In the High Court of New Zealand
Wellington Registry
I Te Kōti Matua O Aotearoa
Te Whanganui-ā-Tara Rohe

CIV-2019-485-000752

under: the Judicial Review Procedure Act 2016

in the matter of: an application for judicial review of decisions under ss 13 and 20 of the Fisheries Act 1996

between: **Royal Forest and Bird Protection Society of New Zealand Inc**
Applicant

and: **Minister of Fisheries**
Respondent

and: **Fisheries Inshore New Zealand**
Second respondent

and: **Te Ohu Kai Moana Trustee**
Third respondent

Synopsis of submissions for Fisheries Inshore New Zealand

Dated: 16 July 2020

Next Event Date: 22 July 2020 (hearing)

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May it please the Court:

(A) SUMMARY

1 The applicant's (**Forest & Bird**) challenge to the Minister's decision in these proceedings is premised on an erroneous interpretation of the Fisheries Act 1996 (the **Act**) and a series of mistaken and contradictory assumptions.

2 Specifically:

2.1 There is no dispute between the parties about the need to restore the tarakihi fish stocks to a biomass level that will produce the maximum sustainable yield (**MSY**). The decisions taken by the Minister to date (in aggregate have resulted in just over a 30% reduction in the level of the commercial catch from the East Coast tarakihi fishery) have commenced that rebuild, with ongoing monitoring and a further stock assessment review to occur in 2021.

2.2 The issues raised by Forest & Bird in these proceedings only go to the question of **how quickly** this rebuild should occur (over what **period**) and the required **degree of certainty** that it will occur within the period chosen.

2.3 Forest & Bird's contention (in the first cause of action) that social, cultural and economic factors are an irrelevant consideration when determining the period over which a rebuild should occur defies logic. The period over which a rebuild is to occur is inextricably linked to the way and rate considerations. The argument is also contrary to the wording of section 13 of the Act together with its legislative history and the international law tenets on which it is based. Forest & Bird's legal argument on this issue is also contradicted by the calculation of the period of time Forest & Bird in fact adopts. It argues that the "period appropriate" for rebuild was 10 years, based on the guidance in the Ministry's Harvest Strategy Standard (**HSS**). Yet under the HSS, that period of 10 years was **expressly** calculated to incorporate a generic limited[1] level of social, cultural and economic considerations, and not ones that properly accounted for the stock specific issues affecting tarakihi. This is a position acknowledged by Katrina Goddard in her supplementary affidavit.[2]

2.4 Forest & Bird's next contentions (in the second and third causes of action) that the Minister's decision does not provide at least a 60% probability of rebuild and that it incorrectly

[1] Dr Mace affidavit at [35]-[36] CB 201.0103.

[2] Goddard reply affidavit at [87] CB 201.0058.

applies the HSS, attempts to read into the Act requirements which simply do not exist:

(a) the Minister's discretion in section 13 is not premised on achieving some mathematically determined "acceptable probability" (inconsistently said by Forest & Bird to be 60% in its second cause of action and 70% in its third cause of action). Rather, the Minister's obligation is to have regard to certain matters specified in the legislation and then make a reasonable (rational) decision;

(b) the decision papers make it clear that the Minister took into account the matters he was required to, knew what he was doing in terms of the projected percentage probability of rebuild and explained why he was allowing for a longer rebuild period than was contemplated in the HSS default guidelines, due to the social and economic implications of requiring a faster rebuild for this fishery.

2.5 Forest and Bird's contention (in its fourth cause of action) that, when setting the Total Allowable Catch (**TAC**), the Minister must, as matter of law, disregard any voluntary (non-statutory) sustainability measures that are being implemented by commercial fishers with the Minister's agreement, ignores both the clear wording in section 11 of the Act, together with the wider statutory scheme. Such voluntary measures are permissible relevant considerations. The proposition also contradicts Forest & Bird's own position (which all parties agree with) that the TAC decision made by the Minister needed to apply to the biologically discrete East Coast tarakihi stock. Yet the East Coast fish stock is not a separate QMA (being the eastern part of TAR1, all of TAR2, the eastern part of TAR7 and all of TAR3) and can only be managed in this way through voluntary industry catch splitting and reporting arrangements for TAR1 and TAR7.

2.6 Forest & Bird's final contention (fifth cause of action), that the Minister's decision when assessed as a whole, is unreasonable (irrational) rings hollow when the substance of the Minister's decision is analysed. Rather than the decision being one where "sustainability has been set aside in favour of (over) utilisation", as submitted by Forest & Bird in the penultimate paragraph [131] of its submissions, the Minister has in fact progressively reduced utilisation of the East Coast tarakihi fishstock by over **30%** from its 2017 levels. He did so for the express purpose of significantly constraining utilisation to enable the stock to rebuild to the required statutory target level. He set this cumulative level having had regard to the

social, cultural and economic factors that apply to this fishery. This was part of a comprehensive rebuild plan approved by the Minister in his 2019 decisions, with future stock monitoring, including an updated stock assessment next year (that will, inter alia, review ongoing catch levels). Even if no further (10%) reduction had been made by the Minister in 2019, the projections showed the Fishery was rebuilding.

(B) FISHERIES MANAGEMENT – THE QMS AND THE TARAKIHI FISHERY

3 The background to the tarakihi fishery, how it fits within the current Quota Management System (**QMS**) framework and the circumstances leading up to the two years of decision-making relevant to this proceeding, is set out in some detail in the affidavits:

3.1 As to the background to the development of the tarakihi fishery and its management over time, see:

(a) Dr Helson [7]-[21]: CB Vol 2: 201.0154

(b) Lawson [47]-[60]: CB Vol 2: 201.0178

(c) Dr Dunn Reply [3]-[6]: CB Vol 2: 201.0035

3.2 As to the concept of MSY and the management of the biomass to achieve different yields, as required by section 13 of the Act, see:

(a) Lawson [12]-[26]: CB Vol 2: 201.0169

(b) Dr Dunn initial [32]-[44] CB Vol 2: 201.0020 and Reply [7]-[10]: CB Vol 2: 201.0036

3.3 As to the background to and purpose of the HSS policy document and the Operational Guidelines that attempt to practically implement it, see:

(a) Dr Mace [16]-[24]: CB Vol 2: 201.0098

(b) Lawson [27]-[46]: CB Vol 2: 201.0173

3.4 As to the full toolbox of measures available to fisheries managers when managing to ensure sustainability, see:

(a) Dr Helson [16]-[28]: CB Vol 2: 201.0156

(b) Lawson [61]-[85]: CB Vol 2: 201.0183

3.5 As background to the need for the industry's Rebuild Plan developed in 2018 and further refined in the context of the 2019 decision, see:

(a) Lawson [86]-[94]: CB Vol 2: 201.0186

(b) Minister [48]-[52]: CB Vol 2: 201.0114

(C) CHRONOLOGY

4 Despite the number and length of the affidavits filed and the size of the bundle of documents, few facts are really in dispute in these proceedings. Certainly, the facts that relate to the essential sequence of events leading up to the decision under review are not.

5 The submissions made on behalf of the Minister explain the decision-making during 2018 and 2019. Those submissions are adopted by Fisheries Inshore. The following chronology briefly summarises the lead up to the decisions:

DATE	KEY EVENT	SOURCE
1986	Quota Management System introduced – separate QMAs for seven fish stocks.	
2008	HSS published.	Lawson at [31]; CB 201.0174
June 2011	Operational Guidelines for HSS.	CB 303.0548
2012	New stock assessment prepared for tarakihi stocks but not accepted by working group.	Helson at [13]; CB 201.0155
Nov 2017	New stock assessment accepted by working group. East Coast QMAs now treated as separate fish stock.	Helson at [13] – [15]; CB 201.0155
July 2018	Industry develop and provide to the Minister a draft Management Strategy for the tarakihi fish stocks. This is the initial version of what becomes the 2019 industry Rebuild Plan, provided to MPI and sets out the full range of measures.	Lawson at [86]-[89]; CB 201.0186
July-Sept 2018	Fisheries New Zealand consult on various options to rebuild East Coast tarakihi stocks based on the 2017 stock assessment.	SoC at [17] – [20]; CB 101.0007

DATE	KEY EVENT	SOURCE
19 Sept 2018	The Minister makes various decisions concerning East Coast tarakihi stocks including a TACC reduction of 20% as part of a "phased approach" to stock rebuild over a number of years. The Minister included a condition that the industry further develop and implement their Rebuild Plan.	SoC at [21] – [22]; CB 101.0008
1 October 2018 onwards	The industry implements voluntary measures in the TAR Management strategy (including the voluntary catch splitting and recording for TAR1E and TAR7E) in addition to a regulatory cut to TACs and TACCs for East Coast TAR.	Lawson at [87]-[91]; CB 201.0187
May 2019	The industry complete and provide a stock Rebuild Plan to Fisheries New Zealand.	SoC at [23]-[27]; CB 101.0009
June 2019	Fisheries New Zealand's initial position paper released for consultation that includes further stock rebuild options for the East Coast tarakihi stocks as part of the 2019 sustainability review. Option 3 involved implementation of the industry's stock Rebuild Plan, while option 4 would also implement the Plan but with an additional 10% TACC reduction.	SoC at [24] – [27]; CB 101.0009
26 July 2019	Submissions made on tarakihi sustainability review including the options consulted on. Submissions made by: • Fisheries Inshore at CB 305.1192. • TOKM at CB 306.1563. • Forest and Bird at CB 302.0419. • LegaSea and others (Recreational fishers) at CB 302.0452.	CB 305.1192
August 2019	NZIER provides Fisheries New Zealand with an economic impacts assessment.	CB 305.1280
30 August 2019	Fisheries New Zealand final advice paper.	CB 302.0462
27 Sept 2019	Minister's decision letter – agreed to option 4 implementing Industry Rebuild Plan and further 10% TACC reduction.	CB 302.0498
30 Sept 2019	Minister varies the TACs by notice in the Gazette.	SoC at [32]; CB 101.0012

(D) FIRST CAUSE OF ACTION: Error of law – application of section 13(2)(b)(ii)

Forest & Bird's argument

6 Forest & Bird's first argument attempts to create an artificial line between elements within the Minister's discretion under section 13. It argues that decisions about the *way and rate* at which stocks are to be restored to B_{MSY} is fundamentally distinct to the determination of a *period appropriate* over which that restoration can occur.

7 Forest & Bird argues that while decisions about *way and rate* can take into account or have regard to the social, cultural and economic impacts of the decision, decisions about the *appropriate period* over which the restoration can occur are fundamentally different and must disregard those societal considerations. Refer to:

7.1 Forest & Bird's statement of claim para [33e] – s 13(2)(b)(ii) is "*a sustainability backstop/bottom line that does not involve balancing those competing considerations.*"

7.2 Forest & Bird's submissions at paragraph [46].

8 The argument is that Parliament intended that scientific factors alone would determine what an "appropriate" period is over which a stock should be rebuilt.

9 Forest & Bird's argument is inconsistent with:

9.1 the legislative history of section 13 and the international law instrument from which it is derived;

9.2 previous decisions of the High Court and Court of Appeal considering both section 13 and the sections that preceded it from the 1983 Act;

9.3 a contextual analysis of the provisions themselves; and

9.4 Forest & Bird's own position in these proceedings.

UNCLOS and Fisheries Act 1983

10 Section 13 has its origins in Article 61 of the United Nations Convention on the Law of the Sea (**UNCLOS**).[3] The early development of the legislation is discussed by the High Court in *Greenpeace NZ Inc v MOF*[4] (the **Orange Roughy** case). That decision considered the equivalent provisions of the 1983 Act.

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[3] UNCLOS, Art 61 [**Resp Auth: Tab 27**].

[4] *Greenpeace NZ Inc v MOF* HC Wellington CP 492/93, 27 November 1995, see pages 3-8 and 17-19 [**F&B Auth: Tab 25**].

Section 5 of the 1996 Act now specifically provides for the Act to be interpreted consistent with New Zealand's international obligations relating to fishing.[5]

11 Article 61 provides for coastal states to determine the allowable catch within their Exclusive Economic Zone (**EEZ**) and to impose conservation management measures to ensure stocks are not over exploited.

12 Article 61(3) states (emphasis added):

> Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the **maximum sustainable yield**, **as qualified by relevant environmental and economic factors**, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

13 These concepts were first brought into New Zealand domestic law through amendments to the Fisheries Act 1983 in 1986, when the quota management system was first introduced. That history and those provisions are discussed in the *Orange Roughy* case as well as in *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97) (the High Court **Snapper** case).[6]

14 Under the 1983 legislation there was no separate section under which a TAC was to be set. Rather, when setting the TACC (under section 28(C)) one of the factors the Minister was to have regard to was the TAC. The term TAC was defined in section 2 as follows (emphasis added):

> "Total allowable catch", with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, **as qualified by** relevant economic or environmental factors…

15 There was considerable debate as to what these "qualifiers" were qualifying – whether it was referring to the amount of yield that should be targeted or the biomass that the fishery needed to be managed at.

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[5] New Zealand became a signatory to UNCLOS on 10 December 1982 (See: *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995, page 4 [**F&B Auth: Tab 25**]).

[6] The primary discussion of this occurs in the High Court decision starting at page 78 [**Resp Auth: Tab 12**]. That decision was overturned on appeal, but the discussion in relation to UNCLOS was unaffected.

16 In the *Orange Roughy* case one of the orange roughy fish stocks was below the level of stock size needed to produce the maximum sustainable yield. The Minister determined that the stock needed to be rebuilt over a period of ten years but left the TAC unchanged in the first year with larger reductions to occur in the following two years.[7] He used this staged reduction to limit the social and economic impacts of immediate cuts.

17 The Court held that "the period chosen" by the Minister could not be seen as being unreasonable. There was clearly material that indicated that (a) the TACC that had been set would not compromise the attainment of the ultimate objective within the specified period, and (b) the Minister's approach could not be said to be unreasonable given the social and economic factors that he took into account as justifying the approach.[8]

18 In terms of the period for rebuild adopted, the Court said:[9]

> The element of objective in the MSY means that its attainment must be programmed over an appropriate period, but is a period which is reasonable bearing in mind all relevant factors. The relationship of the MSY to the TAC would therefore allow those factors which qualify the TAC to have a bearing on the choice of period over which the objective of the MSY is to be attained.

19 And:[10]

> In arriving at what is an appropriate period, all factors must be taken into account and these can reasonably include economic and social-economic factors…

20 Section 13 of the 1996 Act is now more explicit about the use that can be made of the qualifiers – the qualifiers cannot be used to alter the ultimate management objective of managing fisheries at or above B_{MSY} – only the path to achieving that stock size.

21 Shortly after the *Orange Roughy* case and around the time the 1996 Act was enacted, the *Snapper* proceedings were determined, challenging a 40% reduction in the SNA1 TACC. By the time the proceedings got to the Court of Appeal (in 1997) the 1996 Act was in force. The Court (a full bench) deliberately analysed the

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7 *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995 at page 2 [**F&B Auth: Tab 25**].

8 *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995 at pages 27-30 [**F&B Auth: Tab 25**].

9 *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995 at page 24 [**F&B Auth: Tab 25**].

10 *Greenpeace v MOF* HC Wellington CP 492/93, 27 November 1995 at page 29 [**F&B Auth: Tab 25**].

provisions of the new Act as well as the old given the precedent effect of the Court's decision.[11]

Origins of section 13 – Fisheries Act 1996

22 The 1996 Act now contains an explicit TAC setting section (s 13) as well as a TACC setting power (s 21) and contains a separate definition of "maximum sustainable yield" (s 2).

23 Section 13 and subsections (2) and (3) in particular give effect to UNCLOS principles which recognised that economic factors needed be taken into account when setting constraints on commercial fishing activities. This can be seen by an analysis of the legislative history:

23.1 The Bill as introduced in 1984 used language similar to subsections (b)(i) and (b)(ii) but grouped them together within what was then clause 11(2)(b) and (c). This wording allowed for the possibility of the fishery to be permanently below $B_{MSY,}$ providing a "net national benefit" test was met.[12]

23.2 The Bill was subject to an interim report back in December 1995.[13] No relevant commentary was provided by the Select Committee but what has now become section 13 restructured subclause (2) in a way similar to the current subsection (2) but with no subdivision between (b)(i) and (b)(ii) – way and rate were part and parcel of the assessment of a period appropriate to the stock. The net national benefit test had been removed and no equivalent to the present section 13(3) existed.

23.3 The Bill was finally reported back in about August 1996,[14] in the form it now exists in the Act. The Committee doesn't explain why paragraph (b) was split into two subparagraphs but the Select Committee report includes a more general commentary on the TAC setting provisions. It explains that the net national benefit test, and any ability to manage stocks below B_{MSY} was not supported. Sustainability was the key factor used to determine a TAC but the Select Committee went on to explain the origin of section 13(3) (emphasis added):

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11 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 (the Court of Appeal **Snapper** case) at page 5 [**F&B Auth: Tab 17**].

12 Fisheries Bill December 1994 (No. 63) [**Resp Auth: Tab 26**].

13 Interim report on the Fisheries Bill of the primary production Select Committee 1995 page 36 [**Resp Auth: Tab 25**].

14 Fisheries Bill as reported from the Primary Production Committee (No. 63-2) [**F&B Auth: Tab 7**].

> We recommend subclause 13(3) which requires the Minister to have regard to such social, cultural and economic factors as are considered relevant when considering the way in, and the rate at which, a stock is moved towards its sustainable level. This is **consistent with UNCLOS**, does not detract from the philosophy that setting a TAC should be **primarily** based on sustainability concerns, and recognises recent management practice.

23.4 The previous paragraph of the report had elaborated what the Committee saw as the relevant provision in UNCLOS and stated that:

> Article 61 of UNCLOS specifies that relevant economic factors should be taken into account when setting constraints on commercial fishing activity.

24 In summary this legislative history confirms, consistent with the prior *Orange Roughy* case and UNCLOS, that economic and social considerations were intended to be a relevant consideration when determining the level of harvest that will be permitted as stocks are moved towards a level that can produce the maximum sustainable yield.

Authorities interpreting section 13

25 In the Court of Appeal *Snapper* decision the timeframe again selected by the Minister for rebuild was directly in issue (twenty years), as was the Minister's obligation to have regard to the social and economic impacts of his decision.[15]

26 The full bench first discussed the definition of MSY and then TAC in the 1983 Act. In relation to the definition of TAC they said (emphasis added):[16]

> In our judgment that definition both alone and informed by the relevant articles of the United Nations Convention on the Law of the Sea (UNCLOS) cast on the Minister a prima facie duty to move the fishery towards MSY, if not already there, by such means and over such period of time as the Minister directed. That prima facie obligation was subject to the so called qualifiers i.e. those factors introduced by the words "as qualified by". Those qualifiers were matters which the Minster was required to address when considering how to implement his prima facie duty and, if the qualifiers were cogent enough, whether the prima facie duty was for the moment overtaken by one or more of those factors. **Thus the qualifiers were relevant to whether, and if so, by what means and over what time the prima facie duty should be implemented.**

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15 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997, see discussion of obligation to move to MSY at pages 12-15 and "Unreasonableness" at pages 22-23 [**F&B Auth: Tab 17**].

16 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at page 13 [**F&B Auth: Tab 17**].

27 The Court then immediately went on to discuss the new equivalent TAC provision in section 13 of the 1996 Act and:

27.1 noted the obligation, when a fishery's yield was below MSY, to move the stock towards or above a level which can produce MSY, and then said (emphasis added):[17]

> It is similarly made clear that what used to be called the qualifiers (now expressed as social, cultural and economic factors as the Minister considers relevant) are matters to which the Minister must have regard when he considers the way in which and the rate at which the stock is moved towards or above MSY. In short, the Minister now has a clear obligation to move the stock towards MSY and when deciding the **time frame and the ways to achieve** that statutory objective the Minister must consider all relevant social, cultural and economic factors.

27.2 expressed doubt about the need for the goal of MSY to be achieved "within a fixed time" (in part in response to a statement by the Minister that a period longer than twenty years lacked credibility), stating "but why that should be so is by no means obvious".[18]

28 Forest & Bird's submissions acknowledge these findings are directly contrary to its argument (para [53]) and accordingly attempt to minimise the significance of the Court of Appeal *Snapper* decision, stating that it was not directly concerned with the 1996 Act, and that the case was not dealing with the period of time appropriate for a rebuild. Neither proposition is correct. The Court was clear it was dealing with the 1996 provisions (which would have applied on reconsideration of the decision) as well as the 1983 provisions because of the precedent effect,[19] which was also why there was a full bench.

29 The Court quoted section 13(2) and discussed that provision in light of section 13(3), with explicit discussion about the period of time contemplated for the rebuild (twenty or thirty years).[20] It is directly on point. It shows the Court saw both the period of time over which a rebuild was to occur and the way and the rate of achieving this as being all part and parcel of the same essential decision.

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17 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at page 14 [**F&B Auth: Tab 17**].

18 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at page 23 [**F&B Auth: Tab 17**].

19 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at page 5 [**F&B Auth: Tab 17**].

20 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at pages 13-14 [**F&B Auth: Tab 17**].

30 This passage from the Court of Appeal's decision in *Snapper* was then quoted with approval by the Court of Appeal in the *Kahawai*[21] decision, affirmed by the Supreme Court.[22]

31 Forest & Bird's submissions attempt to mitigate these findings by relying on the High Court decision in *Kahawai* and section 8.[23] Neither argument has any substance:

31.1 The passages from the High Court decision in *Kahawai*[24] were overturned in the Court of Appeal.[25] The Supreme Court upheld the Court of Appeal's decision.

31.2 As to the attempt to bring into play the general purpose provision in section 8,[26] both the Court of Appeal and the Supreme Court in the *Kahawai* decision rejected the High Court's finding that the general purpose section in section 8 could be used to limit the express statutory criteria in sections 13 or 21, emphasising that section 8 cannot be used to override the operative provisions of the Act.[27]

31.3 Finally, the characterisation of the Minister's decision as being one made at the "expense of sustainability" and having the effect of "postponing sustainability" is a distortion of the facts. As explained in the context of the final *Wednesbury* cause of action, the Minister's decisions far from postponed anything. The Minister has reduced the TAC of the combined QMAs cumulatively by over 20% since 2017 and the East Coast portion of these QMAs TACC by a massive **30%** for the express purpose of restoring the fish stocks to B_{MSY}.

Contextual analysis of section 13

32 When the Court of Appeal described the scheme underpinning section 13 in both the *Snapper* and *Kahawai* decisions, it read subsection (3) as applying to all elements of subsection (2), not (as

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21 *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 at [64] [**F&B Auth: Tab 11**].

22 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [**F&B Auth: Tab 8**].

23 Forest & Bird submissions at [47]; [54].

24 *New Zealand Recreational Fishing Council and Ors v Sanford Ltd and Ors and Minister of Fisheries* CIV-2005-404-4495, Harrison J, 21 March 2007, Auckland at [49]-[50] [**F&B Auth: Tab 24**].

25 *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 at [45]-[49] [**F&B Auth: Tab 11**].

26 *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 at [47] [**F&B Auth: Tab 11**].

27 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [59] [**F&B Auth: Tab 8**].

Forest & Bird submits) only subsection (2)(b)(i). When section 13 is analysed more carefully, the reasons for that are obvious:

32.1 The considerations in subsection (2) as a whole are inherently composite in nature – the *way and rate* of a rebuild and the *appropriate period* over which it should occur will often be part and parcel of the same essential balancing exercise. That is exactly what the Court of Appeal in *Snapper* was saying when they said (emphasis added):[28]

> In short, the Minister now has a clear obligation to move the stock towards MSY and when deciding the **time frame and the ways to achieve** that statutory objective the Minister must consider all relevant social, cultural and economic factors.

32.2 If the drafters had not seen the composite nature of the factors in subsection (2) as being relevant to the social, cultural and economic factors referred to in subsection (3), the cross-reference in subsection (3) would logically have been confined to (2)(b)(i) only. In fact it cross-references back to the whole of subsection (2)(b).

32.3 The consideration in subsection (2)(b)(ii) is inherently discretionary and not admitting of only one scientifically correct answer, as Forest & Bird seem to suggest. This is clear from both the need to determine an "**appropriate**" period and that in making that determination the Minister is not required to assess only scientific matters.

32.4 Rather than being the only matters that the Minister can consider when determining an appropriate period, the biological characteristics and any environmental conditions affecting the stock are only matters which the Minister must "**have regard to**". Plainly therefore the provision contemplates other matters beyond these scientific considerations being taken into account. There is ample case law, including in the fisheries arena, which confirms the requirement "to have regard" means no more than that.[29] Yet Forest & Bird's argument is that these scientific factors are the **only** permissible relevant consideration.

32.5 As such contextually, social, cultural and economic factors are clearly a **mandatory** relevant consideration under (2)(b)(i)

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[28] *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at page 14 [**F&B Auth: Tab 17**].

[29] *Pacific Trawling Ltd and Independent Fisheries Ltd v Minister of Fisheries* High Court, Napier, 29/8/2008, Priestley J at [83], citing *Sanford Limited & Ors v New Zealand Recreational Fishing Council Inc* (*op cit*) at [94] and adopting the earlier decision of *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544, 551 (CA) [**Resp Auth: Tab 17**].

(because of the wording of subsection (3)). However given the wording of subsection (2)(b)(ii), Forest & Bird cannot say that social, cultural and economic factors are not **permissible** relevant considerations.

32.6 This contextual interpretation is consistent with New Zealand's international obligations relating to fishing (section 5) under which UNCLOS has long recognised the need to take into account economic considerations when determining catch levels. An interpretation of section 13 that allows the Minister to determine how a stock rebuild will occur (not whether it will occur), is fully in accordance with UNCLOS principles.

Fatal contradiction

33 Forest & Bird's submissions presuppose there is some solely science-based "appropriate period" which the Minister had to use. However its own submissions do not use such a period. Rather they use a period that expressly extends the period of rebuild to take into account socio-economic factors, albeit in a more limited way than the Minister considered appropriate when addressing the East Coast tarakihi fishery. Explaining this in more detail:

33.1 Forest & Bird's submissions do **not** ultimately identify or define what an "appropriate period" is, based on a solely scientific assessment of the biological characteristics and environmental conditions affecting tarakihi stocks.

33.2 The HSS time period of $2xT_{min}$ is an arbitrary doubling of the time a stock would take to rebuild in the absence of fishing. The HSS does not define an "appropriate period".

33.3 The nearest Forest & Bird's evidence comes to defining "appropriate period" is in Dr Dunn's evidence.[30] He describes how the T_{min} calculation is based on an assessment of the biological characteristics and environmental conditions affecting the tarakihi stock.

33.4 However, Forest & Bird's case is not that this T_{min} calculation should have been used. If a T_{min} calculation was to be treated as the "period appropriate" for the purposes of section 13, then the effect would be that all fisheries below the soft limit would need to be immediately closed i.e. the soft limit would be the hard limit and the HSS would not need to define a soft limit. In the case of the tarakihi stocks, the T_{min} calculation means the fishery would need to have been closed for five years. This is because, as Dr Dunn correctly explains, T_{min} "*is the time the stock would take to rebuild to the target **in the***

[30] Dr Dunn affidavit at [14] CB 201.0017; [54]-[56] 201.0024.

absence of fishing."[31] He goes on to explain that given the biological characteristics and environmental conditions for tarakihi the T_{min} calculation is five years.[32]

33.5 Despite this, Forest & Bird do not in these proceedings use their own evidence from Dr Dunn on this issue. Specifically they do not suggest that the "period appropriate" for the tarakihi rebuild was five years. Rather they argue it should be ten years ($2xT_{min}$), based on the guidance in the HSS and Operational Guidelines.

33.6 Any increase in the period beyond the biological characteristics and environmental conditions affecting the tarakihi stock is taking into account factors beyond a purely scientific assessment of the stock's biology and environmental conditions affecting it. Both the HSS and the Operational Guidelines expressly state that the $2xT_{min}$ calculation **includes** socio-economic factors, albeit that with it being the generic default the consideration of these factors is limited and does not address the specifics of the East Coast tarakihi fishstock (see passages quoted at paras [91] and [92] of Forest & Bird's submissions).[33] Katrina Goddard for Forest & Bird acknowledges this in her evidence in response to it being explained by Dr Mace.[34]

33.7 As such there is a fatal contradiction in Forest & Bird's argument. The cause of action is based on an allegation that social, cultural and economic factors must be ignored when determining an appropriate period for the rebuild. Yet the period advocated by Forest & Bird expressly includes limited consideration of those matters. It is a period twice the length of the period that they say considers only the biological characteristics and environmental conditions.

33.8 If this submission was correct the Minister would be stripped of any discretion under section 13. He would have no choice but to close any fishery whose biomass was below the soft limit state (and under their interpretation the soft limit would be the hard limit). This would be necessary as the "period appropriate" for the rebuild would always be a period that could only be achieved by stopping all fishing. Plainly such an

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31 Dr Dunn affidavit at [50] CB 201.0023.

32 Dr Dunn affidavit at [17] CB 201.0018.

33 The second of those quoted passages is from the Operational Guidelines for New Zealand's Harvest Strategy Standard June 2011 page 12 CB 303.0561, which state: "*allowing a rebuild period of up to twice T_{min} allows for some element of social-economic considerations when complete closure of a fishery could create undue hardships for various fishing sectors…*"

34 Goddard reply affidavit at [87] 201.0058.

approach in interpretation would undermine the intent of subsection (3).

34 In summary the first cause of action is without merit.

(E) SECOND CAUSE OF ACTION: Error of law – probability of achieving rebuild

35 The second cause of action also alleges an error of law – an alleged failure to set a TAC that "*will in terms of* ***probability of achievement***" enable the East Coast stock to achieve the target stock size within an appropriate period.[35]

36 Factually, this argument turns on the Minister's decision to set TACs that were projected to rebuild the stock to the target size (40%) within 25 years with a **50% probability**.

37 The argument developed by Forest & Bird in its submissions is that the Minister's decision to adopt this 50% "probability of achievement" was unlawful in that:

37.1 it does not give effect to the "*mandatory directive language*" required by the use of the words "shall" and "will" in section 13(2) (Forest & Bird's submissions at [76]);

37.2 the minimum percentage required is a 60% probability of achievement, because that percentage is used by some fisheries scientists in the context of other stock assessment issues (Forest & Bird's submissions at [72]).

38 Fisheries Inshore supports and adopts the Minister's submissions on this cause of action. In short:

38.1 The Act does not, expressly or by implication, require any specific percentage probability of achievement – express language would be required to impose such a requirement.

38.2 The degree of certainty sought by the Minister when making any decision is a matter for the Minister, in the exercise of his or her judgement and discretion and by balancing all the competing considerations.

38.3 The words "shall" and "will" in section 13(2) are not the words primarily relevant to this issue:

(a) The directive is that the Minister "shall" set the TAC – he has done this. Equally it cannot be said that the Minister has not set a TAC that "will" restore the stock

[35] See Forest & Bird's statement of claim at [35] CB 101.0013.

to B_{MSY}. Forest & Bird's real complaint is that this rebuild is not occurring fast enough. Projections were that the stock would have rebuilt to B_{MSY} with approximately 60% probability (that being the probability Forest & Bird say is the minimum required) within 30 years.[36] As such, a rebuild to the target biomass with the probability required by Forest & Bird is being achieved, just not as fast as Forest & Bird would like.

(b) The relevant obligation imposed on the Minister under section 13(2) is to set a TAC that "***enables*** *the level of any stock…to be* ***altered***…". The word "enables" recognises both that there are many other factors at play, most of which the Minister cannot control and which will impact on the rebuild (such as environmental conditions like levels of juvenile recruitment) as well the fact that decisions made do not immediately achieve the desired outcome. Rather, the Minister's decision sets in train a rebuild that will take a number of years and which also depends on many factors including future decision-making. In that sense the Minister's decision is enabling rather than necessarily able to achieve the desired outcome.

38.4 The Minister must therefore set a TAC that will **enable** the desired rebuild – that is distinctly different to a requirement to *achieve,* with a defined (here 60%) degree of certainty, that outcome.

38.5 Equally, the mandatory requirement (in section 13(3)) for the Ministry to have regard to "social, cultural and economic factors as he or she considers relevant" when considering *way and rate* at which any stock rebuild is to be achieved, emphasises the inherently discretionary nature of the decision and the improbability that the legislature contemplated the Minister being required to make those decisions to any particular required degree of mathematical probability.[37]

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[36] See spreadsheets of projections referred to in Dr Griffiths' affidavit [30]; CB 201.0088. The relevant table is in annexed to Dr Dunn's affidavit, MD4, at CB 303.0658: Table 2, Catch 90 under 30 year projection equals 58.7%. These same spreadsheets confirm that if no further (10%) reduction had been made by the Minister in 2019, the stock would still have continued to increase back to the target biomass of 40%. Within thirty years it was projected to have been at 36.91% and continuing to grow (see Table 6 at CB 303.0658).

[37] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA) at 391 [**F&B Auth: Tab 14**]; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [34] [**Resp Auth: Tab 11**]; *Patel v Chief Executive of the Department of Immigration* [1997] NZAR 264 (CA) at 272 [**Resp Auth: Tab 18**].

38.6 The degree of probability suggested by Forest & Bird (60%) has no legislative basis – it is merely the percentage used by some scientists involved in fisheries stock assessment work, which they equate to the word "likely" (see Forest & Bird subs para [72]). The artificiality of treating that particular scale as having some legislative mandate, is contradicted by Forest & Bird's own submissions:

(a) First, the scale relied on is inconsistent with the next scale referred to by Forest & Bird, which is sometimes used in an RMA context (see para [74] of Forest & Bird's submission). That alternative RMA scale treats a 60% probability as being "*about as likely as not*" – yet Forest & Bird's submissions assert expressly that this lower degree of certainty would **not** be sufficient when that same phrase is used in the fisheries management scale (compare the tables at [72] and [74] of Forest & Bird's submissions and see discussion at [73] as to why "*about as likely as not*" is said to be inadequate).

(b) Second, the adoption by Forest & Bird of 60% as being an acceptable degree of probability in this second cause of action is contradicted by its submissions in the third cause of action where, relying on the HSS, it says that a 70% probability is required (see [98] Forest & Bird's submissions).

38.7 Nothing in the scheme of the Act suggests there is any mathematical degree of probability required in decision-making. Ultimately, the Minister's discretion is controlled by the need to have regard to the considerations required by the Act and make a reasonable (rational) decision.

39 In terms of the Minister's decision, his affidavit makes it very clear that he understood that his decision was using a 50% probability of rebuild in respect of both of his decisions, but that he considered this "*reasonable given the status of the stock, the size of the rebuild required in the socio-economic impact associated with achieving a rebuild with greater certainty.*"[38] In contrast to the Court of Appeal's criticism of the Minister's decision in the *Snapper* case, here the Minister has carefully explained why the decision he made is the preferable one.[39]

[38] See Minister's affidavit at [27] CB 201.0110; [46] CB 201.0114.

[39] See the Court of Appeal's discussion of "Unreasonableness" in *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at pages 22-23 [**F&B Auth: Tab 17**].

40 That judgement was the Minister's judgement to exercise. It is not open to Forest & Bird to try and second-guess it unless it can do so on rationality grounds (5th cause of action).

(F) THIRD CAUSE OF ACTION: Harvest Strategy Standard

41 The third cause of action has two distinct causes of action within it, both of which relate to the HSS policy:

41.1 *An alleged mistake of fact* – relying on advice from the MPI as to whether the default rebuild period in the HSS and OG ($2xT_{min}$) took into account social, cultural and economic factors.

41.2 *An alleged failure to have regard to a relevant consideration* - namely the 70% "*acceptable probability*" of rebuilding for stocks below the soft limit in the HSS.

42 Again, Fisheries Inshore is primarily content to adopt the Minister's submissions on this cause of action and adds the following by way of a short encapsulation of the submissions.

Mistake of fact – advice on rebuild period

43 The test for mistake of fact in judicial review is now well established, including in fisheries cases involving scientific issues. Consistent with fundamental judicial review principles, a Court will only treat a mistake of fact as an error of law if the mistake is clear and pivotal to a decision:[40]

44 Forest & Bird needs to establish:

44.1 a clear mistake of an established fact, not simply a disagreement between two or more possible views;

44.2 that mistake was pivotal to the decision; and

44.3 that, not only the Minister was mistaken, but that the mistaken view was also held by those advising him.

45 None of these criteria are established in the present case:

[40] See *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62 at [54] [**Resp Auth: Tab 19**]; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at [66] [**Resp Auth: Tab 9**]*;* and *Northern Inshore Fisheries Company Ltd v Minister of Fisheries* High Court, Wellington, 4/3/2002, CP 235/01 at [49] [**Resp Auth: Tab 15**].

45.1 There was no mistake at all in the advice given. The relevant part of the advice paper reads (emphasis added):[41]

> **Option 3 and 4** also step outside the guidelines in the Harvest Strategy Standard and deliver an initial rebuild rate that is between 4-5*T_{min} instead of 2*T_{min}…
>
> It is not common for Fisheries New Zealand to propose options that are outside the Harvest Strategy Standard, but **Options 3 and 4** have been included in recognition of **the** social, cultural and economic factors. **These factors** are relevant to your decision-making and are not taken into account by the Harvest Strategy Standard.

45.2 The advice was correct. As Mr Lawson discusses in his evidence,[42] this advice expressly occurs in the context of a discussion about Options 3 and 4. It is not generic advice but specific advice explaining why officials are proposing options outside the default guidelines. In contrast to Options 1 and 2, Options 3 and 4 involved no, or only a 10%, further TACC reduction. They therefore had far less negative social and economic impacts on the seafood sector. Options 1 and 2 on the other hand involved substantial reductions and would have had catastrophic social and economic effects on the sector.

45.3 Specifically, working through the paragraph of the advice quoted above in context:

(a) Options 3 and 4 were outside the HSS guidelines.

(b) Options 3 and 4 were included by officials as an option in recognition of the social, cultural and economic factors present in the tarakihi fishery.

(c) The extent of the social, cultural and economic factors relevant to the East Coast tarakihi fishery reflected in Options 3 and 4 were not taken into account in the default rebuild timeframe (2xT_{min}) contained in the HSS.

45.4 Also, there is nothing in the decision papers to suggest that the distinction which Forest & Bird attempts to draw, between the content of the HSS and the advice given, was in any way material, let alone critical, to the Minister's decision:

(a) It is clear from the Minister's decision letter and affidavit that his decision to opt for a longer rebuild,

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41 October 2019 Sustainability Round Decisions document, exhibit KG 15, CB 302.0490.

42 Lawson affidavit at [44]-[46] CB 201.0177.

was because of his concern about the social, cultural and economic impacts of requiring a faster rebuild with larger TACC reductions.

(b) Exactly how the guidelines contained in the HSS had arrived at a default rebuild period of 10 year was of little relevance in circumstances where the Minister considered that period to be inadequate to meet the wider objectives.

45.5 Finally, even if the Minister was under some misunderstanding because of the advice (of which there is no evidence) his departmental officials, who are the drafters of HSS, knew what they provided. It is well established that their knowledge is to be attributed to the Minister.[43]

Relevant consideration – advice on 70% probability

46 Forest & Bird's argument that the Minister failed to have regard to the part of the HSS that suggested a default 70% probability of rebuild should be applied (or that the Minister acted inconsistently in applying some elements of the HSS but not this 70% probability of rebuild requirement) is misconceived:

46.1 Contrary to that suggested, the Minister did not "fail to have regard" to the default guideline of 70% probability of rebuild. Rather he did have regard to it, but decided not to apply it (for reasons which he explained);[44]

46.2 There is no statutory requirement to "have regard" to the HSS. There is no suggestion in the evidence that it is anything other than a policy document (now quite out of date) developed by the Ministry back in 2011. As such it did not (and does not) bind the Minister. He was entitled to apply it (or parts of it) as he considered appropriate in circumstances.

46.3 In addition, the HSS is a generic set of default guidelines which on their face recognise that they may not apply in certain situations. The guidelines were supposed to have been updated every five years at the latest but have not been updated since 2011.[45]

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[43] *Bushell v Secretary of State for the Home Department* [1980] 2 All ER 608 at 613 [**F&B Auth: Tab 27**]; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 201 [**F&B Auth: Tab 16**].

[44] Minister's affidavit at [27] CB 201.0110; [46] CB 201.0114.

[45] See discussion of the HSS in Lawson affidavit in section (D), particularly at [31]–[38] CB 201.0174.

46.4 Even if it were a mandatory relevant consideration, which the Minister was required to have regard to, that would still only mean it is a matter that must be considered. It does not necessarily determine or influence the decision.[46]

46.5 While not stated expressly, there is an implicit inference throughout much of Forest & Bird's submission that the policy contained in the HSS must be followed by the Minister. No policy document has that status and it would not be unlawful for the Minister to consider departing from the policy in appropriate circumstances.[47]

46.6 Nor is there any reason in logic or law why the Minister could not (as it did) adopt part of the policy contained in the HSS, while deciding not to adopt other parts. The fact that he did so simply highlights that he did have regard to the HSS policy and applied it as he thought appropriate in the circumstances.

(G) FOURTH CAUSE OF ACTION: Error of law – allegation that industry Rebuild Plan was an irrelevant consideration

47 Forest & Bird's submissions contend that the industry Rebuild Plan was an irrelevant (impermissible) consideration for the Minister under section 13, so that he erred in law when he took it into account.

48 There is no disagreement that the Minister did take the Plan into account. Fisheries Inshore say he was lawfully entitled to have regard to it as a permissive consideration under sections 13(2)(3) and 11(1)(a).

Forest & Bird's argument

49 Forest and Bird's submissions argue that the Rebuild Plan was not relevant as it says:

49.1 the Rebuild Plan is an "*alternative management approach to rebuilding*", whereas section 13 of the Act requires this to be done by way of an appropriately set TAC (at [101] of Forest & Bird's submissions);

49.2 the industry's Plan is voluntary, with no legal force and is therefore not "*sufficiently certain to be a relevant*

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[46] *Pacific Trawling Ltd and Independent Fisheries Ltd v Minister of Fisheries* High Court, Napier, 29/8/2008, Priestley J at [83], applying earlier Court of Appeal decisions in respect of the use of that phrase in the Fisheries Act [**Resp Auth: Tab 17**].

[47] *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at [48]-[49] [**Resp Auth: Tab 22**].

consideration under section 13" (at [102] of Forest & Bird's submissions).

50 Later, Forest & Bird's submissions put a gloss on this, saying (at [110]) that the *effect of* the Plan is not irrelevant, as if it has any positive effect it will be taken into account in future years when it produces fruit, but at present its potential effect must be ignored by the Minister.

Legal principles – relevant considerations

51 The relevant legal principles relating to relevant considerations can be summarised as follows:

51.1 If a statute confers a discretion, then the objective is to discern from the statute (expressly or by implication) what matters can be or need to be considered when exercising that discretion.[48]

51.2 There are three types of considerations:[49]

(a) *mandatory relevant considerations* – those which the Act expressly or impliedly requires to be considered, making the decision unlawful if not considered;

(b) *irrelevant considerations* – those which the Act expressly or impliedly requires to be ignored, making the decision unlawful if considered; and

(c) *permissible considerations* – being all those in between that can properly be taken into account but do not have to be, not affecting the lawfulness of the decision, whether considered or not.

51.3 The Court construes relevancy from the subject-matter, scope and objects of the Act "*as ascertained from the whole of its provisions*".[50]

51.4 As to what are irrelevant considerations, this inquiry has been treated as analogous to that of **improper purpose**; a factor will be irrelevant when taking it into account would mean the

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48 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 238 at 228.

49 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 224 [**Resp Auth: Tab 4**]; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183 [**F&B Auth: Tab 16**].

50 *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA) at 327; *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC) at 14 [**Resp Auth: Tab 8**].

decision-maker was acting in accordance with an improper purpose.[51]

51.5 Where the discretion is on its face open-ended, a potentially vast range of considerations can be relevant. This is especially so when the purposes of the Act are broad.[52] In such circumstances, the Court should not read in limitations. As *Wade* has put it[53]:

> It is no concern of the court to restrict [a discretion] artificially by limiting the considerations that are relevant.

Analysis of relevant provisions of the Act

52 There is nothing in section 13 itself or the wider scheme which suggests that Parliament would have intended voluntary measures taken by industry to assist in the rebuild of the stock to be an improper consideration for the Minister to have regard to. To the contrary, elements which are mandatory considerations under section 11(1) of the Act:

52.1 Starting with section 13(2)(b), the words "*way and at a rate*" are broad and permissive in nature - the *way* in which something is done and the *rate* at which it occurs may be affected or contributed to by a range of other fisheries management measures – such as reducing juvenile mortality, move on rules, closing areas and the like. Dr Dunn for Forest & Bird accepts this in his reply evidence.[54]

52.2 The Rebuild Plan was not adopted by the Minister as an *alternative* to a TAC reduction, as implied by Forest & Bird. Rather it supplemented and enhanced the rebuild that was achieved through the aggregate 30% TAC and TACC reductions for the East Coast tarakihi fishery.

52.3 Equally, the rebuilding measures in the Rebuild Plan do incorporate social and economic considerations, so are relevant under section 13(3). Forest & Bird's submissions assert the contrary but do not explain why.[55] The Rebuild Plan seeks to assist in enabling a rebuild to occur with lower cuts than might otherwise have been the case – so has direct

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51 *R v Toohey, ex parte Northern Land Council* (1981) 151 CLR 170 at 192-193. See also G Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at 15.37 [**Resp Auth: Tab 23**].

52 G Taylor, above at 15.41 [**Resp Auth: Tab 23**]; *North Shore City Council v Minister of Conservation* [2003] 2 NZLR 497 (HC) at [35]-[42] [**Resp Auth: Tab 16**].

53 HWR Wade & CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 324 [**Resp Auth: Tab 24**].

54 Dr Dunn reply affidavit [21] – [24] CB 201.0038.

55 Forest & Bird's submissions at [115].

and real economic benefits for the industry as well as the fishery. The societal benefits that go with ensuring jobs and livelihoods are maintained go hand-in-hand with these economic benefits.

52.4 Section 11(1) makes it mandatory for the Minister*, before s*etting or varying *any s*ustainability measure (which includes a TAC), to take into account not only any "existing controls under the Act" but also "*any effects of fishing on any stock*". Voluntary measures which affect the amount or size of fish taken by industry, fall squarely within this phrase. A provision such as section 11(1)(a) is logical and necessary. Key sustainability measures, such as TAC decisions, cannot be made in isolation from the rest of the fishery management framework relating to that fishery. All of the considerations in section 11 are aimed at ensuring these are taken into account when other sustainability measures are being considered.

52.5 The fact that some of the measures will impact over time, rather than have the full impact immediately today, is irrelevant. A TAC change in year one has only a small impact on rebuild. What matters is the cumulative effect of those measures over time.

52.6 Fisheries management is now far more sophisticated than just setting TAC and TACCs. Achieving true sustainability requires a range of measures, often not just statutory sustainability measures.[56]

52.7 The fact that many of the measures in the Rebuild Plan are voluntary goes only to the weight which the Minister might choose to place on them. It does not go to their vires.

Catch splitting arrangements – voluntary and central to the management of the tarakihi fishery

53 Again, there is a further significant contradiction in Forest & Bird's position and submissions in respect of this issue. While it asserts that the Minister cannot place reliance on voluntary measures, the sustainable management of the tarakihi fishery that it advocates for in these proceedings is **entirely dependent** on the current **voluntary** catch splitting arrangements provided for in the Rebuild Plan.

54 Since 1 October 2018, following the new 2017 stock assessment, quota owners and fishers have voluntarily split their quota and ACE entitlements between the East and West Coast tarakihi fisheries in TAR1 and TAR7, rather than continuing to catch and report in accordance with the formal QMA boundaries. Those QMA

[56] See discussion in Lawson affidavit [51]-[85] CB 201.0183.

boundaries no longer reflect the known biological characteristics of the East Coast tarakihi fish stocks. Commercial fishers catch and report their catch in accordance with those catch splitting arrangements. In addition, all of the stock assessment and TAC and TACC advice from the Ministry to the Minister, and his decision-making on those matters, is predicated on the basis that these voluntary arrangements are in place and will continue.

55 Contrary to that suggested by Forest & Bird, these catch splitting arrangements are not enforceable nor managed by the Ministry.[57] They are voluntary but adhered to by industry. Forest & Bird's entire submissions are therefore predicated on TACs and TACCs set using these catch splitting arrangements, yet they (wrongly) assert they are not relevant considerations.

Other elements of the plan

56 Forest & Bird's submissions spend some time working through and criticising elements of the Rebuild Plan (at [105]). With respect, most of this criticism is as ill-informed as Forest & Bird's understanding of the catch splitting arrangements. It is sufficient however to note that there is an acknowledgement, both in the Forest & Bird submissions (at [105e]) and in Dr Dunn's evidence[58] that some of the measures will, if implemented, contribute to and enhance the rebuild. Specifically, Measure 5 (reducing the proportion of juvenile tarakihi caught by voluntary closed areas, move on rules and gear modifications).

57 That alone recognises the potential of the Plan to contribute to the rebuild. But in the end what is relevant is the **weight** that the Minister (acting with advice from his officials) was prepared to put on the Rebuild Plan as a relevant consideration. Just because the Minister put more weight on the Plan than Forest & Bird would have been prepared to do, does not make the Minister's decision susceptible to legal challenge or wrong in law.

58 For the reasons discussed above, the industry Rebuild Plan was not an irrelevant consideration. The Plan was not adopted by the Minister as an alternative to a properly set TAC, but rather as an enhancement. The fact that the measures are voluntary goes to the weight the Minister might have attributed to them, not whether they are legally relevant or not.

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[57] See description of the catch spreading arrangements and the need for them in the Lawson affidavit at [68]-[79] CB 201.0184, and in the Plan itself at CB 302.0364.

[58] Dr Dunn reply affidavit [21] – [24] CB 201.0038.

(H) FIFTH CAUSE OF ACTION: Unreasonableness

59 Again, Fisheries Inshore is primarily content to adopt and rely on the Minister's submissions on this cause of action. In terms of the intensity of review suggested appropriate, Forest & Bird relies (appropriately) only on *Wednesbury*. Accordingly, it needs to establish that the decision was so unreasonable that no reasonable Minister could have made the decision – essentially, that it was irrational for the Minister to have made the decision he did.[59]

60 When the rhetoric that surrounds Forest & Bird's submission is stripped aside, the Minister's decision was perfectly reasonable and in conformity with the purpose of the Act.[60] Forest & Bird's submissions end by asserting that the Minister's decision is one where "sustainability has been set aside in favour of (over) utilisation" [131]. Nothing could be further from the case:

60.1 Leading up to the 2017 stock assessment, the tarakihi fishery has showed no signs of being under any significant fishing pressure.[61]

60.2 The 2017 stock assessment indicated that the stock structure was not as previously thought:

(a) with the eastern stocks (comprising parts of a number of QMAs) being a separate biological unit that needed to be managed as a single unit; and

(b) the level of the stock for this now combined fishery was found to be below the default soft limit of 20% B_0 for the stock under the HSS (about 17% B_0).

60.3 Accordingly, in 2018 the Minister reduced the TAC and consequentially TACC of this combined East Coast tarakihi fishstock by approximately 20% (on the basis that the Minister wanted to rebuild the stock to 40% B_0 within 10 years), with further significant cuts foreshadowed by the Minister the following year, in the absence of any other measures, in order to achieve that rebuild.[62]

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59 *Wellington City Council v Woolworths (New Zealand) Ltd (No.2)* [1996] 2 NZLR 537 at page 13-14.

60 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at page 173 [**Resp Auth: Tab 22**].

61 Lawson Affidavit [47]-[60] CB 201.0178, confirmed by Dr Dunn reply affidavit at [3]-[6] CB 201.0036.

62 Technically the 2018 TACC reduction was 25% if assessed in terms of the impact on the East Coast stocks (which comprise parts of more than one QMA). For the same reason the 2019 TACC reduction was 10%, making an aggregate reduction of 32%.

60.4 There is no dispute that this significant initial TACC reduction enabled the rebuild to commence – just not at the rate and with the certainty in respect of the rate, sought by Forest & Bird. The Ministry's projections provided to the Minister were that if no further reduction had been made, the stock would still have continued to increase back to the target biomass of 40% within just over thirty years. By the end of thirty years it was projected to have been at 36.91% and continuing to grow.[63]

60.5 The following year, in 2019, the Minister again reviewed the management settings for the East Coast tarakihi fishery (the TACs and TACCs and other management measures). At the end of the statutory consultation process, the Minister accepted that the social and economic consequences of rebuilding the fishery over a period of about 10 years were too onerous (requiring a TACC reduction of a further 35%).

60.6 Accordingly, he reduced the combined TACC for the East Coast stocks by a further 10%, on top of 20% the previous year. His advice was that this further TACC reduction would rebuild the stock to the target biomass (40% B_0) with 50% probability within 25 years. The Minister accepted this was sufficient when combined with the other rebuild initiatives contained in the industry's Rebuild Plan, together with the industry's commitment to work with him to achieve a rebuild over a 20-year timeframe.

60.7 To that end, the management measures for the East Coast tarakihi fisheries are to be reviewed again following a further stock assessment in 2021.

61 Far from being irrational, the Minister's decision was perfectly sensible and one open to him in all the circumstances. He has acted in conformity with the essential purpose of the Act, both to ensure the long-term sustainability of East Coast tarakihi stocks and specifically, in the context of section 13, to ensure fish stocks that are below B_{MSY} are rebuilt to, at or above that target stock size within a timeframe considered appropriate by the Minister.

(I) SIXTH CAUSE OF ACTION: Challenge to consequential TACC adjustments and relief

62 The sixth cause of action challenges the TACC decisions made consequential to the Minister's 2019 TAC decisions. If the TAC

[63] See tables referred to by Dr Griffiths at [29]-[35] CB 201.0088. The tables her refers to are in Mr Dunn's affidavit, MD4, CB 303.0658 (see Table 6 100% catch at 2048).

decisions were invalid, then it would be necessary to reconsider the TACC decisions which flow directly from the TAC.

63 For the reasons set out above, none of the challenges to the TAC decisions have any substance. If that is correct, this cause of action does not need to be considered.

64 Fisheries Inshore agrees with and adopts the Crown submissions on the question of discretionary relief in the event that the TAC decisions were found to be in error. The relief actually sought by Forest & Bird would have the effect of increasing the TAC and TACC, a result completely contrary to what Forest & Bird want but also contrary to the interests of Fisheries Inshore and the sustainable management of the East Coast tarakihi fish stocks.

(J) COSTS

65 Fisheries Inshore seeks costs in respect of these proceedings including the joinder application which was opposed by Forest & Bird.

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BA Scott/BJ McIntosh
Counsel for Fisheries Inshore

LIST OF AUTHORITIES

Legislation

1 Fisheries Act 1983 sections 2, 28C, 28CA, 28OB & 28OC

2 Fisheries Act 1996 sections 2, 5, 8-10, parts 3 & 4

Cases

3 *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223

4 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA)

5 *Buller Electricity Ltd v Attorney-General* [1995] 3 NZLR 344 (HC)

6 *Bushell v Secretary of State for the Home Department* [1980] 2 All ER 608

7 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385 (CA)

8 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA)

9 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044

10 *Greenpeace v Minister of Fisheries HC Wellington* CP492/93, 27 November 1995

11 *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA)

12 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA)

13 *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA).

14 *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97)

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