



**Fisheries New Zealand**

Tini a Tangaroa

# **Fisheries New Zealand review of sustainability measures**

**Overview of legislative requirements and other considerations in relation to sustainability measures**

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# 1 Introduction

1. Fisheries New Zealand periodically seeks input on proposed settings for sustainability measures for selected fish stocks in New Zealand's Quota Management System (QMS).
2. 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](http://www.legislation.govt.nz).
3. This paper also explains how the Minister may take the Harvest Strategy Standard (HSS) into account when making decisions on sustainability measures.

## 2 The Fisheries Act 1996

4. 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 consider when making decisions.

### Section 8 – Purpose of the Act

5. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability.<sup>1</sup> 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.
6. 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, and that, '[I]n the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability.'<sup>2</sup>

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

7. 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.
8. 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.

### Section 9 – Environmental principles

9. 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

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<sup>1</sup> *Recreational Fishing Council Inc v Sanford Limited and Ors* [2009] NZSC 54, [2009] 3 NZLR 438 at [39].

<sup>2</sup> At [39].

- (c) habitat of particular significance for fisheries management should be protected.

## Section 10 – Information principles

- 10. 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.
- 11. The High Court, reflecting on the challenges in obtaining full information about fisheries, has noted that:<sup>3</sup>

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.

## Section 11 – Sustainability measures

- 12. The Minister may set or vary sustainability measures, after 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.
- 13. Before making decisions on sustainability, the Minister must have regard to 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.
- 14. 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.
- 15. Sustainability measures may include:

### 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 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.

<sup>3</sup> *Greenpeace New Zealand Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 at 32.

- (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

- 16. 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.
- 17. To date national fisheries plans have been approved only for deepwater, highly migratory species and paua.
- 18. The Minister must take these plans into account when making decision on sustainability measures.

## Section 12 – Consultation

- 19. Before making 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.
- 20. 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.
- 21. The Minister must provide the reasons for his or her decisions to the people consulted.

## Section 13 – Total Allowable Catch

- 22. The Minister must set a Total Allowable Catch (TAC) for each quota management stock. The TAC setting must:
  - (a) maintain the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
  - (b) enable 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) enable 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. If the Minister considers that stock levels cannot be estimated reliably using the best available information, he or she must not use the absence of or uncertainty in that information as a reason for postponing or failing to set a TAC and to set a TAC for the stock 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 maximum sustainable yield, having regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock.
24. The Minister must also have regard to any social, cultural and economic factors he or she considers relevant, and to the matters that he or she must have regard to when setting a TAC (set out in section 13).
25. This section also provides information about when the Minister can vary any TAC, that decisions must be notified in the *Gazette*, and about when decisions come into force.

## Section 14 – Alternative TAC for stock specified in Schedule 3

26. For stocks listed in Schedule 3, 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.
27. 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)

28. 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 TACC

29. 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.
30. The Courts have considered what is involved in making allowances for non-commercial interests. In *Snapper*<sup>4</sup> 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.<sup>5</sup>

<sup>4</sup> *New Zealand Fishing Industry Association Inc v Minister of Fisheries* CA 82/97, 22 July 1997 [*Snapper* 1].

<sup>5</sup> At 17.

31. The Supreme Court in *Kahawa*<sup>6</sup> 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 TACC.<sup>7</sup> The Court further noted that that:<sup>8</sup>

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 mind.

32. 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 Act.<sup>9</sup>
33. When allowing for Māori customary non-commercial fishing, the Minister must take into account any mātaihai reserves, area closures or fishing method restrictions in the relevant area.
34. When allowing for recreational fishing interests the Minister must take into account any regulations that prohibit or restrict fishing in any area.

## Section 23 – The effect of increases in Total Allowable Commercial Catch

35. Section 23 sets out the actions and calculations that must be implemented in the event the TACC of any stock that has preferential allocation rights associated with it is increased. Preferential allocation rights are sometimes referred to as “28N rights”. There are two stocks in this Sustainability Round with preferential allocation rights associated with them; SKI 2 and SPO 3. Details of these rights can be found in the individual consultation papers for these stocks (Note that SPO 3 is part of the ECSI multi-species trawl paper).

## Section 75 – Minister to set deemed value rates

36. 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.

<sup>6</sup> *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [*Kahawa*]

<sup>7</sup> At [55].

<sup>8</sup> At [61].

<sup>9</sup> 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.

## Deemed value guidelines

37. The Deemed Value Guidelines April 2020 set out the operational policy that Fisheries New Zealand will use to inform the development of advice to the Minister on the setting/adjusting of deemed value rates. These guidelines supercede the previous version published in 2012.
38. In summary, the April 2020 Guidelines set out six statements used to inform the setting of deemed value rates:
  1. Deemed value rates should incentivise fishers to balance catch against ACE
  2. Deemed value rates should incentivise accurate catch reporting;
  3. Differential deemed values may be set;
  4. Other relevant matters may be considered when setting deemed value rates;
  5. The interim deemed value rates of all stocks should be set at 90% of the annual rate; and
  6. The deemed value rates for Chatham Island landings may be lower.
39. The April 2020 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.

## 3 The Harvest Strategy Standard

40. The Harvest Strategy Standard (HSS) is a policy statement of best practice for setting targets and limits for fish stocks in the QMS.<sup>10</sup> 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.
41. 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.
42. The HSS is not legally binding and the Minister is not obliged to choose options based upon it.

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<sup>10</sup> Available at: <https://fs.fish.govt.nz/Page.aspx?pk=113&dk=16543>