

between: **Seafood New Zealand Limited**
Appellant

and: **Royal Forest and Bird Protection Society of New Zealand Inc**
First Respondent

and: **Minister of Ocean and Fisheries**
Second Respondent

and: **Te Ohu Kai Moana Trustee Limited**
Third Respondent

Appendices to submissions on behalf of Appellant (Seafood New Zealand Limited)

Dated: 16 February 2024

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

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APPENDIX 1: CHRONOLOGY:

DATE	KEY EVENT	SOURCE
Pre-1930	Commercial fishing developed with the introduction of steam trawlers from the 1890s and by the mid-1930s there were annual catches of about 2000 tonnes.	304.0911 at [304.0955] at [2073]
1940 – 1980	Commercial catch of eastern stock increased to 5000 - 6000 tonnes p.a.	304.0911 at [304.0955] at [2074]
	Between the 1940s and 1970s the fishery was fished down. See figure 9 in 2019 Final Advice Paper (FAP).	305.1126 at [305.1161]
1986	Quota Management System (QMS) is created. Eight tarakihi fish stocks established in separate Quota Management Areas (QMAs). See figure 8 in 2019 FAP.	305.1126 at [305.1159]
2008	Harvest Strategy Standard (HSS) and initial Operational Guidelines (Guidelines) are published.	[303.0628]
June 2011	Guidelines are revised.	[303.0548]
2012	Revised stock assessment is prepared for tarakihi stocks but not accepted by MPI Science Working Group.	201.0152 at [201.0155] at [13].
Nov 2017	New stock assessment accepted by Working Group. East Coast QMAs now found to be a separate fish stock (East Coast Stock) and about 17% of B ₀ , which was below the soft limit in the HSS – therefore, it needed to be rebuilt.	201.0152 at [201.0155] at [13]–[15].
March 2018	Stock assessment report for East Coast Stock completed.	[303.0659]
July 2018	Industry develop and provide to the Minister a draft Management Strategy for the tarakihi fish stocks. This was the initial version of what became the 2019 Industry Rebuild Plan .	201.0164 at [201.0186] at [86]–[89]
July-Sept 2018	MPI release Initial Position Paper for consultation on options to rebuild East Coast Stock based on the 2017 stock assessment.	304.0845 at [304.0860]
27 July 2018	Submissions made by: <ul style="list-style-type: none"> • TOKM; • Recreational fishers; and • Forest & Bird. 	[306.1493] [301.0244] [301.0225]
August 2018	MPI provide Minister with FAP and further briefing notes: <ul style="list-style-type: none"> • 31 August 2018; • 7 September 2018; and • 7 September 2018. 	304.0911 at [304.0948] [304.1077] [304.1083] [304.1094]

DATE	KEY EVENT	SOURCE
7 Sept 2018	Minister's 2018 decision letter announcing various decisions concerning East Coast Stock – aggregate 20% TACC reduction for East Coast Stocks (2018 Decision).	305.1102 at [305.1120]
19 Sept 2018	Industry begins implementation of voluntary measures in the interim Rebuild Plan, including catch splitting and reporting to ensure the catch reduction occurs in correct proportions in East Coast Stock.	201.0164 at [201.0187] at [89.2]
March 2019	Stock assessment for East Coast Stocks updated.	
June 2019	MPI release Initial Position Paper for consultation on options to rebuild East Coast Stock based on the updated 2018 stock assessment. Included an updated Rebuild Plan proposed by Industry.	[304.0888]
26 July 2019	Submissions made by: <ul style="list-style-type: none"> • Fisheries Inshore; • TOKM; • Forest & Bird; and • Recreational fishers. 	[305.1192] [306.1563] [302.0418] [302.0451]
30 Aug 2019	MPI provide Minister with Final Advice. This includes: <ul style="list-style-type: none"> • revised Industry Rebuild Plan. • NZIER Economic impact assessment 	[305.1126] [305.1206] [305.1280]
27 Sept 2019	Minister's decision letter – adopts implementation of Industry Rebuild Plan and made a further 10% TACC reduction.	305.1320 at [305.1320]

APPENDIX 2: LEGISLATIVE DRAFTING HISTORY - S 13

UNCLOS & Territorial Sea and Exclusive Economic Zone Act 1977

- 1 The concept of a "total allowable catch", which incorporated reference to MSY and the "qualifiers", was first introduced into New Zealand legislation following the Seventh Session of the United Nations International Convention of the Law of the Sea (**UNCLOS**). New Zealand enacted the Territorial Sea and Exclusive Economic Zone Act 1977 (**TSEEZ Act**).
- 2 The TSEEZ Act enabled a TAC to be set for a fishery within the EEZ. There was then a determination of the capacity of New Zealand vessels to catch it, with the balance to be made available to other countries. TAC was defined in s 2 as (emphasis added):

Total allowable catch, with respect to the yield from any fishery, means, the amount of fish that will produce from that fishery the **maximum sustainable yield**, as **qualified** by any relevant **economic or environmental factors**, fishing patterns, the interdependence of fish, and any generally recommended sub regional, regional or global standards.

- 3 This wording closely followed UNCLOS. The final UNCLOS convention was adopted 1982. Articles 55, 56, 61 and 62 are set out in the Orange Roughy decision (at p 4-7). But relevantly art 60 adopts the concept of MSY for setting allowable catch. Article 61(3) provides (emphasis added):

Such measures shall 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**, including the economic needs of coastal fishing communities and the special requirements of developing States, taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub regional, regional or global.

Fisheries Act 1983

- 4 The Fisheries Act 1983 (pre-the 1986 Quota Management System) referred to and defined the concept of TAC in essentially the same way as in the TSEEZ Act. TACs were primarily relevant to the setting of catch limits for non-transferable annual quotas, set by regulations made under s 89(1)(g). TAC was defined in s 2 as follows (emphasis added):

Total allowable catch, with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the **maximum sustainable yield**, as **qualified** by any **relevant economic or environmental factors**, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards.

Fisheries Amendment Act 1986 – QMS

- 5 In 1986 the Fisheries Act 1983 was amended to incorporate a new pt 2A, which introduced the QMS. In the original 1986 legislation the separate concepts of a TAC and TACC did not exist as they do under the 1996 Act. The commercial catch limit was then known as the TAC and was set after making an allowance for non-commercial interests in the fishery. Section 28C provided:

28C Declaration of total allowable catch

- (1) The Minister may, after allowing for the Maori, traditional, recreational, and other non-commercial interests in the fishery, by notice in the Gazette, specify the **total allowable catch** to be available for **commercial** fishing for each quota management area in respect of each species or class of fish subject to the quota management system.

- 6 In 1990, the separate concepts of the TAC and the TACC was made explicit. This change occurred when the QMS was converted into a proportional regime, under which quota owners hold a proportion of the TACC, rather than a fixed tonnage (see Fisheries Amendment Act 1990). Section 28C provided for the declaration of a TACC and in s 28D the matters to be considered, which now included the TAC – (emphasis added):

28C Total allowable commercial catch for species other than rock lobster

- (1) The Minister may, by notice in the Gazette, specify the **total allowable commercial catch** to be available for **commercial** fishing for each quota management area in respect of each species or class of fish, other than rock lobster, that is subject to the quota management system.

- (2) ...

28D Matters to be taken into account in determining or varying any total allowable commercial catch-

- (1) When setting or recommending any **total allowable commercial catch** under section 28C of this Act, or varying or recommending any variation in a total allowable commercial catch under section 280B or section 280C of this Act (other than a variation made or recommended pursuant to section 28J or section 28JA of this Act), the Minister shall-
- (a) **After having** regard to the **total allowable catch** for the fishery, including any total allowable catch determined under section 11 of the Territorial Sea and Exclusive Economic Zone Act 1977, **allow for-**
- (i) **Maori, traditional, recreational,** and other non-commercial interests in the fishery; and
- (ii) Any amount determined under section 12 of the Territorial Sea and Exclusive Economic

Zone Act 1977 as the **allowable catch** for
foreign fishing craft,

- (b) Where considering any reduction in a total allowable commercial catch, have regard to-
 - (i) Whether or not the imposition of other controls under this Act on the taking of fish would be sufficient to maintain the fish stock at a level where the current total allowable commercial catch could be sustained; and
 - (ii) Whether or not a reduction in the level of fishing could be achieved by the Crown's retaining or obtaining the right to take fish under any appropriate quota and not making those rights available for commercial fishing:

...

- 7 These provision were considered in the Orange Roughy decision in 1995 and the Snapper decision in 1997 (CA).

Māori Fisheries settlement

- 8 In 1989, the Māori Fisheries Act 1989 was enacted. This provided for what was ultimately seen as an interim settlement of the Māori fisheries litigation:

- 8.1 A new Māori Fisheries Commission was established to facilitate entry into and development of Māori into the business and activity of fishing (s 5).
- 8.2 In terms of commercial fisheries, the Crown was to acquire 10% of quota for all species already in the QMS and transfer that quota to the new Māori Fisheries Commission (ss 40-44), and make a payment of \$10 million to the Commission (s 45).
- 8.3 In terms of non-commercial fisheries, a new taiapure-local fisheries regime was established (s 74) and incorporated into Fisheries Act 1983 (as a new Part 3A).

- 9 Following the Māori Fisheries Deed of Settlement in 1992, the Treaty of Waitangi (Fisheries Claim) Settlement Act 1992 gave effect to, and began the process of implementing, the final settlement.

- 9.1 In terms of commercial fisheries, the Crown (a) made a payment of \$150 million to enable the purchase by Māori of a 50% interest in Sealord Products Ltd and (b) agreed to introduce legislation to ensure Māori were allocated 20% of all quota for new species entering the QMS (preamble, cls 3.1 and 3.2);
- 9.2 In terms of non-commercial fisheries, amended the Fisheries (Amateur Fishing) Regulation to better enable customary

fishing (s 37) and undertook to introduce legislation to empower the making of new regulations recognising and providing for customary food gathering (s 10).

9.3 In terms of the right to be consulted when the Minister was setting the TACC, the Māori Fisheries Commission was added to the parties required to be consulted (ss 23 & 24).

Fisheries Act 1996

Fisheries Bill (1994)

- 10 The Fisheries Bill was introduced on 6 December 1994 and sent to the Primary Production Select Committee. The Bill contained provisions giving effect to the Crown obligations under the Fisheries Settlement for the allocation of quota for new species entering the QMS and the making of regulations recognising and providing for customary food gathering. It also provided enhanced rights of consultation for Māori in both the TAC and TACC setting process (now found in s 12(1)(a)&(b) in respect of TAC setting, and s 21 in respect of TACC setting).
- 11 The Bill also now provided the setting of a TAC in cl 11. Subclause (2) was similar to the final version as it incorporated some of the key phrases (altering a stock "*in a way and rate*" and "*within a period appropriate to the stock*"). An important difference, however, was the "*net national benefit*" provision in subcl (3), which would have allowed a stock to be permanently managed below the B_{MSY} in certain limited circumstances. The relevant provisions provided (emphasis added):

11 **Total allowable catch**

- (1) Subject to this section, the Minister shall, by notice in the Gazette, specify in respect of each stock management area and annual **total allowable catch** for each stock that is subject to a quota management system.
- (2) **Except** as specified in **subsection (3)** of this section, the Minister shall specify a **total allowable catch that**, on the balance of the evidence before the Minister, –
- (a) maintains the stock **at** a level that can produce the maximum sustainable yield; or
- (b) **maintains** the stock **above** a level that can produce the maximum sustainable yield, having regard to the net national benefit and the independence of stocks; or
- (c) **enables** the stock to be altered in a **way and at a rate** that will result in the stock being maintained at a level **at or above** the level that can produce the **maximum sustainable yield** within a **period appropriate** to the stock, **having regard** to the stock characteristics, the **net national benefit**, and the interdependence of stocks.

- (3) The Minister may specify a total allowable catch that is consistent with a stock level **below** the level that produces the **maximum sustainable yield** if –
- (a) the Minister is satisfied that such a total allowable catch will provide a greater **net national benefit** that will then would be achieved by a total allowable catch specified in accordance with subsection (two) of this section, having regard to the interdependence of stocks; **and**
 - (b) the Minister has **considered** the **risks** to the sustainability of the stock and adverse effects on the environment.

12 Section 2 defined "**net national benefit**" as meaning:

... the sum of all costs and benefits of any kind, both monetary and non-monetary:

13 Section 2 also defined "**maximum sustainable yield**" in the same way as it is presently defined in the 1996 Act, namely:

... in relation to any stock, means the greatest yield that can be achieved over time while maintaining the stocks productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock:

Interim Report of Select Committee on Fisheries Bill (1995)

14 In December 1995, the Select Committee released an Interim Report considering the Bill. The text of the Committee's report dealt only with issues concerning Chatham Islands. The Report did however attach a revised version of the Bill, which incorporated many changes unrelated to the Chatham Islands issues.

15 In particular, changes made to the TAC setting provision (cl 13):

- 15.1 restructured subcl (2) to more closely (but not fully) follow the final construct and wording – although subcl (2)(b) was still all one paragraph;
- 15.2 removed the net national benefit test, the effect of which was to clarify that a fishery could not be permanently managed below B_{MSY} on the basis that there was a net national benefit in doing so - that is fish stocks below B_{MSY} needed to be restored to at or above B_{MSY} ;
- 15.3 did not yet contain the current subsection (3) - the qualifiers relating to social cultural and economic factors.

16 There was no commentary relating to these provisions. Clause 13 provided (emphasis added):

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 relation to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each year for that stock unless varied under this section.
- (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 the stock to be altered in **a way and at a rate** that will result in the stock being restored to a level at or above a level that can produce the maximum sustainable yield, **having regard** to the interdependence of stocks and **within a period appropriate** to the stock **having regard** to the stock characteristic; or
 - (c) enables the level of any stock whose current level is **above** that level 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 a level at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

...

Final Report of Select Committee on Fisheries Bill (1996)

17 In mid-1996, the Primary Production Select Committee made its Final Report on the Fisheries Bill, which included both an extensive report and proposed amendments.

18 Section 13(2)(b) had now been amended to separate elements within the paragraph, creating subparagraphs (i) and (ii).

- (2) The Minister shall set a total allowable catch that –
 - (a) ...
 - (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 the level** that can produce the **maximum sustainable yield, having regard** to the interdependence of stocks and any environmental conditions affecting the stock; **and**

- (ii) within a **period appropriate** to the stock and its biological characteristics.

19 In addition, the current subsection (3) had been added and states:

- (3) In considering the way in which and the rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall have regard to such social, cultural and economic factors as he or she considers relevant.

20 This amended wording for s 13(2)(b)&(3) remained unchanged and was not subsequently amended before the final enactment of the Act in August 1996.

21 The commentary in the Select Committee's Final Report explains the changes made to s 13 as follows:

Total allowable catch

....

The majority of the submissions commented on this clause. The TAC setting provision in the Bill, as introduced, allowed the Minister to set a TAC at a point below the level that produces the MSY if doing so would provide a greater net national benefit. There was concern from environmentalists and the Parliamentary Commissioner for the Environment that this provision could result in unsustainable catch limits being set. These submissions wanted all references to the net national benefit deleted. Industry submissions were strongly supportive of the ability of the Minister to set a TAC below MSY if doing so was in the net national benefit. The FIB argued that, to be consistent with international law, the Bill needed to provide for economic factors to be taken into account when setting a TAC. Article 61 of UNCLOS specifies that relevant economic factors should be taken into account when setting constraints on commercial fishing activity.

We accept that the Bill needs to be consistent with New Zealand's international obligations. However, we are convinced that "net national benefit" is a vague term which would be difficult to measure and recommend that it be deleted. We strongly believe that sustainability concerns should be the key factor used to determine a TAC. We recommend subclause 13(3) which requires the Minister to have regard to social, cultural and economic factors as are considered relevant when considering the way in, and the rate at which, a stock is moved towards its sustainable level. This is consistent with UNCLOS, does not detract from the philosophy that setting a TAC should be primarily based on sustainability concerns, and recognises recent management practice.

Fisheries (Remedial Issues) Amendment Act 1998

22 Following the enactment of the Fisheries Act 1996, a number of issues were identified which led to the enactment of the Fisheries (Remedial Issues) Amendment Act 1998. Section 4(2) of this Act repealed the then existing s 13(2)(b) and substituted a new paragraph (b). This remains the provision in force today. The

changes to subparagraph (b), brought about by that 1998 amendment, are shown with red lining below:

- (2) The Minister shall set a total allowable catch that –
 - (a) ...
 - (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 the level that can produce the maximum sustainable yield, having regard to the interdependence of stocks ~~and any environmental conditions affecting the stock~~; and
 - (ii) within a period appropriate to the stock, **having regard to the ~~and its~~ biological characteristics of the stock and any environmental conditions affecting the stock**;

23 This amendment commenced on 23 June 1998 (see s 1(3) of the Fisheries (Remedial Issues) Amendment Act 1998).

24 When that Act was introduced, the explanatory note to the Bill (the Fisheries (Remedial Issues) Amendment Bill 1997) provided the following explanation for this amendment (which was then part of cl 5):

The second amendment moves the reference to environmental factors currently specified in subparagraph (i) of section 13(2)(b), which deals with setting a target stock level for stocks currently below the maximum sustainable yield level, to subparagraph (ii), which deals with the period over which any change in stock level will occur. This is because the effects of changing environmental factors could well be relevant in considering the rate at which a stock size will change.

25 When reporting back on the Bill, the Select Committee rejected submissions seeking changes to the wording of the Bill.

26 The Departmental Report dealt with the amendments to s 13(2)(b) and repeated the above explanation of the purpose of this amendment (at [22]). In a response to submissions on this proposed amendment, the report went on to explain:

[39] In regard to the second amendment, S 22 believes the reference to "*environmental conditions affecting the stock*" should apply to both (i) and (ii) of section 13(2)(b). MFish does not agree with this suggestion. Subsection (2)(b), in respect of stocks that are currently below a level that can produce the maximum sustainable yield (MSY), specifies matters that the Minister must have regard to when determining the target stock level and the rate at which the stock is moved towards the target stock level. In the current section 13 it is unclear as to whether the Minister must have regard to the interdependence of stocks and any environmental conditions

affecting the stock when determining the target stock level or the rate of movement or both. The intention of section 13(2)(b)(i) is that the Minister must have regard to the interdependence of stocks when determining the target stock level. Regard must be had to any environmental conditions when determining the period in which the stock is moved towards that target stock level.

[40] MFish notes that environmental factors are also included in the definition of MSY in section 2 of the Act. In this context it was intended to relate to the "over time" part of the definition of MSY. MFish believes the inclusion of environmental factors in the definition of MSY addresses the concerns of S 22. Theoretically there is one stock level that will produce the MSY. However, changes in environmental conditions, over the long term, may result in a change to the MSY stock level. Section 13(2) addresses the Minister's decision at a particular time and the intent was to recognise that the effects of changing environmental factors could well be relevant in considering the rate at which a stock size will change (for example using recent weather patterns to predict the amount of recruitment into a particular fishery over the short term).

[41] In summary, the key issue in the proposed second amendment to section 13 is that transient environmental conditions should not be used to modify the target stock level (i.e. the level that can produce MSY) when the Minister is making decisions on the appropriate TAC allowable catch in a particular fishing year. However, current and predicted environmental conditions should be considered when determining the TAC/TACC levels to achieve a certain rate of rebuild.

Fisheries Act 1996 Amendment Act 1999

- 27 In 1999 an alternative TAC setting mechanism was enacted in what is now ss 14A -14D (enacted by the Fisheries Act 1996 Amendment Act 1999). The mechanism is available to by-catch species and if the relevant criteria is meet, the stock can be managed permanently below B_{MSY} . That criteria includes that the total benefits out way the total cost of managing the stock at a level other than permitted under s 13 and that the stock is able to be managed at a level that ensures its long term viability (s 14A(5)).
