

Fisheries New Zealand review of sustainability measures

Overview of legislative and other requirements

Introduction

The purpose of this consultation is to seek input on proposed settings for sustainability measures for selected fish stocks in New Zealand's Quota Management System (QMS).

This document provides an overview of key legal requirements as they relate to decision-making on sustainability measures, and signposts the relevant provisions in the Fisheries Act 1996 (the Act or the Fisheries Act). You can access the full version the act at www.legislation.govt.nz.

This paper also explains how the Minister may take the Harvest Strategy Standard (HSS) into account when making decisions on sustainability measures.

The Fisheries Act 1996

The Fisheries Act gives the Minister the power to set or vary sustainability measures and defines the objectives of such measures and things that the Minister must take into account when making decisions.

Section 8 – Purpose of the Act

The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability¹. Ensuring sustainability means maintaining the potential of fisheries resources to meet the needs of future generations while managing the adverse effects of fishing on the environment.

The Supreme Court acknowledged that the purpose statement incorporates two competing social policies and noted that both are to be accommodated as far as is practicable in the administration of fisheries under the QMS.... '[I]n the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability.'

Section 5 – Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

The Act must be interpreted, and decisions made, consistent with our obligations under international agreements related to fishing and the provisions of the Treaty of Waitangi.

International obligations arise from our being a party to the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) and the United Nations Convention on Biological Diversity 1992 (the CBD). New Zealand is also a signatory to a number of international conventions, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Migratory Species (CMS). We are also a member of several regional fisheries management organisations.

¹ Recreational Fishing Council Inc v Sanford Limited and Ors [2009] NZSC 54 at [39].

Section 9 – Environmental principles

Decision-makers must take into account that:

- (a) associated or dependent species (non-harvested species taken or affected by the taking of a harvested species) should be maintained above a level that ensures their long-term viability
- (b) biological diversity of the aquatic environment should be maintained, and
- (c) habitat of particular significance for fisheries management should be protected.

Section 10 – Information principles

Decision-makers must take into account that:

- (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.

The High Court, reflecting on the challenges in obtaining full information about fisheries, noted that, ‘The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide upon the weight which can be given it with such care as the situation requires’².

Section 11 – Sustainability measures

The Minister may set or vary sustainability measures taking into account:

- (a) any effects of fishing on any stock and the aquatic environment
- (b) any existing controls under the Act that apply to the stock or area concerned; and
- (c) the natural variability of the stock concerned.

In making decisions on sustainability, the Minister must consider any of the following that he or she considers to be relevant:

- (a) any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991
- (b) any management strategy or management plan under the Conservation Act 1987
- (c) sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000
- (ca) regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
- (d) a planning document lodged with the Minister of Fisheries by a customary marine title group under section 91 of the Marine and Coastal Area (Takutai Moana) Act 2011.

The Minister must also take into account:

- (a) any conservation services or fisheries services (such as research into stock abundance)
- (b) any relevant fisheries plan approved under Part 3 of the Act (see 11A, below); and
- (c) any decisions not to require conservation services or fisheries services.

The Hauraki Gulf Marine Park Act

Section 13 of the HGMPA requires that decisions under various acts, including the Fisheries Act, that affect the Hauraki Gulf must have particular regard to sections 7 and 8 of the HGMPA. This applies to the setting or varying of TACs, TACCs, and deemed values.

Section 7 of the HGMPA recognises the national significance of the Hauraki Gulf and section 8 sets out objectives for management of the Gulf.

² *Greenpeace NZ Inc v Minister of Fisheries* (HC, Wellington CP 492/93, 27/11/95, Gallen J) p 32.

Sustainability measures can include:

- (a) the catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14, any total allowable catch for that stock
- (b) the size, sex, or biological state of any fish, aquatic life, or seaweed of any stock that may be taken
- (c) the areas from which any fish, aquatic life, or seaweed of any stock may be taken
- (d) the fishing methods by which any fish, aquatic life, or seaweed of any stock may be taken or that may be used in any area
- (e) the fishing season for any stock, area, fishing method, or fishing vessels.

Section 11A – Fisheries plans

The Minister may approve or revoke fisheries plans, which may include:

- (a-c) fisheries management objectives, strategies to achieve them, and performance criteria to measure achievement
- (d) Conservation or fisheries services
- (e) Contingency strategies to deal with foreseeable variations in circumstances.

To date national fisheries plans have been approved for deepwater and highly migratory species, and for the Chatham Island paua fishery (PAU4).

Section 12 – Consultation

Before taking decisions, the Minister must consult with people and organisations he or she considers represent people who have an interest in the stock or the effects of fishing in the area concerned, including Māori, environmental, commercial, and recreational interests.

The Minister must also provide for the input and participation of tangata whenua that have:

- (i) a non-commercial interest in the stock concerned; or
- (ii) an interest in the effects of fishing on the aquatic environment in the area concerned—
and have particular regard to kaitiakitanga.

The Minister must provide the reasons for his or her decisions to the people consulted.

Section 13 – Total Allowable Catch

The TAC for most stocks in the Quota Management System (QMS) is set and varied under section 13 of the Act.

Under s13 the general premise is to set a TAC that maintains the biomass of a fishstock at or above a level that can produce the maximum sustainable yield (MSY) or enables the stock to move to that level. That biomass level is abbreviated as B_{MSY} .

MSY is defined, in relation to any fish stock, as being 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.

Section 13(2) states that the Minister shall set a TAC 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.

Section 13(2A) says that if the Minister considers that the current level of a stock or the level of a stock that can produce the MSY is not able to be estimated reliably using the best available information, the Minister must:

- not use this lack of information as a reason for postponing, or failing to set a TAC for the stock, and
- have regard to the interdependence of stocks, the biological characteristics of the stock and any environmental conditions affecting the stock, and
- set a TAC using the best available information that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level which can produce the MSY.

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, the Minister is required to have regard to such social, cultural, and economic factors as he or she considers relevant. This provision applies to TACs set under s13(2)(b) or (c), or s13(2A) (if applicable).

Section 13(4) says the Minister may from time to time vary any TAC by increasing or reducing it and in doing that must have regard to the matters specified in subsections (2), (2A) if applicable and (3).

The obligation to have regard to the interdependence of stocks when setting a TAC requires consideration of the effects of fishing on associated stocks harvested with the target stock. Examples include other non-target fish species (bycatch) or benthic species that are incidentally impacted by trawl gear. The role of the target stock in the food chain should also be considered. In particular, interdependence involves a direct trophic (i.e. one stock is likely to be directly affected through a predator or prey relationship by the abundance of another stock) relationship between stocks.

Section 14 – Alternative total allowable catch for stock specified in Schedule 3

For stocks listed in Schedule 3, if the Minister may set a TAC otherwise than in accordance with section 13 (which focuses on the biomass required for maximum sustainable yield (B_{MSY})) if he or she considers that the purpose of the Act would be better achieved by doing so.

Schedule 3 identifies stocks that:

- (i) have biological characteristics that make it impossible to estimate (B_{MSY})
- (ii) have had a national allocation for New Zealand determined as part of an international agreement
- (iii) are managed on a rotational or enhanced basis, or
- (iv) comprise one or more highly migratory species.

Section 20 – Setting and variation of the Total Allowable Commercial Catch (TACC)

Once the TAC is set for a stock, the Minister must set the total allowable commercial catch (TACC) for the stock. The TACC cannot be larger than the TAC for a stock.

Section 21 – Matters to be taken into account in setting or varying any total allowable commercial catch

When setting the TACC the Minister must make allowances for Māori customary non-commercial fishing and recreational interests, and all other mortality to the stock caused by fishing. The Minister must consult with interested people including Māori, environmental, commercial, and recreational interests and advise those consulted of the reasons for his or her decisions.

The Courts have considered what is involved in making allowances for non-commercial interests. In *Snapper*³ the Court of Appeal said that the recreational allowance is simply the best estimate of what recreational fishers will catch while subject to the controls the Minister decides to impose, such as bag limits and minimum sizes. Having set the TAC the Minister apportions it among the relevant interests.⁴

The Supreme Court in *Kahawai*⁵ endorsed this approach and said that the words ‘allow for’ require the Minister both to take into account the interests and make provision for them in the calculation of the TACC⁶. The Supreme Court went on to say that sections 20 and 21 prescribe a framework within which the Minister must operate when setting the TACC. The framework requires apportionment of the TAC by the Minister among the various interests and other mortality. The sequential nature of the method of allocation provided for in s 21 does not indicate that non-commercial fishing interests are to be given any substantive priority over commercial interests. In particular the allowance for recreational interests is to be made keeping commercial interests in mind⁷.

The Supreme Court further said that in the end, within the limits provided for by the Act, the Minister makes a policy decision as to what allocations are appropriate for non-commercial interests and other mortality and what is to be the TACC. These decisions are interdependent. The Act does not confer priority for any interests over the other. It leaves that to the judgment of the Minister.⁸

Under the customary fishing regulations [Fisheries (South Island Customary Fishing) Regulations 1999 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998], customary take is regulated through the authorisation system which requires that all customary fishing is to be undertaken in accordance with tikanga and the overall sustainability of the fishery. This framework was put in place to give effect to legal obligations in the Settlement Act⁹.

When allowing for Māori customary non-commercial fishing, the Minister must take into account any mataitai reserves, area closures or fishing method restrictions in the relevant area.

When allowing for recreational fishing interests the Minister must take into account any regulations that prohibit or restrict fishing in any area.

Sections 23 and 24 – The effects of reductions and increases in Total Allowable Commercial Catch

These sections set out the actions and calculations that must be implemented in the event that TACC is reduced or increased. For reductions in quota this includes the transfer of unencumbered quota shares from the Crown to quota owners. Section 24 addresses the treatment of preferential allocation rights in the event of an increase in TACC.

³ *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA 82/97, 22 July 1997 (‘*Snapper 1*’).

⁴ *Snapper 1*, p 17.

⁵ *New Zealand Recreational Fishing Council Inc v Sanford Limited* [2009] NZSC 54 (‘*Kahawai*’)

⁶ *Kahawai* [55]

⁷ *Kahawai* [61]

⁸ *Kahawai* [65]

⁹ Where the customary regulations don’t apply customary fishing is regulated under regulations 50-52 of the Fisheries (Amateur Fishing) Regulations 2013 and a similar authorisation system applies.

Section 75 – Minister to set deemed value rates

The Minister must set interim and annual deemed value rates for each quota management stock. In setting deemed value rates, the Minister:

- (a) must take into account the need to provide an incentive for every commercial fisher to acquire or maintain sufficient annual catch entitlement in respect of each fishing year that is not less than the total catch of that stock taken by that commercial fisher; and
- (b) may have regard to—
 - (i) the desirability of commercial fishers landing catch for which they do not have annual catch entitlement
 - (ii) the market value of the annual catch entitlement for the stock
 - (iii) the market value of the stock
 - (iv) the economic benefits obtained by the most efficient commercial fisher, licensed fish receiver, retailer, or any other person from the taking, processing, or sale of the fish, aquatic life, or seaweed, or of any other fish, aquatic life, or seaweed that is commonly taken in association with the fish, aquatic life, or seaweed
 - (v) the extent to which catch of that stock has exceeded or is likely to exceed the total allowable commercial catch for the stock in any year
 - (vi) any other matters that the Minister considers relevant.

Deemed Value Guidelines

The Deemed Value Guidelines set out eight principals for the review of deemed value rates:

1. deemed value rates must generally be set between the ACE price and the port price
2. deemed value rates must generally exceed the ACE price by transaction costs
3. deemed value rates must avoid creating incentives to misreport
4. deemed value rates for constraining bycatch species may be higher than for target species
5. deemed value rates must generally be set at twice the landed or port price for high value single species fisheries and species subject to international catch limits
6. deemed value rates for Chatham Island landings may be lower
7. interim deemed value rates must generally be set at 90% of the annual deemed value rate
8. differential deemed value rates must generally be set.

The Guidelines do not bind the Minister. They serve only as a guide and do not preclude the Minister from taking into account relevant information on a case by case basis.

The Harvest Strategy Standard

The Harvest Strategy Standard (HSS) is a policy statement of best practice for setting targets and limits for fish stocks in the QMS. It is intended to provide guidance on the application of fisheries law by establishing a consistent and transparent framework for decision-making to achieve the objective of providing for utilisation of New Zealand's QMS species while ensuring sustainability.

The HSS outlines Fisheries New Zealand's approach to relevant sections of the Act and, as such, forms a core input to Fisheries New Zealand's advice to the Minister on the management of fisheries, particularly the setting of TACs under sections 13 and 14.

The HSS is not legally binding and the Minister is not obliged to choose options based upon it.