

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 99/2023  
[2024] NZSC 111

BETWEEN	SEAFOOD NEW ZEALAND LIMITED Appellant
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
AND	MINISTER FOR OCEANS AND FISHERIES Second Respondent
AND	TE OHU KAI MOANA TRUSTEE LIMITED Third Respondent

Hearing: 23 April 2024

Court: Winkelmann CJ, Glazebrook, Williams, Kós and Miller JJ

Counsel: B A Scott and A Kraack for Appellant  
S R Gepp, M C Wright and P D Anderson for First Respondent  
N C Anderson and K F Gaskell for Second Respondent  
J P Ferguson for Third Respondent

Judgment: 12 September 2024

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**JUDGMENT OF THE COURT**

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- A** The appeal is allowed to the extent set out at [145] and [146].
- B** Costs are reserved.
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**REASONS**  
(Given by Miller J)

Table of Contents

	<b>Para No</b>
<b>Introduction</b>	[1]
<b>The legislation</b>	[12]
<b>The Harvest Strategy Standard and Operational Guidelines</b>	[29]
<i>Core elements of the HSS</i>	[32]
The first element: the target biomass	[33]
The second element: the soft limit	[34]
The third element: the hard limit	[41]
<i>Rebuild plans</i>	[42]
<b>The East Coast tarakihi fishery</b>	[44]
<b>The 2018 and 2019 TAC and TACC decisions</b>	[48]
<i>The 2018 TAC decision</i>	[49]
<i>The Industry Rebuild Plan</i>	[54]
<i>The options presented to the Minister</i>	[55]
<i>The 2019 TAC decision</i>	[56]
<b>The issues for decision</b>	[57]
<b>Period appropriate to the stock</b>	[60]
<i>The Court of Appeal's reasons</i>	[60]
<i>Submissions</i>	[67]
<i>The position of Māori interests</i>	[71]
<i>The rebuild period: a sustainability control on TAC decisions</i>	[75]
<i>Scope for ministerial judgement, within the rebuild constraint</i>	[84]
<i>A range of rebuild periods is possible</i>	[94]
<i>The HSS, Operational Guidelines and <math>2 * T_{min}</math> as an outer limit on the rebuild period</i>	[101]
<i>The decision-making process</i>	[109]
<i>The Minister's error restated</i>	[111]
<b>A default 70 per cent probability of success?</b>	[112]
<i>The HSS and the Operational Guidelines</i>	[113]
<i>The Court of Appeal's reasons</i>	[116]
<i>Our approach to the issues</i>	[120]
<i>Are the HSS and Operational Guidelines mandatory relevant considerations?</i>	[122]
<i>The 70 per cent probability as "best available information" under s 10</i>	[126]
<b>Disposition</b>	[145]
<b>Costs</b>	[148]

**Introduction**

[1] In 2019 the Minister of Fisheries, the Hon Stuart Nash, exercised his statutory duty to review the total allowable catch (TAC) and total allowable commercial catch

(TACC) for the East Coast tarakihi fishery.<sup>1</sup> Because the stock had fallen below the level that can produce its maximum sustainable yield (MSY), the Minister was obliged to alter the TAC to enable the stock to recover to at least that level “within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock”.<sup>2</sup> The Minister was also required to take into account any social, cultural and economic factors that he considered relevant.<sup>3</sup>

[2] The Minister had already reduced the TAC by 17 per cent in 2018<sup>4</sup> following the first fully quantitative stock assessment for East Coast tarakihi, which was completed in 2017.<sup>5</sup> The 2018 decision was not challenged. In 2019, he reduced the TAC by a further 6.4 per cent and intimated that he would revisit it the following year and would make further reductions if the fishing industry did not live up to commitments made in an Industry Rebuild Plan that it had developed.<sup>6</sup> The industry had committed to rebuild the stock within 20 years.<sup>7</sup>

[3] Royal Forest & Bird Protection Society of New Zealand Inc (RFB) challenges the Minister’s decision, saying the Minister ought to have adopted a recovery period

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<sup>1</sup> Stuart Nash “Changes to sustainability measures and other management controls for 1 October 2019” (press release, 27 September 2019) [2019 decision] at 6. The TACC is arrived at by deducting from the TAC allowances for customary Māori fishing, recreational use and other mortality: *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [*Kahawai case*] at [62] per Blanchard, Tipping, McGrath and Wilson JJ.

<sup>2</sup> Fisheries Act 1996, s 13(2)(b)(ii).

<sup>3</sup> Section 13(3). We discuss what this requirement means below at [89].

<sup>4</sup> Stuart Nash “Changes to sustainability measures and other management controls for 1 October 2018, and closure of the Kaipara Harbour to the taking of scallops” (press release, 19 September 2018) [2018 decision] at 19. The Minister reduced the combined TACC by 18.4 per cent, but in practice this amounted to a TACC reduction of 20 per cent when considering only the eastern portion of TAR 1 (the quota management area for tarakihi at the north of the North Island) and the Cook Strait portion of TAR 7 (the quota management area for tarakihi at the west of the South Island and Cook Strait). This relied on voluntary catch splitting and reporting.

<sup>5</sup> Fisheries New Zealand | Tini a Tangaroa *Review of Sustainability Measures for the October 2018/19 Fishing Year: Proposals to Alter Total Allowable Catch, Allowances, Total Allowable Commercial Catch and Deemed Value Rates for Selected Fishstocks* (August 2018) [2018 advice] at [2110]–[2111].

<sup>6</sup> 2019 decision, above n 1, at 6–7. The Minister reduced the combined TACC by 6.9 per cent, but in practice this amounted to a TACC reduction of 10 per cent when considering only the eastern portion of TAR 1 and the Cook Strait portion of TAR 7. See Southern Inshore Fisheries, Te Ohu Kaimoana and Fisheries Inshore New Zealand *Supporting a Sustainable Fishery: Eastern Tarakihi Management Strategy and Rebuild Plan 2019* (18 April 2019) [Industry Rebuild Plan].

<sup>7</sup> Letter from Southern Inshore Fisheries, Te Ohu Kaimoana and Fisheries Inshore New Zealand to Fisheries New Zealand regarding the proposed TAC changes for the East Coast tarakihi fishery (26 July 2019) at [26]. That was on the basis of an industry-preferred target of 35 per cent of SB<sub>0</sub> (for the meaning of that term, see below at [33] and n 53).

having regard only to the scientific (biological and environmental) considerations and based on the best information available to him. The Minister did not receive such advice.

[4] RFB also says that Fisheries New Zealand | Tini a Tangaroa guidelines, namely the Harvest Strategy Standard (HSS) and the Operational Guidelines, recommend that the rebuild period should be calculated using a probability of success of 70 per cent.<sup>8</sup> It further contends that that standard was the best available information and a mandatory consideration for the Minister. The Minister's 2019 decision adopted an implicit probability of 50 per cent.<sup>9</sup>

[5] Had the Minister adopted a 10-year recovery period and a 70 per cent probability of success, it would have been necessary to reduce TAC in 2019 by more than 60 per cent.<sup>10</sup>

[6] In the High Court, Gwyn J held that the Minister was required to determine the period appropriate to the stock by reference to the scientific considerations.<sup>11</sup> Social, cultural and economic considerations come into play after the period has been fixed. They may influence the way in which and rate at which a stock is moved to B<sub>MSY</sub> (the average biomass that can produce MSY).<sup>12</sup> That meant the Minister erred when he considered the Industry Rebuild Plan while setting the period appropriate to the stock.<sup>13</sup> The Judge was also satisfied that, between the HSS and the Operational Guidelines, the minimum probability for the rebuild being completed to

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<sup>8</sup> Relying on Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa *Harvest Strategy Standard for New Zealand Fisheries* (24 October 2008) [Harvest Strategy Standard] at 8; and Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa *Operational Guidelines for New Zealand's Harvest Strategy Standard* (June 2011) [Operational Guidelines] at 10 and 12. The relevant ministries and government departments have since changed. See below at [12]. Except in direct quotations, this judgment uses tohutō (macrons) to ensure correct spelling of kupu Māori.

<sup>9</sup> Because an explicit probability of 50 per cent was adopted in 2018, it is implicit that this probability applied also in 2019. The options discussed at [55] appear to be based on a 50 per cent probability.

<sup>10</sup> That exact scenario was not modelled. The evidence of Dr Matthew Dunn is that the highest catch reduction option used for the 2019 assessment model simulations was a 60 per cent reduction of the TAC set in 2018. That option achieved a rebuilt stock within 10 years with a 50 per cent probability, and 12 years with a 70 per cent probability.

<sup>11</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 1427 [HC judgment] at [92]–[93].

<sup>12</sup> Referring to s 13(3) of the Fisheries Act. See Harvest Strategy Standard, above n 8, at 17; and Operational Guidelines, above n 8, at 31.

<sup>13</sup> HC judgment, above n 11, at [193] and [200].

the target level is 70 per cent.<sup>14</sup> The Minister must consider the HSS’s guidance on probability because it is the “best available information” and an implied mandatory relevant consideration for the Minister.<sup>15</sup> He failed to do so.<sup>16</sup> The Judge did not set aside the 2019 decision but directed that the 2021 TAC assessment must have regard to her findings.<sup>17</sup>

[7] The Court of Appeal dismissed an appeal by Fisheries Inshore New Zealand Ltd, which has since amalgamated into Seafood New Zealand Ltd (Seafood).<sup>18</sup> Seafood largely represents commercial fishing interests. The majority, Brown and Courtney JJ, held that the “period appropriate to the stock” establishes an outer limit to the rebuild period, or maximum period, that must be fixed by reference to the scientific considerations.<sup>19</sup> The Industry Rebuild Plan could not be taken into account when making that decision, but to the extent that the scientific opinion expressed in the HSS made some allowance for social, cultural and economic factors, the Minister was entitled to take that into account.<sup>20</sup> The majority also held that the HSS does specify a default minimum probability standard of 70 per cent, and that the Minister was required to consider it.<sup>21</sup>

[8] The Minister did not defend the 2019 decision in the Court of Appeal.<sup>22</sup> He acknowledged that the decision did not incorporate, on the face of the record, an adequate assessment of the period appropriate to the stock.<sup>23</sup> It is also common ground that he did not consider whether to set the TAC using a 70 per cent probability of

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<sup>14</sup> At [157].

<sup>15</sup> At [152]–[153]. The Minister was obliged to take into account the principle that “decisions should be based on the best available information”: Fisheries Act, s 10(a).

<sup>16</sup> At [167].

<sup>17</sup> At [218]–[219]. The Judge subsequently stayed the requirement for the Minister to make a decision until 1 October 2022, to enable him to receive, consider and consult on an updated stock assessment: *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 2282 at [96]; and *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 2468 at [10].

<sup>18</sup> *Fisheries Inshore New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2023] NZCA 359, [2023] 3 NZLR 780 (Brown, Courtney and Goddard JJ) [CA judgment]. On 31 January 2023, Fisheries Inshore New Zealand Ltd amalgamated with other companies to become Seafood New Zealand Ltd, the appellant in this appeal.

<sup>19</sup> At [92] and [94].

<sup>20</sup> At [91]–[92] and [96] per Brown and Courtney JJ.

<sup>21</sup> At [124] and [149] per Brown and Courtney JJ.

<sup>22</sup> At [3] per Brown and Courtney JJ and [159] per Goddard J.

<sup>23</sup> At [58] per Brown and Courtney JJ and [259] per Goddard J.

recovery, although the Minister does not accept that that was an error.<sup>24</sup> The Minister also agreed he erred by considering the Industry Rebuild Plan while setting the period appropriate to the stock.<sup>25</sup> However, he argued that the legislation contemplated a range of periods, up to a maximum period, that are appropriate to the stock.<sup>26</sup> He submitted that he was entitled to select a period within that range, having regard to social, cultural and economic factors as well as scientific factors, so long as the selected period was appropriate to the biological characteristics of the stock and the prevailing environmental conditions.

[9] This Court granted leave to appeal to settle the questions of law.<sup>27</sup>

[10] We summarise our principal findings. We reject Seafood's claim that the legislation relegates the appropriate recovery period to a mere mandatory relevant consideration. But it succeeds in part on the issue of periods appropriate to the stock. We accept that social, cultural and economic considerations may influence the Minister's choice of rebuild period in a TAC decision. However, they may do so only to the extent that the Minister is choosing from rebuild periods all of which are appropriate to the stock. Periods appropriate to a stock must be assessed by reference to the stock's biological characteristics and environmental conditions, and without regard to social, cultural and economic factors.

[11] We accept Seafood's claim that the Minister need not take into account a recommended 70 per cent probability that the TAC would rebuild the stock to  $B_{MSY}$  at the end of the rebuild period. Rather, the Minister had to adopt an appropriate probability, not being less than 50 per cent,<sup>28</sup> that the target would be achieved at that time.

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<sup>24</sup> At [115] per Brown and Courtney JJ.

<sup>25</sup> At [95] per Brown and Courtney JJ.

<sup>26</sup> At [61] per Brown and Courtney JJ. The Minister's argument before us differed slightly. See below at [69].

<sup>27</sup> *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2023] NZSC 154 (Glazebrook, Williams and Kós JJ).

<sup>28</sup> See below at [18].

## The legislation

[12] The relevant provisions of the Fisheries Act 1996 are administered by the Ministry for Primary Industries | Manatū Ahu Matua (MPI). The division responsible for fisheries now goes by the name “Fisheries New Zealand” but we will refer to the Ministry or MPI.

[13] The Act provides in s 8(1) that its purpose is “to provide for the utilisation of fisheries resources while ensuring sustainability”. Under s 8(2), “utilisation” means “conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being”, and “ensuring sustainability” means:

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

[14] A TAC is a sustainability measure, meaning that it is a measure set under Part 3 of the Act for the purpose of ensuring sustainability.<sup>29</sup>

[15] The majority of this Court explained in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* (the *Kahawai case*) that:<sup>30</sup>

[39] Section 8(1) ... expresses a single statutory purpose by reference to the two competing social policies reflected in the Act. Those competing policies are “utilisation of fisheries” and “ensuring sustainability”. The meaning of each term in the Act is defined in s 8(2). The statutory purpose is that both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system. But recognising the inherent unlikelihood of those making key regulatory decisions under the Act being able to accommodate both policies in full, s 8(1) requires that in the attribution of due weight to each policy[, the weight] given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.

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<sup>29</sup> Fisheries Act, ss 2(1) definition of “sustainability measure” and 11(3)(a). Other sustainability measures include controls on the size, sex or biological state of stock, the area from which it may be taken, the fishing methods that may be used, and the fishing season.

<sup>30</sup> *Kahawai case*, above n 1, at [39]–[40] per Blanchard, Tipping, McGrath and Wilson JJ (emphasis and footnote omitted).

[40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of “utilisation” is the conserving of fisheries resources. Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of “ensuring sustainability”, on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

It will be seen that although the Court spoke of competing social policies—sustainability and utilisation—it explained that the Act adopts a single objective, the elements of which are complementary; utilisation of stock includes its conservation, and the Act pursues sustainable utilisation to meet the reasonably foreseeable needs of future generations.

[16] Section 9 lists environmental principles that must be taken into account by everyone exercising functions, duties or powers under the Act:

## **9 Environmental principles**

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:

- (a) associated or dependent species should be maintained above a level that ensures their long-term viability:
- (b) biological diversity of the aquatic environment should be maintained:
- (c) habitat of particular significance for fisheries management should be protected.

[17] Uncertainty may affect utilisation and sustainability decisions. It extends to stock levels at any given point in time and methods and periods intended to alter a stock’s biomass over time. Section 10 requires, in particular, that the Minister take into account the principles that the best information should be used, uncertainty in information should be taken into account, and caution should be exercised when information is uncertain, unreliable or inadequate:

## **10 Information principles**

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or



ensuring sustainability, shall take into account the following information principles:

- (a) decisions should be based on the best available information:
- (b) decision makers should consider any uncertainty in the information available in any case:
- (c) decision makers should be cautious when information is uncertain, unreliable, or inadequate:
- (d) the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

[18] It is common ground that mathematical models that employ probabilities must be used when assessing stock levels and projecting recovery. It is also common ground that a minimum probability of 50 per cent is implicit in s 13(2)(b); that is so because a TAC set under s 13(2)(b) must “enable” recovery and employ a way and rate that “will” achieve that objective.

[19] Section 11(1) provides that the Minister may, from time to time, set or vary any sustainability measure (which includes a TAC) for any stock or area, after taking into account any effects of fishing on any stock and the aquatic environment, any existing controls under the Act that are applicable to the stock or area concerned, and the natural variability of the stock.

[20] Under s 13(1), the Minister must set a TAC for each quota management stock and area. Tarakihi is a quota management stock.<sup>31</sup> The TAC is an annual fishing year quantity, usually specified by biomass weight but sometimes by numbers of stock taken. Once set, it continues to apply until varied.<sup>32</sup> The appeal is concerned with the interpretation of s 13(2)(b), which applies when the level of the stock is below that which can produce the MSY. MSY means:<sup>33</sup>

... 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

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<sup>31</sup> Fisheries (Quota Management Areas, Total Allowable Catches, and Catch Histories) Notice 1986, cl 3(1) and sch 1; and Fisheries Act, ss 2(1) definition of “quota management stock” and 17(3).

<sup>32</sup> Fisheries Act, s 13(1). But see, in respect of stock whose abundance is highly variable, s 13(7)–(8).

<sup>33</sup> Section 2(1) definition of “maximum sustainable yield”.

As noted above, the average biomass that can produce MSY is described as  $B_{MSY}$ .<sup>34</sup>

[21] We observe that MSY and the period appropriate to a stock both refer to environmental conditions influencing the stock and biological characteristics of the stock. We take population dynamics to be a subset of biological characteristics. It is not in dispute that a stock at  $B_{MSY}$  is not in a state of equilibrium; rather, it will fluctuate naturally about  $B_{MSY}$ .

[22] Section 13(2) provides:

- (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.

[23] It will be seen that under subs (2)(a) the Minister must set the stock's TAC at a level that maintains the stock at or above  $B_{MSY}$ , having regard to "the interdependence of stocks". That concept must also be considered when deciding on the way in which and rate at which a depleted stock is restored to  $B_{MSY}$  under subs (2)(b). It is not a defined term, but we did not understand counsel to disagree that

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<sup>34</sup> See Harvest Strategy Standard, above n 8, at 17; and Operational Guidelines, above n 8, at 31.

it concerns the effects of fishing on associated stocks, including bycatch harvested with the target species, and the role of the target species in the food chain.<sup>35</sup>

[24] Subsection (2)(b) deals with stocks which are below  $B_{MSY}$  and requires that the Minister set a TAC that will enable the stock to recover. We examine subs (2)(b) below from [75].

[25] Subsection (2A) deals with stocks whose level or  $B_{MSY}$  cannot be estimated reliably. It provides that the Minister must set a TAC that uses the best available information and is not inconsistent with the objective of moving stocks to  $B_{MSY}$  or better and maintaining them there:

- (2A) For the purposes of setting a total allowable catch under this section, if the Minister considers that the current level of the stock or the level of the stock that can produce the maximum sustainable yield is not able to be estimated reliably using the best available information, the Minister must—
  - (a) not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for the stock; and
  - (b) have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock; and
  - (c) set a total allowable catch—
    - (i) using the best available information; and
    - (ii) that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.

[26] Section 13(3) provides that the Minister must have regard to such social, cultural and economic factors as they consider relevant when considering the “way” and “rate” at which a stock is moved to  $B_{MSY}$ :

- (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

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<sup>35</sup> This is the meaning used in 2018 advice, above n 5, at [42]. Other species are caught as bycatch when trawling for tarakihi: at [2214]–[2215].

shall have regard to such social, cultural, and economic factors as he or she considers relevant.

[27] For the avoidance of doubt, a TAC may be set or varied to zero:<sup>36</sup>

(5) Without limiting subsection (1) or subsection (4), the Minister may set or vary any total allowable catch at, or to, zero.

[28] The majority explained in the *Kahawai case* that sustainability is the guiding consideration under s 13 but the Minister has some flexibility to consider fishing industry aspirations for utilisation:<sup>37</sup>

In considering the way in which, and rate at which, a stock is moved towards or above a level producing a maximum sustainable yield, the Minister must have regard to “social, cultural, and economic factors as he or she considers relevant”. This imports into the process for setting the total allowable catch a key aspect of the definition of “utilisation” in s 8(2) [meaning the objective of enabling people to provide for their social, economic and cultural wellbeing].

### **The Harvest Strategy Standard and Operational Guidelines**

[29] The HSS and Operational Guidelines are companion documents which the Ministry of Fisheries | Te Tautiaki i ngā tini a Tangaroa issued in 2008, some years after the Act was enacted in 1996.<sup>38</sup> They are not among a list of documents that s 11 prescribes the Minister must consider, where relevant, before setting sustainability measures.<sup>39</sup> Nor are they approved as fisheries plans under s 11A.<sup>40</sup>

[30] The HSS states that it is a technical document to be used by the Ministry for the purpose of advising the Minister.<sup>41</sup> It aims to provide a consistent and transparent framework for setting fishery and stock targets and limits and associated fisheries management work so that there is a high probability of achieving targets, a very low probability of breaching limits, and acceptable probabilities of rebuilding depleted stocks in a timely manner.<sup>42</sup> It explains that it does so by providing that depleted

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<sup>36</sup> Fisheries Act, s 13(5).

<sup>37</sup> *Kahawai case*, above n 1, at [44] per Blanchard, Tipping, McGrath and Wilson JJ (footnote omitted).

<sup>38</sup> The Operational Guidelines were later revised in 2011. We refer to that version.

<sup>39</sup> The list in s 11(2) comprises documents and regulations expressly contemplated by other legislation.

<sup>40</sup> See s 11(2A)(b).

<sup>41</sup> Harvest Strategy Standard, above n 8, at 22.

<sup>42</sup> At [22]. The term “depleted” is used in preference to “overfished”, which is only one cause of depletion: at [28], n 19.

stocks should be rebuilt to targets based on MSY-compatible reference points, or better, and ensuring that specified rebuild rates take account of relevant biological and environmental factors.<sup>43</sup> It records that it has no legal effect and does not address all considerations that affect ministerial decisions under the Act.<sup>44</sup> It was approved by the then Minister.

[31] The Operational Guidelines were prepared for the Chief Executive of the Ministry.<sup>45</sup> They contain technical guidelines for use with the HSS.<sup>46</sup> They include guidance on incorporating productivity considerations into MSY-compatible reference points.<sup>47</sup> The Guidelines envisage that they will evolve and be updated by the Chief Executive, on the advice of the Chief Scientist and National Manager for Fisheries Operations, from time to time.<sup>48</sup> They were not formally approved by the Minister and they record that they do not have the same status as the HSS.<sup>49</sup>

#### *Core elements of the HSS*

[32] The HSS comprises three core elements:<sup>50</sup>

- (a) a specified target about which a fishery or stock should fluctuate;
- (b) a soft limit that triggers a requirement for a formal, time-constrained rebuilding plan; and
- (c) a hard limit below which fisheries should be considered for closure.

#### The first element: the target biomass

[33] The HSS records that all quota stocks should be managed to fluctuate about a target, which should be  $B_{MSY}$  or better, with at least a 50 per cent probability of

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<sup>43</sup> At 23.

<sup>44</sup> At [9] and 22.

<sup>45</sup> At [6].

<sup>46</sup> At [4]–[5]; and Operational Guidelines, above n 8, at 1.

<sup>47</sup> Harvest Strategy Standard, above n 8, at [24], n 3.

<sup>48</sup> At [5]–[6]; and Operational Guidelines, above n 8, at 1.

<sup>49</sup> Harvest Strategy Standard, above n 8, at [6]; and Operational Guidelines, above n 8, at 1.

<sup>50</sup> Harvest Strategy Standard, above n 8, at [23].

achieving the target.<sup>51</sup> “Target” is defined in the HSS and Operational Guidelines as, generally and relevantly, a biomass level that management actions are designed to achieve with at least a 50 per cent probability.<sup>52</sup> For the East Coast tarakihi stock, MPI has set a target of 40 per cent of the virgin spawning biomass ( $SB_0$ ), meaning 40 per cent of what the spawning (mature) biomass would be had the species never been fished.<sup>53</sup> That accords with the Operational Guidelines’ default level for low-productivity stocks.<sup>54</sup>

The second element: the soft limit

[34] The HSS adopts a default soft limit of one-half  $B_{MSY}$  or 20 per cent of virgin biomass ( $B_0$ ), whichever is higher.<sup>55</sup> For the East Coast tarakihi stock, MPI estimated the soft limit to be 20 per cent of  $SB_0$ .<sup>56</sup> The meaning of the language used by the HSS when explaining the soft limit is in issue, so we set it out in full:<sup>57</sup>

**A soft limit that triggers a requirement for a formal, time-constrained rebuilding plan**

- > The default soft limit is  $\frac{1}{2} B_{MSY}$  or 20%  $B_0$ , whichever is higher.
- > The soft limit will be considered to have been breached when the probability that stock biomass is below the soft limit is greater than 50%.
- > Stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a time frame between  $T_{min}$  and  $2 * T_{min}$  with an acceptable probability.
- > Stocks will be considered to have been fully rebuilt when it can be demonstrated that there is at least a 70% probability that the target has been achieved<sup>8</sup> *and* there is at least a 50% probability that the stock is above the soft limit.

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<sup>51</sup> At [16]–[17], 7 and [26].

<sup>52</sup> At 21; and Operational Guidelines, above n 8, at 39.

<sup>53</sup> 2018 advice, above n 5, at [2041(a)(ii)]; and Fisheries New Zealand | Tini a Tangaroa *October 2019 Sustainability Round Decisions* (30 August 2019) [2019 advice] at [7.2]. Spawning biomass is the total weight of sexually mature fish in a stock that spawn in a given year: Harvest Strategy Standard, above n 8, at 20.

<sup>54</sup> Operational Guidelines, above n 8, at 10.

<sup>55</sup> Harvest Strategy Standard, above n 8, at 7.  $B_0$  is estimated from the average over recent years of the biomass that theoretically would have occurred if the stock had never been fished: at 17.

<sup>56</sup> 2018 advice, above n 5, at 388; and 2019 advice, above n 53, at [7.2].

<sup>57</sup> Harvest Strategy Standard, above n 8, at 7–8 (emphasis in original and some footnotes omitted). See below at [35].

[35] Footnote 8 of the HSS explains why a 70 per cent probability is used when assessing stock level against the target.<sup>58</sup>

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%.

[36] We make three points about the soft limit. First, it is deemed to have been breached when there is a probability of more than 50 per cent that the stock's biomass is below that limit.

[37] Second, stocks below the soft limit should be rebuilt to at least the target level in a time frame between  $T_{\min}$  and  $2*T_{\min}$ , with an acceptable probability.  $T_{\min}$  is defined in the HSS and Operational Guidelines as:<sup>59</sup>

$T_{\min}$ : the number of years required to rebuild a stock in the absence of fishing; this is a function of three primary factors: the biology of the species, the extent of stock depletion below the target, and the prevailing environmental conditions.

[38] For the East Coast tarakihi stock, with MPI's target of 40 per cent of  $SB_0$ ,  $T_{\min}$  was estimated to be five years, and so  $2*T_{\min}$  was 10 years.<sup>60</sup> We address below at [101] the issue of  $2*T_{\min}$  as a default outer limit on the rebuild period.

[39] Third, the HSS says that stocks will be deemed fully rebuilt when it can be shown that there is at least a 70 per cent probability that the target has been achieved and at least a 50 per cent probability that the stock is above the soft limit.<sup>61</sup> The Operational Guidelines also address this point, explaining why a higher probability is used.<sup>62</sup>

For both limits, 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

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<sup>58</sup> At 8, n 8.

<sup>59</sup> At 21; and Operational Guidelines, above n 8, at 39 (emphasis omitted).

<sup>60</sup> 2018 advice, above n 5, at [2041(a)(ii)]; and 2019 advice, above n 53, at [7.2].

<sup>61</sup> The evidence of Dr Dunn is that the latter requirement is redundant in the sense that it will always have been met if there is a 70 per cent probability that the stock has been restored to  $B_{MSY}$ .

<sup>62</sup> Operational Guidelines, above n 8, at 10.

fish, with relatively few large, highly fecund fish). In such instances it is necessary to rebuild both the biomass and the age composition.

[40] As explained above, the meaning of these parts of the HSS is disputed. RFB says, and the majority in the Court of Appeal agreed, that the HSS recommends a 70 per cent probability be used when setting a TAC to rebuild the stock.<sup>63</sup> Seafood contends, and Goddard J agreed, that the HSS recommends a 70 per cent probability when deciding, at a later point in time, whether the target has been reached and the rebuild probability used when setting a TAC need not exceed 50 per cent.<sup>64</sup> We address that issue below at [126].

The third element: the hard limit

[41] The default hard limit is one-quarter  $B_{MSY}$  or 10 per cent of  $B_0$ , whichever is higher.<sup>65</sup> It is a minimum standard, meaning that a higher hard limit may be appropriate for some stocks and a lower hard limit generally should not be adopted. At the hard limit, fisheries are considered collapsed and should be considered for closure.<sup>66</sup> For the East Coast tarakihi stock, the hard limit is 10 per cent of  $SB_0$ .<sup>67</sup>

### *Rebuild plans*

[42] The Operational Guidelines explain that a rebuild plan comprises the rebuild target, the expected time frame to reach the target, a minimum acceptable probability of success, and a set of management actions:<sup>68</sup>

A rebuilding plan consists of the rebuild target, the expected timeframe for rebuilding and a minimum acceptable probability of achieving the rebuild, together with a set of management actions that will achieve the desired rebuild.

The current practice is that a stock assessment must indicate that there is at least a 50% probability that the stock will simply increase in size (potentially by as little as one kilogram) over a specified period of time, usually 3-5 years. This does not represent a “rebuilding plan” in the sense of the usual meaning of the term. In response to this situation, the Harvest Strategy Standard specifies the need for a formal, time-constrained rebuilding plan.

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<sup>63</sup> CA judgment, above n 18, at [124] per Brown and Courtney JJ.

<sup>64</sup> At [276] and [282] per Goddard J.

<sup>65</sup> Harvest Strategy Standard, above n 8, at 9.

<sup>66</sup> At 9 and [28].

<sup>67</sup> 2018 advice, above n 5, at 388; and 2019 advice, above n 53, at [7.2].

<sup>68</sup> Operational Guidelines, above n 8, at 11.



Different management actions will apply depending upon the status of the stock relative to the target and soft limit. When stock size is below the target but above the soft limit, management action needs to be continually applied to ensure that fisheries fluctuate around target levels, particularly when they start to fall below those targets. Management actions need to ensure that stocks do not decline further. When the stock is at or below the soft limit, a formal time-constrained, rebuilding plan with reduced catches needs to be implemented.

[43] The Guidelines identify considerations which must be taken into account when setting time frames for recovery, explain how  $T_{\min}$  is estimated, and explain that the outer limit of  $2 * T_{\min}$  takes into account social, cultural and economic considerations.<sup>69</sup>

The setting of timeframes for rebuilding stocks needs to take into account the interdependence of stocks, the biological characteristics of the stock, any environmental conditions affecting the stock and the economic, social and cultural factors relevant to fisheries on the stock in question. Another relevant issue is the comprehensiveness and reliability of the available information on these factors and on stock status.

The Act requires that relevant economic, social and cultural factors be taken into account in deciding upon the way and rate at which a stock is rebuilt to the target level. In the case of stocks with significant allocations to more than one sector (greater than about 20% of the TAC), there may be considerable disagreement about timeframes for rebuilding. Where a stock is virtually exclusively allocated to one sector, the timeframe selected may be more reflective of the interests of that particular sector.

The Harvest Strategy Standard specifies that where the probability that a stock is at or below the soft limit is greater than 50%, the stock should be rebuilt to the target within a time period between  $T_{\min}$  and  $2 * T_{\min}$  (where  $T_{\min}$  is the theoretical number of years required to rebuild a stock to the target with zero fishing mortality).

Mathematical projection models will generally need to be developed to estimate  $T_{\min}$  and to compare and contrast alternative rebuilding strategies. These will usually be probabilistic models that incorporate uncertainty in the projections. 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. A stock will not be declared to be rebuilt, and therefore absolved from further rebuilding, until it can be determined that there is at least a 70% probability that the target has been achieved. This means that if the initial rebuilding plan is underachieved/overachieved, it may need to be revised prior to the termination of the timeframe initially set. This may result in a more restrictive, or more lenient, rebuilding plan as time progresses.

$T_{\min}$  reflects the extent to which a stock has fallen below the target, the biological characteristics of the stock that limit the rate of rebuild, and the

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<sup>69</sup> At 11–12.

prevailing environmental conditions that also limit the rate of rebuilding. Allowing a rebuilding period up to twice  $T_{\min}$  allows for some element of socio-economic considerations when complete closure of a fishery could create undue hardships for various fishing sectors and/or when the stock is an unavoidable bycatch of another fishery. The probability of rebuild should be increased where the information is highly uncertain or where multiple sectors have significant interests in the fishery.

### **The East Coast tarakihi fishery**

[44] Tarakihi live to 40-plus years and reach sexual maturity at about six years.<sup>70</sup> They grow rapidly for the first eight years and achieve minimum legal catch size at three to four years. The species is characterised by fast growth early in life and high fecundity. But compared to other fish species, tarakihi are slow-growing and long-lived, with low natural mortality.<sup>71</sup> For those reasons, the species has been classified as a low-productivity species that is less resilient to intensive fishing than other species.<sup>72</sup>

[45] It is now understood that tarakihi on the east coast of the North and South Islands comprise a single stock.<sup>73</sup> The major spawning areas are from Cape Runaway to the East Cape and from Cape Campbell to Pegasus Bay.<sup>74</sup> In the Canterbury Bight/Pegasus Bay area there is a preponderance of juvenile fish, and the fish tend to migrate northward as they age.<sup>75</sup> This distribution is said to create an opportunity to manage the fishery to reduce the number of juvenile fish caught, and in that way improve productivity (because greater numbers would recruit to the fishery).

[46] The stock has been fished heavily for many decades but, as noted above, the first fully quantitative assessment was not completed until 2017. It estimated that stock levels were at 17 per cent of  $SB_0$ .<sup>76</sup> The level was estimated to have fallen to

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<sup>70</sup> 2018 advice, above n 5, at [2064]; and 2019 advice, above n 53, at [7.1].

<sup>71</sup> John H Annala *The biology and fishery of tarakihi, Nemadactylus macropterus, in New Zealand waters* (NIWA, Fisheries Research Division Occasional Publication No 51, 1987) at 10.

<sup>72</sup> 2018 advice, above n 5, at [2064]; and 2019 advice, above n 53, at [7.1].

<sup>73</sup> 2018 advice, above n 5, at [2036].

<sup>74</sup> At [2065]. Later reports also identify the west coast of the South Island near Jackson Bay as a main spawning ground: see, for example, Fisheries New Zealand | Tini a Tangaroa *Fisheries Assessment Plenary: Stock Assessment and Stock Status – Volume 3: Red gurnard to Yellow-eyed mullet* (May 2024) [2024 plenary] at 1814.

<sup>75</sup> 2018 advice, above n 5, at [2066].

<sup>76</sup> At [2108].

around 20 per cent of  $SB_0$  as long ago as 1975. In 2019 stock levels were estimated at 15.9 per cent of  $SB_0$ .<sup>77</sup>

[47] We have explained that MPI's target  $B_{MSY}$  for the East Coast tarakihi fishery is the default level of 40 per cent of  $SB_0$ , and the soft limit is 20 per cent.<sup>78</sup> So, stock levels in 2017 and 2019 were substantially below the level that can produce MSY. At that level, natural fluctuations in stock numbers are thought to create a sustainability risk. However, the stock had remained at about that level for a long time, and it was not thought to be at serious risk of collapse. Because the stock includes a substantial proportion of juvenile fish which are at or near sexual maturity, MPI estimated that it would recover to  $B_{MSY}$  in five years if the fishery was closed.

### **The 2018 and 2019 TAC and TACC decisions**

[48] We have explained that the proceeding is concerned with the 2019 decision. It is necessary to read the 2018 and 2019 decisions together because the Minister took a staged approach in which the 2018 reduction was an initial step to be followed by further reductions, depending on the fishing industry's response to his intention to rebuild the stock to  $B_{MSY}$ .<sup>79</sup>

#### *The 2018 TAC decision*

[49] The Minister chose to combine what had previously been understood and managed as several separate fisheries. He acknowledged that the East Coast tarakihi fishery is a key fishery for commercial, recreational and customary fishers. As noted earlier, he reduced the TAC by 17 per cent.

[50] The Minister recognised industry concerns about uncertainty in the data:<sup>80</sup>

The industry raised particular concern about uncertainty in the assessment (driven by it being the first assessment for east coast tarakihi), the assumed stock structure and projections. They are concerned about this uncertainty

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<sup>77</sup> 2019 advice, above n 53, at [7.2].

<sup>78</sup> Some fishing interests argued that a species-specific  $B_{MSY}$  ought to be set before TAC reductions are made but, for the purposes of this proceeding, the default level is not now in issue. A  $B_{MSY}$  of only 40 per cent might seem counter-intuitive, but yield follows a harvest curve which increases initially as the stock is fished down (because fish remain plentiful and there is plenty of food).

<sup>79</sup> 2018 decision, above n 4, at 21–23.

<sup>80</sup> At 20.

given the magnitude of the economic impacts on the inshore commercial sector from some of the options proposed.

It is clear to me that there is always some level of uncertainty associated with management of fisheries. It is difficult to be certain about abundance and trends when you cannot see what you are trying to estimate. The Fisheries Act information principles deal with the issues of uncertainty directly. In that context, I am advised that the stock assessment has been peer reviewed and is regarded as robust. It is the best available information. Fisheries New Zealand has indicated areas of particular uncertainty in its final advice to me. I have considered the nature and extent of the uncertainty, and given appropriate weight to it in my decision.

[51] He explained that he had adopted a target of 40 per cent of  $SB_0$  (consistent with the HSS) and declined an industry invitation to adopt a lower target.<sup>81</sup> He announced that he found it necessary to rebuild the stock to  $B_{MSY}$ , having regard to the best available information.

[52] The Minister explained that he had carefully considered his discretion to manage the way and rate, and he acknowledged that the decision had significant socio-economic implications.<sup>82</sup> These were a key consideration along with the biological characteristics of the stock. He discussed the options that had been considered.<sup>83</sup>

A range of options were consulted on, from 10 to 20 years for the rebuild period. The trade-offs between these rates are clear. The shorter the rebuild time, the quicker the benefits of a rebuilt stock are available to all users, but the larger the short-term socio-economic impact. I am conscious that this stock has been well below the target level since introduction to the QMS over 30 years ago. Further, I do not consider the current stock status of less than half of the target level to be in any way acceptable. I consider the stock at this level of abundance is impacting significantly on the ability of all users to derive benefits they would like from the stock, relative to the value they place on it.

I note that science advice suggests the stock would rebuild over a minimum period of 5 years in the absence of fishing. I recognise there is uncertainty in this assessment, but nonetheless it appears to me to be a very short timeframe. I have no intention of closing the fishery, but the potential speed of rebuild does provide opportunities not available in many other fisheries. I note that the Harvest Strategy Standard suggests, as a guide, that a fishery should be rebuilt in twice this timeframe.

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<sup>81</sup> At 20.

<sup>82</sup> At 20.

<sup>83</sup> At 21.

Rebuilding the stock over 10 years makes the benefits associated with rebuild available to people in a timeframe that is more tangible than is possible for some other inshore finfish species. I see this as a real opportunity for benefits from our management regime to be illustrated in a stock that covers a wide area, and would be accessible to [a] wide variety of users. I therefore favour a rebuild timeframe of 10 years.

I recognise the potential for very significant socio-economic impacts that may result from this rebuild rate, and I would like to see innovative approaches to the way we rebuild this stock to mitigate those impacts.

The final decision I need to make is on the way the stock rebuilds to the target at the rate I have decided on. A reduction in catch is necessary to ensure a rebuild. The advice provided to me outlined the requirement for a 55% reduction from current commercial catch to provide a 50% probability of rebuild within 10 years.

I note that this is not a particularly high probability of rebuild. However, to rebuild with more certainty would require even larger reductions. I consider a probability of rebuild of 50% reasonable given the status of the stock, the size of rebuild required, and the socio-economic impact associated with achieving a rebuild with greater certainty.

It will be seen that the Minister indicated he favoured a rebuild period of 10 years. An advice paper explained that the 10-year period was based on  $T_{\min}$ , which we discuss below. The Minister acknowledged that the probability of 50 per cent on which that period was based was not particularly high. He also observed that, if closed, the fishery would rebuild within a very short time frame.

[53] The Minister hoped that the socio-economic effects could be mitigated by an alternative management strategy and indicated that he had taken a staged approach for that reason, starting with a reduction of 20 per cent in the commercial catch.<sup>84</sup> That would begin the rebuild, but at a pace which was not sufficient without further measures. He invited the industry to develop a robust and effective plan to contribute to the rebuild.<sup>85</sup> He asked that a plan be presented by mid-2019 and indicated that it would influence the TAC to be set at that time.<sup>86</sup>

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<sup>84</sup> At 21–22.

<sup>85</sup> At 22.

<sup>86</sup> At 23.

### *The Industry Rebuild Plan*

[54] In response, the industry produced the *Eastern Tarakihi Management Strategy and Rebuild Plan 2019*, which we have called the Industry Rebuild Plan.<sup>87</sup> The Plan contains a range of new or existing industry measures for East Coast tarakihi. Briefly, new management measures aim to better select fish and spread catch areas, including by implementing a rule that fishers move on when many of the tarakihi caught in a particular area are below the minimum legal size.<sup>88</sup> New scientific measures seek to enhance the fishery's data and models, including by incorporating information on changes in fishing gear and fisher behaviour.<sup>89</sup>

### *The options presented to the Minister*

[55] MPI presented four options to the Minister in a decision paper dated 30 August 2019.<sup>90</sup>

- (a) A TACC reduction of 31 per cent spread unevenly across the area. It would rebuild the stock to 40 per cent of SB<sub>0</sub> over 12 years at a 50 per cent probability. The paper stated that this period was two years longer than the HSS recommended.
- (b) A TACC reduction of 35 per cent proportionally shared across the area.<sup>91</sup> It would rebuild the stock to the target of 40 per cent of SB<sub>0</sub> over 11 years at a 50 per cent probability.
- (c) A target of 35 per cent of SB<sub>0</sub>, as recommended by the industry, with no TAC or TACC cuts in 2019 and assumed implementation of the Industry Rebuild Plan. The proposed rebuild period was at most 20 years, based on an industry commitment to that maximum period. No probability was specified. The paper noted uncertainty about the

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<sup>87</sup> Industry Rebuild Plan, above n 6.

<sup>88</sup> At [61].

<sup>89</sup> At [99].

<sup>90</sup> 2019 advice, above n 53, at [9].

<sup>91</sup> That is, across the whole of TAR 1, 2, 3 and 7 (the quota management areas for tarakihi along the eastern coast of mainland New Zealand). In practice this would amount to a 50 per cent TACC reduction when considering only the eastern portion of TAR 1 and the Cook Strait portion of TAR 7.

Plan delivering an accelerated rate of rebuild and advised that in the absence of additional management actions (that is to say, assuming the Plan was ineffective) the rebuild time frame would be 27 years (presumably at a 50 per cent probability) to reach the lower target.

- (d) A TACC reduction of seven per cent combined with the Industry Rebuild Plan and using an initial target of 40 per cent of SB<sub>0</sub> pending a species-specific target being developed as part of the scheduled 2021 stock assessment.<sup>92</sup> Again, no probability was specified. The Ministry advised that, in the absence of any additional management actions, the rebuild time frame would be 25 years to reach the initial target.

*The 2019 TAC decision*

[56] As noted earlier, the stock level had not changed materially since the Minister's 2018 decision. It was estimated at 15.9 per cent of SB<sub>0</sub>, a level which the Minister described as "currently very low".<sup>93</sup> The Minister maintained the target spawning biomass at the default level of 40 per cent of SB<sub>0</sub> and chose to reduce the combined TACC by a further seven per cent.<sup>94</sup> The Minister agreed to the implementation of the Industry Rebuild Plan, under which the industry had committed to a 20-year rebuild period.<sup>95</sup> A reduction was nonetheless necessary to give the Minister confidence that the stock would rebuild in a way and at a rate he considered appropriate. He recorded that his decision reflected the economic impact on fishers, their families and regional communities.<sup>96</sup> He indicated that he would further reduce the TAC before the 2021 stock assessment if the industry failed to deliver on its commitments.

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<sup>92</sup> In practice this would amount to a 10 per cent TACC reduction when considering only the eastern portion of TAR 1 and the Cook Strait portion of TAR 7.

<sup>93</sup> 2019 decision, above n 1, at 8.

<sup>94</sup> See above n 92.

<sup>95</sup> 2019 decision, above n 1, at 7.

<sup>96</sup> At 8.

## **The issues for decision**

[57] The appeal presents two issues, one concerning the determination of “period appropriate to the stock” in s 13(2)(b)(ii) and the other the existence and status in law of a default rebuild probability of 70 per cent for stocks under the soft limit.

[58] The first issue has several parts:

- (a) whether the rebuild period appropriate to the stock under s 13(2)(b)(ii) is a single period or a range with an outer limit;
- (b) whether the rebuild period must be determined separately from the way in which and rate at which the rebuild occurs;
- (c) whether that decision should be made solely by reference to the scientific factors specified in s 13(2)(b)(ii); and
- (d) if the answer to (c) is no, whether the Industry Rebuild Plan may be taken into account when determining the appropriate period.

[59] The second issue has two parts:

- (a) whether the HSS specifies or incorporates a 70 per cent default probability of rebuild (and reasons for that default probability) that is relevant to rebuild plans relating to stocks below the soft limit; and
- (b) whether the 70 per cent probability of rebuild (and the reasons for that probability) specified as the default probability in the Operational Guidelines (and, if the answer to (a) is yes, the HSS) was a mandatory relevant consideration when the Minister set the TAC for East Coast tarakihi in 2019.



## Period appropriate to the stock

### *The Court of Appeal's reasons*

[60] For the majority, Courtney J reasoned that s 13(2)(b)(i) and (ii) work together to produce a TAC but it does not follow that the legislation envisages a single composite inquiry.<sup>97</sup> The subparagraphs were separated into two during the legislative process.<sup>98</sup> While the legislative record does not explain why that was done, it is clear that sustainability was the overarching concern and sustainability was to take precedence over utilisation.<sup>99</sup> That objective could not be achieved if subs (2)(b) provided for a single composite decision.

[61] The majority observed that a way and rate decision under subs (2)(b)(i) will necessarily produce a rebuild period.<sup>100</sup> But subpara (ii) is intended to operate as a control on the rebuild period. It can achieve that purpose only if (a) it is determined separately from way and rate, and (b) it is determined by reference to a different or narrower set of considerations, namely the scientific factors.<sup>101</sup> The majority found support for that conclusion in subs (3), holding that it is engaged only when way and rate are being considered.<sup>102</sup>

[62] The majority then turned to the evidence that the HSS, which represents recognised best practice, provides for a rebuild period of between  $T_{\min}$  (the recovery period in the absence of fishing) and  $2 * T_{\min}$ .<sup>103</sup> The evidence was that the HSS permitted a period longer than  $T_{\min}$  to take some account of socio-economic factors, to recognise the practical reality that it is very difficult to completely eliminate fishing for a species which may still be caught as bycatch, and because it is “not necessary or advisable” to completely close fisheries where stocks are not below the hard limit.<sup>104</sup>

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<sup>97</sup> CA judgment, above n 18, at [64] per Brown and Courtney JJ.

<sup>98</sup> Compare Primary Production Committee “Interim Report on the Fisheries Bill” [1993–1996] XLII AJHR I 11A [Interim report] at 36; and Fisheries Bill 1994 (63-2), cl 13(2)(b).

<sup>99</sup> CA judgment, above n 18, at [64] per Brown and Courtney JJ.

<sup>100</sup> At [65] per Brown and Courtney JJ.

<sup>101</sup> At [92] per Brown and Courtney JJ.

<sup>102</sup> At [71] per Brown and Courtney JJ.

<sup>103</sup> At [87] per Brown and Courtney JJ.

<sup>104</sup> At [88] per Brown and Courtney JJ.

[63] Nonetheless, the majority held, the period appropriate to the stock under subs (2)(b)(ii) is necessarily based on expert scientific opinion, having regard to biological characteristics of the stock and any environmental considerations affecting the stock.<sup>105</sup> The Minister might rely on the HSS, but he was not free to make any further allowance for socio-economic and cultural factors when determining the rebuild period; to do so would be to defeat the statutory purpose.<sup>106</sup>

[64] The majority rejected the Minister's contention that subs (2)(b)(ii) contemplates a "range" of periods, holding that the Minister may select the longest or any shorter period that is appropriate to the stock:

[93] It follows that we do not accept the Minister's argument that s 13(2)(b)(ii) contemplates a range of periods. We agree with Forest & Bird's response that the Minister's approach is misconceived because the requirement in s 13(2)(b)(ii) to rebuild "within" a period appropriate to the stock means that rebuilding within the longest period appropriate to the stock or any shorter period would always satisfy s 13(2)(b)(ii). There is no need for the unnecessary gloss of allowing for a range of periods from which a specific period is selected on the basis of considerations other than those permitted by s 13(2)(b)(ii).

It followed that the Minister was not permitted to consider the Industry Rebuild Plan when deciding the appropriate period.<sup>107</sup>

[65] Goddard J dissented. He held that the appropriate period in subs (2)(b)(ii) is not a maximum period which must be determined by reference to scientific considerations alone.<sup>108</sup> If that were so, one would expect s 13 to be structured differently, so that the period would be fixed as a step preliminary to deciding the TAC.<sup>109</sup> Subsection (2) is a single sentence which appears to have been divided into a chapeau and two subparagraphs for readability reasons.<sup>110</sup> He agreed with the majority that the subparagraphs cannot be read in isolation from one another. It followed, in his view, that way, rate and period could not be decided separately; to decide way and rate is to decide the period, and to decide the TAC is to decide both.<sup>111</sup>

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<sup>105</sup> At [91] per Brown and Courtney JJ.

<sup>106</sup> At [92] per Brown and Courtney JJ.

<sup>107</sup> At [95]–[96] per Brown and Courtney JJ.

<sup>108</sup> At [230].

<sup>109</sup> At [226] per Goddard J.

<sup>110</sup> At [227] per Goddard J.

<sup>111</sup> At [227] and [236(a)] per Goddard J.

He observed that biological and environmental considerations must be relevant to way and rate, as well as period.<sup>112</sup> He concluded that:

[230] A reading of s 13(2)(b) as a coherent textual whole, in light of its place in the statutory scheme and its purpose, leads in my view to the conclusion that:

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

[66] Goddard J held that the legislation recognises that there may be many periods that are appropriate to the stock, not a single maximum.<sup>113</sup> But if the rebuild period may be more than  $T_{\min}$  it must be the case that other considerations may be taken into account in fixing it.<sup>114</sup> The only reason to exceed  $T_{\min}$  would be to take account of social, cultural and economic considerations.

### *Submissions*

[67] Seafood contended that the "appropriate period" is to be determined alongside the way and rate in a single composite decision that must incorporate the likely past, present and future effects of fishing and existing controls (including the Industry Rebuild Plan) alongside biological characteristics of the stock, relevant environmental conditions and social, cultural and economic factors. Mr Scott argued that this follows from the ordinary and natural meaning of the provisions and the purpose of the Act when read as a whole. The majority incorrectly bifurcated the

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<sup>112</sup> At [227] per Goddard J.

<sup>113</sup> At [229].

<sup>114</sup> At [231]–[232] per Goddard J.

statutory purpose in s 8 and failed to recognise the Minister's obligation to allow utilisation. Nor did they recognise that sustainability is not a wholly scientific objective. An exclusively scientific approach to the appropriate period would be unworkable and would rob s 13(3) of any real purpose. It must result in the fishery being closed completely during the rebuild, because it leads inexorably to  $T_{\min}$ . To the extent the majority sought to incorporate socio-economic factors through the HSS in an attempt to avoid the logical conclusion that the period must be  $T_{\min}$ , the reasoning was contradictory. The majority were mistaken in their opinion that a composite approach would not ensure sustainability; it is the obligation to return stocks to  $B_{\text{MSY}}$  with a probability of not less than 50 per cent that achieves that objective. The Act does not permit the Minister to manage stocks to a target that is permanently below  $B_{\text{MSY}}$ . Nor does it allow the Minister to adopt a probability of meeting the target that is less than 50 per cent.

[68] In oral argument, Mr Scott was prepared to accept that the decision-making process should include an evaluative step at which the Minister assesses the appropriateness of the period having regard to the scientific factors alone, but he did not concede that this step operates as a control on the TAC, maintaining that it is not a distinct limit but a relevant consideration in a single decision.

[69] The Minister contended that subs (2)(b)(ii) operates as a cross-check on the period that results from the way and rate analysis. The cross-check is carried out by reference to biological characteristics and relevant environmental conditions. Counsel for the Minister, Mr Anderson, argued that the rebuild must be timely for the stock given its biological characteristics and environmental considerations. That being so, the Industry Rebuild Plan is not relevant to the cross-check. But the legislation does not compel adoption of the period "most appropriate" to the stock, nor does it prescribe that  $T_{\min}$  is the starting point. Counsel submitted that socio-economic considerations are not "directly relevant" to assessing the period but argued that the appropriate period is a matter of judgement, not scientific precision. In other words, there may be a range of periods that are appropriate to the stock having regard to its current biomass and resilience to fishing pressure. So long as those periods are appropriate to the stock, the Minister is not precluded from taking social, cultural and economic considerations

into account when choosing among them. Nor is the Minister obliged to estimate a maximum rebuild period.

[70] RFB contended that the Minister erred in the 2019 decision by at least doubling the period he considered appropriate in 2018 and doing so by reference to legally irrelevant social, cultural and economic considerations. The appropriate period must be determined having regard only to the stock's biological characteristics and any environmental conditions affecting the stock. Subject to that outer limit, Ms Gepp accepted, as she did in the Court of Appeal,<sup>115</sup> that there may be a range of appropriate periods among which the Minister can choose. Counsel did not accept that the scientific factors alone will always point to  $T_{\min}$ . The maximum appropriate period is the period beyond which it is *inappropriate*, having regard to the stock's biological characteristics and environmental conditions, to delay the stock's return to  $B_{\text{MSY}}$ . To the extent that the majority in the Court of Appeal recognised, through the HSS, that social, cultural and economic factors may influence the period, they were in error.

*The position of Māori interests*

[71] The third respondent, Te Ohu Kai Moana Trustee Ltd (Te Ohu), is the trustee of Te Ohu Kai Moana trust established, pursuant to s 31 of the Māori Fisheries Act 2004, generally to advance the interests of iwi in connection with fisheries and fishing, and in particular to further agreements with the Crown whose key terms are recorded in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Fisheries Settlement Act).<sup>116</sup> Te Ohu has interests in the East Coast tarakihi stock, including as an owner of quota shares as trustee for iwi.

[72] In the Court of Appeal, Te Ohu supported Seafood's arguments and further emphasised that social, cultural and economic considerations affecting Māori must be taken into account under s 13(2)(b) and (3) of the Fisheries Act.<sup>117</sup> It offered affidavit evidence emphasising that the stock supports stable local markets and customary harvests because it is seasonally continuous and TACC reductions have a direct financial impact on the commercial fishing sector.

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<sup>115</sup> See at [223] and [225] per Goddard J.

<sup>116</sup> Māori Fisheries Act 2004, s 32.

<sup>117</sup> CA judgment, above n 18, at [98] per Brown and Courtney JJ.

[73] The majority noted that the Fisheries Settlement Act included the acknowledgement by Māori that the quota management system was a lawful and appropriate regime for the management of commercial fisheries in New Zealand.<sup>118</sup> That Act recorded Crown commitments to Māori in connection with the allocation of commercial fishing quota.<sup>119</sup> The Fisheries Act also provides that it is to be interpreted in a manner consistent with the Fisheries Settlement Act.<sup>120</sup> It requires that, when deciding sustainability measures, the Minister must provide for participation by tangata whenua having a non-commercial interest in fish stocks or an interest in the environmental effects of fishing.<sup>121</sup> The majority held that the Fisheries Settlement Act does not require that the Fisheries Act be interpreted in a way which would undermine its sustainability purpose.<sup>122</sup> It would undermine that purpose to allow social, cultural and economic factors to influence the period appropriate to the stock under s 13(2)(b)(ii).<sup>123</sup> Those factors may be taken into account in way and rate decisions.

[74] Te Ohu did not participate in the hearing before us but advised by memorandum that it supports the written arguments advanced by Seafood. Mr Scott emphasised that the Fisheries Settlement Act and Fisheries Act together seek to enable Māori participation and s 13(3) of the Fisheries Act was enacted partly to ensure Māori interests were taken into account. The Act should not be interpreted in a way that results in it having no real value for Māori. Ms Gepp responded that it cannot be assumed that Māori interests would always support a rebuild period longer than that appropriate to the stock. Cultural practices such as rāhui and mātaimai may significantly affect “way” decisions and permit smaller TAC reductions than would otherwise be necessary.

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<sup>118</sup> At [99] per Brown and Courtney JJ. The minority reasons did not specifically address the position of Māori interests. We note that the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [Fisheries Settlement Act] does not expressly record the endorsement made by Māori. For that, see cl 4.2 of the Deed of Settlement (23 September 1992).

<sup>119</sup> See Fisheries Settlement Act, preamble.

<sup>120</sup> Fisheries Act, s 5(b).

<sup>121</sup> Section 12(1)(b). Section 12 applies to decisions made under s 13(1), including the Minister’s 2018 and 2019 decisions.

<sup>122</sup> CA judgment, above n 18, at [101] per Brown and Courtney JJ.

<sup>123</sup> At [102] per Brown and Courtney JJ.

*The rebuild period: a sustainability control on TAC decisions*

[75] We begin with s 11(1), which establishes the Minister’s power to set or vary any sustainability measure, after having regard to three considerations: any effects of fishing on any stock and the aquatic environment; any existing controls under the Act that apply to the stock or area concerned; and the natural variability of the stock concerned. It is logically implicit in the obligation to assess the effects of fishing that the Minister must consider the state of the stock with and without fishing, and further that, as Mr Scott submitted, the effects of fishing include any fisheries management measures that will apply to the stock while the sustainability measure concerned subsists.<sup>124</sup> In respect of the Minister’s 2019 decision, that included the Industry Rebuild Plan.

[76] Section 13 addresses four estimated stock level scenarios: the stock is at or about  $B_{MSY}$  (subs (2)(a)); the stock is below  $B_{MSY}$  (subs (2)(b)); the stock is above  $B_{MSY}$  (subs (2)(c)); and the stock level cannot be reliably estimated using the best available information (subs (2A)). In each case the Minister’s decision must ensure utilisation within limits set by the sustainability of the harvest.<sup>125</sup> Where the stock level is at or about  $B_{MSY}$ , the Minister is simply required to set a TAC that maintains stock at or above that level. When the stock is below  $B_{MSY}$ , subs (2)(b) requires that the TAC must allow the stock level to increase and imposes additional requirements on the Minister: the Minister must adopt a way, rate and period that will result in the stock level being restored to  $B_{MSY}$ .

[77] We repeat s 13(2)(b) for convenience:

**13 Total allowable catch**

...

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

...

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<sup>124</sup> “Effect” is widely defined in s 2(1) of the Fisheries Act to mean the direct and indirect effects of fishing.

<sup>125</sup> See above at [28], referring to *Kahawai case*, above n 1, at [44] per Blanchard, Tipping, McGrath and Wilson JJ.

- (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 ...

[78] The legislative history does not establish why subs (2)(b) was split into a chapeau and two subparagraphs. That was recommended, along with the addition of subs (3), in the Select Committee’s final report, but without explanation.<sup>126</sup> It may be, as Goddard J observed, that it was done to make a long and complex sentence more readable.<sup>127</sup>

[79] But it is evident from the legislative history that the Select Committee’s intention was always to insist that stock levels be restored to  $B_{MSY}$  within a period appropriate to the stock. The draft Bill that the Committee produced in its interim report provided in a single paragraph that the TAC must enable the stock level to be restored to  $B_{MSY}$  “within a period appropriate to the stock having regard to the stock characteristics”.<sup>128</sup> The final version of the Bill recommended by the Committee used the wording in cl 13(2)(b)(ii) “[w]ithin a period appropriate to the stock and its biological characteristics”, while environmental conditions were a relevant consideration to the way and rate determination in subpara (i).<sup>129</sup> That version of cl 13 was enacted in 1996 without further amendment.<sup>130</sup> Section 13(2)(b) was then amended in 1998 following a departmental report reviewing submissions on the Act.<sup>131</sup> That report recommended the removal of environmental conditions from subpara (i), on the ground that to keep them there would allow transient environmental conditions to influence the target stock level.<sup>132</sup> For that reason, the report recommended that

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<sup>126</sup> Fisheries Bill 1994 (63-2), cl 13(2)(b) and (3).

<sup>127</sup> CA judgment, above n 18, at [227].

<sup>128</sup> Interim report, above n 98, at 36.

<sup>129</sup> Fisheries Bill 1994 (63-2), cl 13(2)(b)(ii).

<sup>130</sup> Fisheries Act 1996, s 13(2)(b)(ii) (as enacted).

<sup>131</sup> Fisheries (Remedial Issues) Amendment Act 1998, s 4(2).

<sup>132</sup> Office of the Minister of Fisheries *Fisheries (Remedial Issues) Amendment Bill: Departmental Report* (27 April 1998) at [39]–[41]. See also Fisheries (Remedial Issues) Amendment Bill 1997 (97-1) (explanatory note) at ii.



environmental considerations should be confined to the recovery period in subpara (ii).

[80] Consistent with that policy approach, subs (2)(b) imposes cumulative requirements; that follows from the conjunction “and”. They are both imperative: the Minister must adopt a way and rate that “will result” in the stock level being restored, and the “period [must be] appropriate to the stock”.

[81] The legislature must be taken to have appreciated that way, rate and period are intimately connected in any single TAC decision. A way and rate will produce a period. It follows that, if the period appropriate to the stock were to be a mere mathematical function of way and rate, there would be no need for subpara (ii). The division into two separate requirements indicates that each is intended to constrain the TAC by reference to a sustainability requirement. In subpara (i) that requirement is an implicit probability of not less than 50 per cent that the way and rate “will” move the stock level towards  $B_{MSY}$ . In subpara (ii) it is the requirement that the period be appropriate to the stock.

[82] The Court of Appeal held that, in context, the fact the Minister must enable the stock level to be altered within a period appropriate to the stock “having regard to” biological characteristics and environmental conditions does not mean that the Minister may or may not treat biological characteristics and environmental conditions as influential in the choice of rebuild period.<sup>133</sup> These considerations must be given effect. In this Court the Minister agreed. We concur. The decision is concerned with a period appropriate to the stock, not a period appropriate to those having an interest in the stock. The assessment must rest on biological characteristics and relevant environmental conditions. Other considerations may be taken into account, as we explain below from [94], but only to the extent they are concerned with what is appropriate for the stock.

[83] For these reasons, we do not accept Seafood’s submission that the majority in the Court of Appeal erred by focusing on sustainability. Counsel argued that the Act adopts a single blended objective, and the majority were wrong to hold that

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<sup>133</sup> CA judgment, above n 18, at [68] per Brown and Courtney JJ and [231] per Goddard J.

sustainability takes precedence over utilisation. It is correct, as the Court held in the *Kahawai case*, that s 8 expresses a single purpose by reference to utilisation and sustainability over the long term.<sup>134</sup> But as the Court said there, utilisation may not jeopardise sustainability.<sup>135</sup> And subs (2)(b) specifically addresses TAC-setting for a stock that is already below the level that can maximise sustainable utilisation. That is why the subsection is the only provision in s 13, besides subs (2A), which expressly constrains TAC decisions by reference to specified sustainability requirements.

*Scope for ministerial judgement, within the rebuild constraint*

[84] Although both requirements in subs (2)(b) are imperative, the Minister is afforded substantial scope for the exercise of judgement when deciding on way, rate and period. Four features of the legislation make that clear. First, the criteria that must be considered under subs (2)(b) and (3) are broad and imprecise. They are the interdependence of stocks, such social, cultural and economic considerations as the Minister considers relevant, the biological characteristics of the stock and any environmental considerations affecting the stock.

[85] Second, the statute does not specify the weight that must be attached to these considerations. Some of them are likely to point in opposing directions and a TAC decision may need to balance them, within the limits set by the Act.

[86] Third, the indefinite article in both limbs of subs (2)(b)—“a” way, “a” rate and “a” period—contemplates that more than one of each may be available to the Minister. In particular, subs (2)(b)(ii) envisages that there may be more than one period that is appropriate to the stock. And the word “appropriate” signifies that a range of outcomes is available, with the scope for judgement depending on the nature of the relevant considerations.<sup>136</sup>

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<sup>134</sup> See above at [15], referring to *Kahawai case*, above n 1, at [39]–[40] per Blanchard, Tipping, McGrath and Wilson JJ.

<sup>135</sup> *Kahawai case*, above n 1, at [39] per Blanchard, Tipping, McGrath and Wilson JJ.

<sup>136</sup> See, for example, *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [29(b)] and [100] per Elias CJ, McGrath, Glazebrook and Arnold JJ; and *Regina (Champion) v North Norfolk District Council* [2015] UKSC 52, [2015] 1 WLR 3710 at [41].

[87] Finally, the statutory language also does not specify that the Minister is confined to the specified considerations when setting a TAC by reference to way, rate and period. To say that regard must be had to specified considerations is not to exclude others. In particular, we accept Mr Scott's submission that the scientific factors in subpara (ii) will affect way and rate decisions although they are not specified in subpara (i). By way of illustration, part of the Industry Rebuild Plan is a proposal to increase by one year the age at which the fish are caught, so increasing the likelihood that fish will reach sexual maturity.<sup>137</sup> Another is to modify catches and fishing gear in areas where juvenile fish predominate.<sup>138</sup> We accept that these are relevant considerations, to the extent the Minister decides they can be relied upon when making way and rate decisions under subpara (i). We also accept that the interdependence of stocks, which is specified in subpara (i), may be linked to the biology of a stock.<sup>139</sup>

[88] It does not follow that social, cultural and economic factors may influence the rebuild period that is appropriate to the stock, for two reasons. First, subpara (ii) requires that the Minister determine a period appropriate to the stock. The specified considerations that must be taken into account when making that decision—biology of the stock and environmental conditions affecting it—reflect that focus on the stock. Any other considerations that may be taken into account when determining appropriate periods must similarly be concerned with what is appropriate for the stock, not for users of the stock.

[89] Second, s 13(3), which we have set out above at [26], prescribes that relevant social, cultural and economic considerations must be taken into account when deciding on way and rate under subs (2)(b) or (c), or subs (2A). It does not say that they may affect the assessment of periods appropriate to the stock. We reject Mr Scott's submission that the legislation would have specified that social, cultural and economic factors are relevant to subs (2)(b)(i), rather than the whole of subs (2)(b), had it intended to confine these considerations to way and rate decisions. We prefer the view that, had the legislature intended that social, cultural and economic factors be taken into account when determining periods appropriate to the stock, it would have

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<sup>137</sup> Industry Rebuild Plan, above n 6, at [70].

<sup>138</sup> At [62].

<sup>139</sup> As noted above at [23], this term refers to the effects of fishing on associated stocks.

specified that these considerations may be taken into account when considering way, rate *and* period. We consider that subs (3) envisages that the analysis of periods appropriate to the stock must exclude social, cultural and economic considerations.

[90] It is apparent from the legislative history that such was the Select Committee's objective when recommending subs (3). When rejecting a net national benefit criterion and urging that sustainability should be the key consideration, the Committee stated that its proposed subs (3) made social, cultural and economic considerations relevant to way and rate decisions and reasoned that that did not detract from the primary objective of sustainability.<sup>140</sup>

[91] Mr Scott argued that s 13(2A), which we have set out above at [25], is inconsistent with this interpretation of s 13(3) because it envisages a single TAC decision in which the interdependence of stocks, the biological characteristics of the stock and any environmental conditions affecting the stock are taken into account alongside social, cultural and economic factors. We do not agree. Subsection (2A) is concerned with low-knowledge stocks for which it is not possible to reliably estimate current stock level or  $B_{MSY}$  using the best available information. That is evidently why it does not speak of way and rate and periods appropriate to the stock. Its principal purpose is to specify that the Minister may not rely on uncertainty as a reason to postpone setting a TAC, which is a sustainability measure intended to place or keep the stock at  $B_{MSY}$  or better.<sup>141</sup>

[92] We accept Ms Gepp's submission that the Fisheries Settlement Act does not point to a different construction either, for several reasons: the Deed of Settlement underlying the Fisheries Settlement Act acknowledges the appropriateness of the quota management system; tarakihi are a taonga species and it cannot be assumed that Māori interests (commercial, customary and recreational) favour an interpretation that would permit recovery periods longer than those appropriate to stocks; and the Fisheries Act clearly recognises that cultural and socio-economic factors relevant to

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<sup>140</sup> Fisheries Bill 1994 (63-2) (select committee report) at xi. The Committee's interim report omitted the net national benefit concept and, at that stage, did not suggest any replacement: compare, as it then was, cl 11(2)(c) of the Fisheries Bill 1994 (63-1) with cl 13(2)(b) in the Interim report, above n 98, at 36.

<sup>141</sup> See Fisheries Act 1996 Amendment Bill (No 2) 2008 (240-2) (select committee report).

Māori may be taken into account when making way and rate decisions but equally clearly does not allow those interests to determine periods biologically and environmentally appropriate to a stock.<sup>142</sup> We observe in passing that, under ss 10(a) and 12(1), customary Māori information and analysis of that information may be taken into account when assessing periods appropriate to a stock,<sup>143</sup> to the extent that such information concerns the stock's biological characteristics and environmental conditions. No party pointed to such information being offered to the Minister in this case.

[93] For these reasons, we are satisfied that the assessment of periods appropriate to the stock in subs (2)(b)(ii) may not take into account social, cultural and economic considerations.

*A range of rebuild periods is possible*

[94] The next question is whether the legislation contemplates that there may be more than one recovery period that is appropriate to a rebuilding stock.

[95] We begin by agreeing with counsel that the period appropriate to a rebuilding stock need not always be  $T_{\min}$ , which is defined in the Operational Guidelines as the theoretical number of years required to rebuild a stock in the absence of fishing.<sup>144</sup> If the only appropriate period is  $T_{\min}$ , the TAC must be set at zero until the Minister is confident that the stock has reached  $B_{\text{MSY}}$ . Section 13(2)(b)(ii) does not say that the appropriate period can only be  $T_{\min}$ . If that was what was intended, the legislature could have specified that fisheries must be closed when stock levels are below  $B_{\text{MSY}}$ . It specified instead that the Minister must decide on a period that is appropriate to the stock.

[96] We agree with the majority in the Court of Appeal that subs (2)(b)(ii) operates as a control on TAC decisions for depleted stocks.<sup>145</sup> But for the reasons just explained, a TAC for a depleted stock may be set at a positive value that rests on a

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<sup>142</sup> See above at [89].

<sup>143</sup> See Fisheries Act, s 2(1) definition of "information", quoted below at [127].

<sup>144</sup> See above at [37].

<sup>145</sup> CA judgment, above n 18, at [65] and [92] per Brown and Courtney JJ.

recovery period longer than that which would result from closing the fishery, so long as that period is biologically and environmentally appropriate to the stock and the TAC will result in the stock returning to  $B_{MSY}$ . Within those constraints, there may be a range of recovery periods reasonably available to the Minister. To describe the scope for decision as a range is to say that the Minister may choose any period that lies between  $T_{min}$  and the longest period appropriate to the stock.

[97] We conclude that s 13(2)(b)(ii) does not envisage, as a matter of construction, that there will necessarily be a single recovery period that is appropriate to the stock, having regard to the scientific factors.

[98] That view of the legislation finds support in the Operational Guidelines, which confirm in the extract set out above at [43] that the models are probabilistic because of uncertainty in the projections. One of the witnesses, Dr Pamela Mace, explained that the objective of TAC-setting in a depleted fishery, such as this, is to significantly increase the stock above any biomass limits (both the soft and hard limits) and to minimise the risk of further decline. The tools used when setting a formal, time-constrained rebuild plan include the stock's productivity characteristics (which include growth, natural mortality and reproduction), the stock's present level relative to  $B_{MSY}$ , environmental conditions, the risk of stock collapse and serious ecosystem consequences, and the acceptable probability that the stock will be rebuilt during a given period.<sup>146</sup> Each of these considerations is likely to offer a range of possibilities. To take an example which arises here, some of tarakihi's productivity characteristics, which determine its  $B_{MSY}$ , indicate that the stock has the capacity to rebuild quite quickly. As alluded to above at [44], there appears to be room to debate whether it is correctly classified as a low-productivity stock (for which  $B_{MSY}$  is set by default at 40 per cent of  $B_0$ ).<sup>147</sup>

[99] It must follow that, unless the fishery is so severely depleted that it must be closed, there may be no single period that must be adopted. Rather, the Minister must

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<sup>146</sup> Dr Dunn explains that the probability should be seen as the median of a distribution around the target probability, meaning in the case of a 50 per cent probability that in half of the cases the rebuild will be below  $B_{MSY}$ .

<sup>147</sup> This decision appears to have been based on tarakihi's long lifespan, slow growth and low natural mortality, despite their high fecundity and fast growth early in life, which may point to medium productivity: see 2024 plenary, above n 74, at 1835.

select a recovery period that is appropriate to the stock, having regard to the stock's biological characteristics and environmental conditions. Where there is more than one appropriate recovery period, the legislation does not require that the Minister select the shortest of them.

[100] Social, cultural and economic considerations must be taken into account, to the extent the Minister thinks them relevant, when making way and rate decisions.<sup>148</sup> If they are taken into account there, it necessarily follows, as Goddard J pointed out, that they also affect the rebuild period.<sup>149</sup> The legislation reconciles that characteristic of TAC decisions with the limit in subs (2)(b)(ii) by permitting the Minister to take social, cultural and economic considerations into account when selecting among recovery periods all of which are appropriate to the stock.

*The HSS, Operational Guidelines and  $2 * T_{min}$  as an outer limit on the rebuild period*

[101] As noted above at [30], the HSS explains that it assists decision-making by providing that depleted stocks should be rebuilt to MSY-compatible targets, such as  $B_{MSY}$ , and ensuring that the specified rate of rebuilding takes account of relevant biological and environmental considerations.<sup>150</sup> It specifies that stocks that have fallen below the soft limit should be rebuilt in a time frame between  $T_{min}$  and  $2 * T_{min}$ .<sup>151</sup> The Operational Guidelines explain why an outer default limit of  $2 * T_{min}$  was adopted. They record that a recovery period of up to  $2 * T_{min}$  allows for some element of socio-economic considerations, in the form of undue hardship for the fishing sector resulting from the closure of a fishery.<sup>152</sup> Read together, the HSS and Operational Guidelines allow social, cultural and economic considerations to affect the assessment of rebuild periods appropriate to stocks.

[102] The Judges in the Court of Appeal differed on the role that social, cultural and economic considerations may play under subs (2)(b)(ii). The majority accepted that the period appropriate to the stock may exceed  $T_{min}$ .<sup>153</sup> They reasoned that best

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<sup>148</sup> Fisheries Act, s 13(3).

<sup>149</sup> CA judgment, above n 18, at [232].

<sup>150</sup> Harvest Strategy Standard, above n 8, at 23.

<sup>151</sup> At 8.

<sup>152</sup> Operational Guidelines, above n 8, at 12.

<sup>153</sup> CA judgment, above n 18, at [86] per Brown and Courtney JJ.

practice, represented by the HSS, recognises that the appropriate rebuild period is  $T_{\min}$  to  $2 * T_{\min}$ .<sup>154</sup> The multiplier of two allows for non-scientific factors by permitting fishing whilst the stock is rebuilding. However, the majority held, it does not follow that the Minister may make further allowance for social, cultural and economic considerations when selecting the appropriate period.<sup>155</sup> Rather, subpara (ii) requires that the Minister determine the outer limit within which the rebuild must occur. The outer limit may be determined first or used as a cross-check on the way and rate selected, so long as the target is met within the outer limit.<sup>156</sup> The outer limit is the “period appropriate to the stock”, and any shorter period, down to  $T_{\min}$ , will also satisfy subpara (ii).<sup>157</sup>

[103] Goddard J agreed that a period appropriate to the stock in s 13(2)(b)(ii) may exceed  $T_{\min}$  but reasoned that it will do so only if social, cultural and economic factors are taken into account.<sup>158</sup> In the absence of those factors, there is no reason to choose a longer period. The scientific opinion reflected in the HSS (that an appropriate rebuild period is  $T_{\min}$  to  $2 * T_{\min}$ ) merely recognises that socio-economic factors are relevant to determining any rebuild period other than  $T_{\min}$ .<sup>159</sup> But where a period is chosen that is longer than  $T_{\min}$ , subpara (ii) requires that period be appropriate to the stock, having regard to its biological characteristics and relevant environmental conditions.<sup>160</sup>

[104] It might be that  $2 * T_{\min}$  was thought to be a reasonable proxy, in the absence of good stock-specific information, for a maximum recovery period that is appropriate to the stock. In the case of this stock and fishery, it would have resulted in a relatively short recovery period of 10 years. The speed of recovery if this fishery were closed—five years—suggests a reasonably high level of confidence in the biological capacity of the tarakihi stock. The Minister remarked on this in his 2018 decision.<sup>161</sup> But so far as we know, any correlation between  $2 * T_{\min}$  and the longest period that

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<sup>154</sup> At [87] per Brown and Courtney JJ.

<sup>155</sup> At [92] per Brown and Courtney JJ.

<sup>156</sup> At [94] per Brown and Courtney JJ.

<sup>157</sup> At [93] per Brown and Courtney JJ.

<sup>158</sup> At [232] and [239].

<sup>159</sup> At [236] per Goddard J.

<sup>160</sup> At [239] per Goddard J.

<sup>161</sup> 2018 decision, above n 4, at 21. See above at [52].



would be appropriate to the stock, based on science alone, is coincidental. The HSS does not say that  $2 * T_{\min}$  was adopted because it is a reasonable scientific proxy for a biologically and environmentally appropriate outer recovery period. On the contrary, the Operational Guidelines justify that limit by reference to considerations that, as we have explained, may not be taken into account when assessing recovery periods appropriate to the stock.

[105] We conclude that, to the extent that a default outer rebuild limit of  $2 * T_{\min}$  rests on the premise that socio-economic (and cultural) considerations may influence the assessment of recovery periods appropriate to the stock, the HSS and Operational Guidelines are strictly incorrect. To the extent that the majority in the Court of Appeal adopted  $2 * T_{\min}$  in reliance on the HSS,<sup>162</sup> they were wrong for the same reason. The period appropriate to the stock operates as a sustainability limit on utilisation.<sup>163</sup> As a matter of logic, it can function in that way only if the period appropriate to the stock is assessed by reference to the specified scientific considerations and by discounting or excluding some other considerations that may be relevant to the TAC decision. The legislation achieves that objective by excluding social, cultural and economic considerations from the assessment of periods appropriate to the stock.

[106] For these reasons we respectfully disagree with the majority in the Court of Appeal to the extent that their approach followed the HSS and would allow social, cultural and economic considerations to influence the assessment of recovery periods appropriate to the stock. Rather, those considerations may influence the choice among a number of periods all of which are biologically and environmentally appropriate to the particular stock.

[107] Turning to the minority reasons, Goddard J agreed with the majority that the period must be appropriate to the stock, having regard to its biological characteristics and environmental conditions.<sup>164</sup> But he reasoned that if the period appropriate to the stock refers to the period of the expected rebuild, and if that period may be more than

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<sup>162</sup> See CA judgment, above n 18, at [86]–[90] per Brown and Courtney JJ.

<sup>163</sup> See above at [83].

<sup>164</sup> CA judgment, above n 18, at [230(c)].

$T_{\min}$  to mitigate adjustment costs, it must follow that the only reason a rebuild period would exceed  $T_{\min}$  is to take account of social, cultural and economic factors.<sup>165</sup> He pointed out that it is logically impossible to determine the rate of rebuild by reference to those factors but not the expected period of rebuild.

[108] We agree that the expected rebuild period adopted in a TAC decision is a function of rate, way and period appropriate to the stock. We also agree that the only apparent reason to set a rebuild period at more than  $T_{\min}$  in a TAC decision is to take account of non-scientific considerations, specifically social, cultural and economic adjustment costs that a TAC reduction may cause for users of the stock. But we do not agree that a period appropriate to the stock is synonymous with the expected rebuild period adopted in a TAC decision.<sup>166</sup> There may be more than one period appropriate to the stock, and where that is so the Minister may choose among them. The concept of periods appropriate to the stock is employed as a control on the TAC, as we have explained. It serves that purpose by excluding social, cultural and economic factors. It cannot be reduced to a consideration which the Minister must examine but may ultimately discount in favour of those factors.

#### *The decision-making process*

[109] Counsel debated the decision-making process that the Minister must follow. It appears that in practice the exercise is done by setting a rebuild target, adjusting the TAC, deciding whether the resulting period to achieve that target (to an acceptable probability) is appropriate, and then changing the TAC as necessary to accommodate way, rate and period. In the Court of Appeal, Ms Gepp argued that the appropriate rebuild period should be set first (but presumably after the target).<sup>167</sup> But before us she accepted that a cross-check at the end, as the Minister contends, would produce the same outcome, provided the rebuild period adopted in the TAC did not exceed the maximum determined by reference to the scientific criteria alone.

[110] The Act does not prescribe a process, and, as we have explained, the Minister may take non-scientific considerations into account when choosing among recovery

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<sup>165</sup> At [232] per Goddard J.

<sup>166</sup> See at [230(a)] per Goddard J.

<sup>167</sup> See at [225] per Goddard J.

periods appropriate to the stock. We think it is immaterial whether the rebuild period is set first or used to check, and if necessary change, the period that results from a proposed TAC decision, so long as the final decision adopts a period that is appropriate to the stock's biological characteristics and environmental conditions and the way and rate will result in the stock returning to  $B_{MSY}$  in that period.

*The Minister's error restated*

[111] We have noted that the Minister did not defend the 2019 TAC decision in the Court of Appeal.<sup>168</sup> In this Court, the Minister accepted that the decision conflated the two requirements in subs (2)(b) without separately considering whether the period was appropriate to the stock. We agree that the Minister erred. We find that, to the extent that it relied on the range of  $T_{min}$  to  $2 * T_{min}$  derived from the HSS, the advice he received was apt to lead him to think that social, cultural and economic factors could be taken into account when assessing whether the chosen rebuild period was biologically and environmentally appropriate to the stock. That error was reflected in his decision. His affidavit suggests that he considered whether the chosen recovery period was appropriate to the stock, but he did not decide that it was appropriate having regard to the scientific considerations and excluding social, cultural and economic factors. That error appears to have contributed to a decision to adopt a recovery period at least twice that which he had provisionally thought appropriate in 2018.

**A default 70 per cent probability of success?**

[112] We turn to the second issue: whether the HSS specifies or incorporates a default 70 per cent probability that the stock will be rebuilt within the appropriate period and, if so, whether that probability is information that the Minister must consider when setting a TAC for a stock below the soft limit. It is common ground that the Minister did not take the probability of 70 per cent into account when setting the 2019 TAC.

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<sup>168</sup> Above at [8].

*The HSS and the Operational Guidelines*

[113] We referred above at [34] to the part of the HSS which provides that breach of a soft limit calls for a formal, time-constrained rebuild plan and explains when a rebuild is complete. As set out there, the HSS specifies that:<sup>169</sup>

- (a) a soft limit is deemed to have been breached when the probability that the stock biomass is below that limit is greater than 50 per cent; and
- (b) stocks are considered fully rebuilt when it can be demonstrated that there is at least a 70 per cent probability that the target has been achieved.<sup>170</sup>

[114] A footnote to the HSS, set out above at [35], explains that use of a probability of more than 50 per cent ensures rebuild plans are not abandoned too soon and may be necessary to ensure age structure is rebuilt along with biomass.<sup>171</sup> As noted above at [39], the Operational Guidelines expand on this point, stating that a severely depleted stock is likely to have an age structure that is distorted by over-reliance on juvenile fish and a shortage of large, highly fecund fish, and where that is so it is necessary to rebuild biomass and age composition.<sup>172</sup>

[115] The Operational Guidelines also envisage, in the passage quoted above at [43], that the minimum standard of 70 per cent for achievement of the rebuild target equates to an ex-ante probability, when setting the TAC, that the stock will be at or above the target level at the end of the projected period:<sup>173</sup>

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  $2 * T_{\min}$  ... [which] equates to a probability of 70% that the stock will be above the target level at the end of the timeframe.

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<sup>169</sup> Harvest Strategy Standard, above n 8, at 8.

<sup>170</sup> See above n 61.

<sup>171</sup> Harvest Strategy Standard, above n 8, at 8, n 8.

<sup>172</sup> Operational Guidelines, above n 8, at 10.

<sup>173</sup> At 12. See also at 28.

*The Court of Appeal's reasons*

[116] The majority in the Court of Appeal held that the HSS and Operational Guidelines recommend a default probability of 70 per cent when setting a TAC to rebuild a stock under subs (2)(b).<sup>174</sup>

[117] For the majority, Courtney J began with the objective of the HSS, which we have discussed above at [30], emphasising that it states that the HSS sets probabilities that will achieve its objectives, which include target-setting.<sup>175</sup> Read as a whole, the HSS specifications for stocks which are below soft limits make clear that a rebuild plan comprises not only a target level and requisite time frame but also an acceptable probability of achieving its goals.<sup>176</sup> The acceptable probability is essential because the target level and time frame are not absolute but probabilistic. It is unlikely that the centrally important probability of a rebuild achieving its target would not be specified in the HSS. This reading is consistent with the reference (albeit in a footnote) to how the target can be reached.<sup>177</sup>

[118] The majority did not find it necessary to decide an argument for RFB that the rebuild probability guidance in both the HSS and Operational Guidelines were mandatory relevant considerations, in the sense that the legislation expressly or impliedly requires that they be taken into account.<sup>178</sup> Rather, the majority held that the probability of 70 per cent was the best available information for the purposes of s 10(a).<sup>179</sup> They observed that “information” is defined to include scientific information and “any analysis of such information”.<sup>180</sup> The HSS and Operational Guidelines are described as statements of best practice, but they qualify as “information” because they meet a broad dictionary definition of that term as “[k]nowledge communicated”.<sup>181</sup> That being so, the Minister had to take the 70 per cent probability into account when setting the TAC.

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<sup>174</sup> CA judgment, above n 18, at [114(c)] and [124] per Brown and Courtney JJ.

<sup>175</sup> At [120] per Brown and Courtney JJ, citing Harvest Strategy Standard, above n 8, at [22].

<sup>176</sup> At [122] per Brown and Courtney JJ.

<sup>177</sup> At [123] per Brown and Courtney JJ. See Harvest Strategy Standard, above n 8, at 8, n 8.

<sup>178</sup> CA judgment, above n 18, at [146]–[147] per Brown and Courtney JJ. See *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 182–183 per Cooke J.

<sup>179</sup> CA judgment, above n 18, at [133] and [148] per Brown and Courtney JJ.

<sup>180</sup> At [134] per Brown and Courtney JJ, citing Fisheries Act, s 2(1) definition of “information”.

<sup>181</sup> At [136]–[137] per Brown and Courtney JJ. See JA Simpson and ESC Weiner (eds) *The Oxford English Dictionary* (2nd ed, Oxford University Press, Oxford, 1989) vol VII at 944.

[119] Goddard J disagreed. In his view the HSS addresses two quite distinct issues: the probability with which a rebuild plan must be expected to reach the Minister's target, and the identification of the point in time at which that target has been met.<sup>182</sup> The probability of 70 per cent is used in connection with the latter assessment, not the former. He accepted that the Operational Guidelines refer to a probability of 70 per cent in connection with a rebuild plan.<sup>183</sup> However, the guidance given in both the HSS and Operational Guidelines does not comprise mandatory relevant considerations and is appropriately characterised as a set of policy preferences, not information, under s 10.<sup>184</sup>

*Our approach to the issues*

[120] In this Court, RFB maintained that the default rebuild probability, and the reasons for it, set out in both the HSS and Operational Guidelines are mandatory relevant considerations under the Act. We address that issue first. We then consider whether the recommended 70 per cent probability that the stock will be rebuilt within the chosen period is the best available information for the purposes of s 10(a).

[121] Before addressing those issues, we record that Seafood renewed its argument that the 70 per cent probability was not adequately pleaded by RFB as best available information under s 10(a). That argument was rejected by the majority of the Court of Appeal, who noted that the HSS was advanced as a statement of best practice and so s 10(a) was inevitably at issue.<sup>185</sup> We see no reason to disturb the Court's conclusion that the issue was adequately pleaded.

*Are the HSS and Operational Guidelines mandatory relevant considerations?*

[122] In the High Court, Gwyn J held that the HSS and Operational Guidelines were mandatory relevant considerations because, applying the familiar test from *CREEDNZ*

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<sup>182</sup> CA judgment, above n 18, at [279]–[280] per Goddard J.

<sup>183</sup> At [283] per Goddard J.

<sup>184</sup> At [272] and [283] per Goddard J.

<sup>185</sup> At [131] per Brown and Courtney JJ. Goddard J put this procedural issue to one side: at [271].

*Inc v Governor-General*,<sup>186</sup> the legislation expressly or by implication incorporated them as matters that must be taken into account when exercising a statutory power of decision.<sup>187</sup> As noted, the majority in the Court of Appeal found it unnecessary to address this issue but Goddard J held that the Judge was wrong and RFB renewed the argument in this Court.<sup>188</sup>

[123] We can be brief because we agree with Goddard J, who rejected RFB's argument for several reasons:<sup>189</sup>

- (a) The Act lists a number of planning documents that must be taken into account and that list does not include the HSS and/or the Operational Guidelines.<sup>190</sup>
- (b) The HSS and Operational Guidelines are not preconditions to valid ministerial decision-making; indeed, they were not in existence when the Act came into force.
- (c) The HSS is not addressed to the Minister; it is a statement of standards that the Ministry is expected to meet when advising the Minister.<sup>191</sup>
- (d) The HSS also states that it is not intended to have legal effect.<sup>192</sup>

[124] We add that, as noted earlier, the Operational Guidelines lack the status of the HSS; they are internal to the Ministry and were formulated for the Chief Executive, not the Minister.<sup>193</sup>

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<sup>186</sup> *CREEDNZ Inc v Governor-General*, above n 178, at 182–183 per Cooke J, citing *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA) at 228 per Lord Greene MR; and *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) at 1065 per Lord Diplock.

<sup>187</sup> HC judgment, above n 11, at [153]. Gwyn J appears to have considered the HSS and Operational Guidelines together: see at [12], [157] and [168].

<sup>188</sup> Above at [118]–[120].

<sup>189</sup> CA judgment, above n 18, at [262]–[265].

<sup>190</sup> Fisheries Act, s 11(2) and (2A).

<sup>191</sup> See Harvest Strategy Standard, above n 8, at [2] and [9].

<sup>192</sup> At 22.

<sup>193</sup> Above at [31].

[125] Finally, we accept, for reasons explained below from [142], that these documents may contain the best available information relevant to a given TAC decision, but it does not follow that the documents as a whole are mandatory relevant considerations. Nor is there any need to locate in the statute an implied obligation to consider these documents to the extent that information found in them is relevant, because s 10 establishes an express set of information principles.

*The 70 per cent probability as “best available information” under s 10*

[126] We have set out s 10 above at [17]. It specifies that decision makers under the Act must take into account the principles that: decisions should be based on the best available information, decision makers should consider any uncertainty in information and exercise caution when the quality of information is low, and decision makers should not use uncertainty as a reason to delay measures intended to achieve the purpose of the Act.

[127] “Information” and “best available information” are defined as:<sup>194</sup>

**information** includes—

- (a) scientific, customary Maori, social, or economic information; and
- (b) any analysis of any such information

**best available information** means the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time

[128] As noted, we are concerned here with the questions whether the HSS and Operational Guidelines recommend that TAC decisions for depleted stocks adopt a 70 per cent probability that the rebuild will be completed within the chosen appropriate period and, if so, whether that recommendation was the best available information on the rebuild probability. If the answers are affirmative, the Minister was obliged to take that probability into account.

[129] We have accepted that s 13(2)(b) adopts a minimum probability of 50 per cent that the TAC adopted by the Minister will achieve the objective of rebuilding the stock

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<sup>194</sup> Fisheries Act, s 2(1).



within a period appropriate to the stock.<sup>195</sup> That minimum is implicit in the statutory language. It may be that, in any given case, a higher probability is required to reasonably satisfy the Minister that the rebuild will be successful by the end of the recovery period.

[130] We consider, contrary to the view of the majority in the Court of Appeal,<sup>196</sup> that the HSS does not specify a rebuild probability of more than 50 per cent. On the contrary, the HSS specifies that the stock should be rebuilt within the chosen period (between  $T_{\min}$  and  $2 * T_{\min}$ ) with “an acceptable probability”.<sup>197</sup>

[131] We reject RFB’s submission that a 70 per cent rebuild probability is necessarily implicit in the HSS’s provision for a 70 per cent probability that the stock level is at or above  $B_{MSY}$  at the end of the rebuild programme.<sup>198</sup> We make four points about it.

[132] First, if that were the case, the HSS would specify a 70 per cent rebuild probability rather than “an acceptable probability”.

[133] Second, as Seafood submitted and Goddard J found,<sup>199</sup> the probability that the rebuild will succeed and the probability that the stock is at or above  $B_{MSY}$  at the end of that period are not the same. The first is an ex-ante projection that the TAC will achieve the target by the end of the projected period, the second a posterior measure of the stock level, relative to  $B_{MSY}$ , at a particular point in time.

[134] MPI’s stock assessments for tarakihi tend to confirm that the two estimates are not the same. For the posterior stock assessment, a mathematical model first attempts to estimate the posterior distributions of key parameters—such as  $B_0$  (the initial population size before fishing), fish size by age and fish age when caught—by

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<sup>195</sup> See above at [18].

<sup>196</sup> CA judgment, above n 18, at [124] per Brown and Courtney JJ.

<sup>197</sup> Harvest Strategy Standard, above n 8, at 8.

<sup>198</sup> At 8.

<sup>199</sup> CA judgment, above n 18, at [279]–[280].

identifying values that best replicate the historical survey data of the stock.<sup>200</sup> In other words, it looks backwards in time. The model then estimates the current stock status by simulating many times the stock trajectories that would result from those parameter distributions. For the forward-looking TAC assessment, the model projections are the median of a large number of individual projections simulated on those parameters but also less certain parameters such as stock biomass and population age structure, and assumptions such as future catch levels and future reproduction.<sup>201</sup> The “probability” which emerges is the percentage of the projections that are at or above the target at the end of the period.

[135] We accept, as noted above at [115], that the Operational Guidelines recommend a rebuild probability of 70 per cent. They appear to do so because they “equate” the ex-ante probability of 70 per cent that the target will be achieved with the  $B_{MSY}$  probability of 70 per cent at the end of the period.<sup>202</sup> To the extent they adopt that conclusion, they appear to us to be strictly in error because, as just noted, an ex-ante probability of success is not the same as a posterior probability that the stock is at or above  $B_{MSY}$  following a stock assessment done at that time. Put another way, it is not the case that, unless the TAC decision starts with a 70 per cent probability of success at the outset, it will not reach the target with a 70 per cent confidence level at the end.

[136] Third, we accept that, viewed at the outset, uncertainty about stock levels at the end of the period may be high. Indeed, Dr Matthew Dunn expressed the opinion that projections beyond the near future (five to 10 years) may be considered to have low credibility. He also noted that, while the mathematical model accounts for historical climate variations affecting the stock, it does not take into account the impact of climate change because too little is known about it. Uncertainty about the future must be taken into account in TAC decisions. It may be necessary for the Minister to

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<sup>200</sup> See, for example, AD Langley *Stock assessment of tarakihi off the east coast of mainland New Zealand* (Ministry for Primary Industries | Manatū Ahu Matua, New Zealand Fisheries Assessment Report 2018/05, March 2018) at 36; and AD Langley *An update of the assessment of the eastern stock of tarakihi for 2019* (Fisheries New Zealand | Tini a Tangaroa, New Zealand Fisheries Assessment Report 2019/41, September 2019) [2019 assessment] at 7. We also refer to the evidence of Dr Dunn.

<sup>201</sup> See, for example, 2019 assessment, above n 200, at 13 and 22. We also refer to the evidence of Dr Dunn.

<sup>202</sup> Operational Guidelines, above n 8, at 12.

manage it by adopting an ex-ante rebuild probability that is greater than 50 per cent. Dr Dunn also explained that there is a growing body of scientific literature indicating that the probability of success can be increased by adopting substantial TAC reductions at the outset, rather than relying on incremental small reductions over time.

[137] However, the Act and HSS together envisage that uncertainty about the future may be managed in two other ways. First, the rebuild should not end unless the stock has been rebuilt to a 70 per cent probability; it will continue until that target has been met to that level of confidence.<sup>203</sup> Second, the Minister need not adopt the default assumption that the TAC will remain fixed throughout the projected rebuild period.<sup>204</sup> The Minister may require periodic stock assessments with a view to reducing the TAC further if the rebuild is not following an appropriate trajectory.<sup>205</sup>

[138] Fourth, in this case the Minister chose not to set a one-time TAC for the entire rebuild period. As explained above, he opted to review TAC periodically, beginning in 2018, because he had to consider the Industry Rebuild Plan, the effects of which could not be reliably measured ex ante.<sup>206</sup> The measurement issue may have been attributable in part to the unknown efficacy of new management practices and different fishing gear, but it is apparent that the Minister also wanted proof of the industry's commitment to the Plan.

[139] It follows that, even if it were statistically equivalent to the  $B_{MSY}$  posterior probability, the recommended ex-ante probability of 70 per cent in the Operational Guidelines was inapplicable to the 2019 decision. It is a default probability which rests on an assumption that the TAC will not change during the rebuild period. The Operational Guidelines themselves recognise that it may be necessary to depart from this assumption by revisiting the TAC during the period, if it appears the rebuild plan is not working as intended.<sup>207</sup>

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<sup>203</sup> Fisheries Act, s 13(2)(b); and Harvest Strategy Standard, above n 8, at 8.

<sup>204</sup> See Fisheries Act, s 13(1) and (4).

<sup>205</sup> Operational Guidelines, above n 8, at 12.

<sup>206</sup> Above at [53] and [56].

<sup>207</sup> Operational Guidelines, above n 8, at 12.

[140] For these reasons, we do not accept that the 70 per cent ex-ante rebuild probability in the Operational Guidelines was the best available information about the appropriate probability of success in this case. That being so, the 2019 decision did not need to take it into account. We add that, as Goddard J observed,<sup>208</sup> the Minister had turned his mind to the appropriate probability of success, noting in his 2018 decision that the probability of 50 per cent was not especially high.<sup>209</sup>

[141] That brings us to the question whether the 70 per cent ex-ante probability is “information” at all for the purposes of s 10. As we have explained, Goddard J categorised the entire HSS as a policy statement of best practice which is concerned with the law and its implementation, not a source of factual information or evidence.<sup>210</sup> Mr Scott pursued the point in this Court, arguing that the 70 per cent probability is a policy preference and as such outside the statutory definition.

[142] We observe that we are concerned not with the HSS and Operational Guidelines as a whole but with the specific default probability of a successful rebuild which is found in the Operational Guidelines. Plainly, the HSS and Operational Guidelines may contain “information” as defined. Equally plainly, they may inform advice to the Minister about TAC decisions as “best available information”. The definition of “information” refers to (inter alia) scientific information and any analysis of such information.<sup>211</sup> “Analysis” must include its product, in the form of opinions and recommendations derived from the information. A bare policy preference may not be “information” when viewed in isolation, but information and analysis which informs that preference is likely to meet the statutory definition.

[143] The Operational Guidelines state, as noted, that a 70 per cent probability of success equates to a 70 per cent probability that the posterior  $B_{MSY}$  probability at the end of the period will be at least 70 per cent.<sup>212</sup> In our view that is information as defined; it purports to report a property or product of the statistical models used. Of

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<sup>208</sup> CA judgment, above n 18, at [277].

<sup>209</sup> 2018 decision, above n 4, at 21.

<sup>210</sup> CA judgment, above n 18, at [272].

<sup>211</sup> Fisheries Act, s 2(1) definition of “information”.

<sup>212</sup> Operational Guidelines, above n 8, at 12.

course it is not necessarily the best available information. As we have explained above, its relevance to any particular TAC decision depends on its accuracy, as a statistical matter, and the extent to which any underlying assumptions apply to that TAC decision.

[144] For these reasons we accept Mr Scott's submission that the 2019 TAC decision need not involve a consideration of the default ex-ante probability of 70 per cent set out in the Operational Guidelines. The Minister had to turn his mind to the likelihood of meeting the  $B_{MSY}$  target. The advice he was given had to address the appropriate probability of success, being not less than 50 per cent.<sup>213</sup> But the default probability of 70 per cent was not the best available information in this case, if only because it assumed the TAC would not be revisited before the rebuild period expired and it was already evident at the time of the 2019 decision that the Minister would not adopt that assumption. In his 2018 decision he had adopted a policy of reviewing progress and adjusting the TAC as necessary during the rebuild period.<sup>214</sup> The next stock assessment was scheduled for 2021.

### **Disposition**

[145] As we recorded at the outset, Seafood has not succeeded in relegating the appropriate recovery period to a mere mandatory relevant consideration in TAC decisions. We agree with the majority in the Court of Appeal that subs (2)(b)(ii) sets a sustainability limit on TAC decisions for recovering stocks. Periods appropriate to the stock must be assessed by reference to the stock's biological characteristics and environmental conditions, and without regard to social, cultural and economic factors. To that extent we have accepted the argument for the Minister and RFB. But we have accepted that social, cultural and economic considerations may influence the Minister's choice of rebuild period in a TAC decision where there is more than one period that is appropriate to the stock. The rebuild period may exceed  $2 * T_{min}$  provided it remains appropriate to the stock.

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<sup>213</sup> See *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [43]–[53], citing *Bushell v Secretary of State for the Environment* [1981] AC 75 (HL) at 96–97 per Lord Diplock.

<sup>214</sup> 2018 decision, above n 4, at 22–23.

[146] Seafood has succeeded on the second issue. We have held that the Minister need not take into account a recommended 70 per cent probability that the TAC decision would result in the stock being rebuilt to  $B_{MSY}$  at the end of the rebuild period. Rather, the Minister was required to adopt an appropriate probability, not being less than 50 per cent, that the target would be achieved at that time.

[147] For these reasons, the appeal is allowed to the extent set out above at [145] and [146].<sup>215</sup>

### **Costs**

[148] Seafood sought costs in the event the appeal succeeded. We did not understand Mr Scott to seek costs against the Minister. Ms Gepp indicated that RFB would ask that it not be ordered to pay costs on public interest grounds.

[149] Costs are reserved. Counsel should file memoranda if they cannot agree. Submissions for the appellant are to be filed and served by 3 October 2024. Submissions for any respondents are to be filed and served by 17 October 2024, and any submissions for the appellant in reply by 24 October 2024.

#### Solicitors:

Chapman Tripp, Wellington for Appellant

P D Anderson, Royal Forest & Bird Protection Society of New Zealand Inc, Wellington for First Respondent

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Second Respondent

B E Boxall, Te Ohu Kai Moana Trustee Ltd, Wellington for Third Respondent

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<sup>215</sup> The orders made in the High Court are now spent because in 2022, as anticipated, the Minister further reduced the TAC for East Coast tarakihi, having regard to the High Court's findings: David Parker "Changes to fisheries sustainability measures for the 2022 October Round" (press release, 27 September 2022) at 5.