It is unlikely these two documents would take a fundamentally different approach on something that is an integral element of rebuilding plans.

Issue 2(b): Default probability and reasons for it were mandatory relevant considerations

6.14 The High Court held that probability is an inherent component of the requirement to set a TAC that will result in the stock being restored to a level that can produce MSY, not simply something to be assessed at a later point in the rebuild process, and therefore the Minister was required to identify a probability level at the time of setting the TAC.¹⁴⁹ The Court held that the Minister failed to take mandatory relevant considerations into account.¹⁵⁰ The Court of Appeal agreed.¹⁵¹

¹⁴⁸ Exhibit MD2 page 10 - 12 [303.0559 - 303.0561](#)

¹⁴⁹ High Court decision at [127] [101.0100](#)

¹⁵⁰ At [168] [101.0110](#)

¹⁵¹ At [149] [05.0054](#)

- 6.15 The first respondent supports those findings. It submits that there are three reasons why the default probability of 70% and the reasons for it were mandatory relevant considerations.

Minister required to be adequately informed

- 6.16 A duty to exercise a statutory discretion on reasonable grounds necessarily requires that the Minister be adequately informed as to the relevant considerations and that he or she take them into account.¹⁵² If a decision-maker ignores or acts in defiance of an incontrovertible fact or an established and recognised body of opinion, which is plainly relevant to the decision to be made — in a sense that Parliament must have intended it to be taken into account — the decision may be invalidated.¹⁵³
- 6.17 *Bushell v Secretary of State for the Environment*¹⁵⁴ is authority that discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he or she will have available to them in arriving at their decision the collective knowledge, experience and expertise of the department that the Minister heads. The collective knowledge, technical as well as factual, of the department and their collective expertise is to be treated as the minister's own knowledge.¹⁵⁵ However, as was held in *Air Nelson Ltd v Ministry of Transport*:¹⁵⁶

Bushell circumscribes this unarticulated discretion of the Minister's staff to act in the Minister's name by requiring that the Minister be apprised of the key aspects of the officials' findings. This is reflected in Lord Diplock's reference to the provision by the relevant officials to the Minister of a "fair, accurate and adequate report" on the various objections, the arguments for and against them and, if appropriate, the merits. As Lord Diplock puts it, the Minister must "form a balanced judgment on the strength of the objections and merits".

- 6.18 The TAC that is predicted to move a stock level to MSY in a given period depends on the chosen probability. As probability is an inevitable component of TAC decisions, Parliament must have intended the Minister to consider the probability with which their chosen TAC would

¹⁵² *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264 (CA) at 303 **First Respondent BOA 4**, cited in a Fisheries Act context in *Environmental Law Initiative*, above n67, at [101]. **First Respondent BOA 6**

¹⁵³ *Taiaroa v Minister of Justice* HC Wellington CP99/94, 4 October 1994, at 42-43 **First Respondent BOA 9**, cited in *Environmental Law Initiative*, above n67, at [102]. **First Respondent BOA 6**

¹⁵⁴ *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) **Second Respondent BOA 7**

¹⁵⁵ *Bushell*, per Lord Diplock, at 95. **Second Respondent BOA 7**

¹⁵⁶ *Air Nelson Ltd*, above n 13, at 48 **Second Respondent BOA 3**

achieve the appropriate rebuild period. Consideration of probability is a mandatory relevant consideration inferred by s 13.

6.19 As to what the Minister must consider in relation to probability, in this case, the Minister was advised by Fisheries NZ that the HSS recommends a 50% probability.¹⁵⁷ That advice was not accurate or complete. The HSS (and OG) recommend a default 70% probability for rebuilding stocks below the soft limit, because a stock that has been severely depleted is likely to have a distorted age structure and it is necessary to rebuild both its biomass and its age composition. The Minister could not discharge his obligation to be properly informed on the appropriate probability for his TAC decision without advice as to what the HSS actually specified. In the context of this decision, the HSS and OG default rebuild probability and reasons for it were mandatory relevant considerations.

6.20 The Minister submits it was permissible for the Minister to rely on the advice of Fisheries NZ that 50 per cent was the “acceptable probability” of achievement.¹⁵⁸ This refers to Fisheries NZ advice, when addressing the “biological characteristics of the stock and any relevant environmental conditions”, that:¹⁵⁹

Projections suggest the East Coast tarakihi stock has a 50% probability of rebuilding to a target of 40% SB_0 within five years in the absence of fishing. A 50% probability of reaching the target is considered acceptable, due to the natural variation caused by fluctuations in recruitment and environmental conditions.

6.21 In that passage, Fisheries NZ is advising why it has used a 50% probability of reaching the MSY target in calculating T_{min} . It is not advice as to the appropriate probability to use in a rebuild plan for East Coast tarakihi. Even if that statement is seen as advice on an appropriate probability for the rebuild, its legitimacy as advice on Fisheries NZ’s preferred probability is tainted by the advice that the HSS recommends use of 50%, where the Minister was also given to understand that the HSS is the basis for how the Ministry approaches relevant sections of the Fisheries Act.

6.22 The Minister relies on authorities that the “collective knowledge” of a department is to be treated as part of the Minister’s own knowledge.¹⁶⁰ In the cited authorities, the allegedly overlooked consideration was said to be part of this collective knowledge even if not referenced by the

¹⁵⁷ Exhibit DP8 [305.1126](#) at [305.1161](#)

¹⁵⁸ At [91], referencing the October 2019 Sustainability Round Decisions [302.0462](#) at [302.0488](#) [note this is the same document as Exhibit DP8 [305.1126](#) at [305.1182](#)]

¹⁵⁹ Exhibit DP8 [305.1126](#) at [305.1182](#)

¹⁶⁰ At [95].

decision-maker. That is not the situation here. Rebuild timeframes presented to the Minister were based on 50% probability and the Minister was told that approach was recommended by the HSS. There is no evidence of Fisheries NZ factoring in but rejecting the reasons for the default 70% probability. And this does not overcome the requirement to present the Minister with fair, accurate and adequate information.

Section 10 information principles

6.23 Section 10 requires all persons exercising or performing functions, duties, or powers under the Act, in relation to the utilisation of fisheries resources or ensuring sustainability, to take into account information principles which include that decisions should be based on the best available information.¹⁶¹

6.24 “Best available information” means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time.¹⁶² The importance of the requirement relating to the use of the “best available information” in a fisheries context, has been described as “somewhat elevated” and part of a scheme that “favours precaution”.¹⁶³

6.25 “Information” includes scientific, customary Māori, social, or economic information; and any analysis of any such information. The Majority held that “information” is intended to have a wide import, referencing dictionary definitions of information as including “knowledge communicated concerning some particular fact, subject or event”.¹⁶⁴

6.26 The HSS represents best practice.¹⁶⁵ The HSS and OG provide the scientific opinions of its authors on why a 70% probability is the appropriate default probability for a depleted fish stock. Those reasons, and the default probability they support, are “information”. The metrics in the HSS are “to be treated as defaults”. The HSS specification on probability is the best available information on the default probability that should be applied. That default could be displaced by more specific information supporting a different probability, but the HSS specification is nonetheless the best available information if more specific information is not available. The fact that it is found within a policy document is not relevant. If a default minimum probability and the

¹⁶¹ [Section 10\(a\) Appellant BOA 1](#)

¹⁶² [Section 2 Appellant BOA 1](#)

¹⁶³ *Environmental Law Initiative*, above n 67, at [108] [First Respondent BOA 6](#)

¹⁶⁴ At [136] [05.0049](#)

¹⁶⁵ Affidavit of Dr Mace at [18] [201.0098](#), Exhibit MD3 at paragraph 2 [303.0631](#)

reasons for it are adopted as a policy, the probability and the reasons do not cease to be the best available information.

- 6.27 The first respondent relies on the Majority's analysis¹⁶⁶ in response to the appellant's assertion that a finding on s 10(a) was not available because it was not pleaded.

Section 10(b) - uncertainty in the information available

- 6.28 Section 10(b) is "decision makers should consider any uncertainty in the information available in any case". Rebuild predictions are inherently uncertain and uncertainties propagate through time.¹⁶⁷ In setting a TAC, it was incumbent on the Minister to ensure it would enable the stock level to be adjusted to MSY in a period appropriate to the stock. The requirement to consider the uncertainty in rebuild trajectories supports the view that the Minister was required to have regard to reasons for preferring a 70% probability over a 50% probability.

Minority judgment

- 6.29 The Minority held that whether the Minister should apply a 50% or 70% probability goes to the heart of *how* the Minister makes the decision, and has nothing to do with the information on which that decision is based.¹⁶⁸ Respectfully, it is difficult to see why the knowledge that 70% is best practice probability for a rebuild plan, and the reasons why that probability is used rather than 50%, is not information on which that decision would be based. If the Minister had commissioned specific advice on what probability to use, and why, that would be "information". Best practice default standards are the same type of information.
- 6.30 The Minority found that the Minister was conscious that a 50 per cent probability was not especially high but that he considered it appropriate (this is a reference to his 2018 decision)¹⁶⁹. Goddard J then said:¹⁷⁰

I do not understand what express consideration of the recommendation in the HSS that a 70 per cent probability be adopted would have added to this analysis. It could hardly be suggested that the Minister was not aware that he could adopt a higher probability of rebuild, and that this would result in a higher TAC reduction ... or a longer expected period of rebuild...

- 6.31 The second respondent submits that:

¹⁶⁶ At [106] – [108] [05.0040](#) and [130]-[131] [05.0048](#)

¹⁶⁷ Dr Dunn affidavit at [61] – [74] [201.0025 – 201.0028](#)

¹⁶⁸ At [274] [05.0095](#)

¹⁶⁹ [302.0317](#)

¹⁷⁰ At [277] [05.0095](#)

- a. What would have been added to the analysis was the understanding that a 70% probability is not merely related to greater certainty, but also directed by the biological requirements for rebuilding a stock that is depleted below the soft limit. Goddard J appears to have found that this knowledge would not have been material. That requires an assumption that the Minister would not be moved by those biological requirements, which is not warranted.
- b. The Minister would then have needed to consider whether a 30+ year rebuild constituted a period appropriate to the stock.

6.32 The Minority found that in circumstances where Parliament has expressly identified a range of relevant planning documents that must be taken into account, some caution is required before finding that other planning documents are mandatory relevant considerations.¹⁷¹ The first respondent agrees, and does not suggest that the HSS as a whole had to be considered on the basis it is relevant policy. That does not detract from the reasons, set out above, why it was necessary in this case for the Minister to have regard to the default probability and associated reasons in the HSS and OG.

7. RELIEF

- 7.1 The first respondent seeks:
- a. That the appeal is declined.
 - b. Costs.

Dated 22 March 2024

SR Gepp | MC Wright
Counsel for the First Respondent

¹⁷¹ At [177] [05.0064](#) referencing the documents required to be considered under s 11.