

1. Ministry of Fisheries explanation of “28N RIGHTS” as at March 2008

Origin and Law in respect of “28N Rights”

The preferential allocation rights given force by section 23 of the Fisheries Act 1996 originate under sections 28N, 28T, and 28OE of the Fisheries Act 1983. These sections were part of the major amendment to the Act that introduced the quota management system (QMS) in 1986. Although referred to as 28N rights, the rights actually arise under other sections of the Fisheries Act 1983 (s.28T and s.28OE). However, it is in respect of the administrative reductions to provisional maximum individual transferable quota (PMITQ) made under s.28N that the rights were granted.

In preparation for commencement of the quota management system in 1986, commercial fishers' reported catch history was assessed. Fishers could choose the best 2 of 3 qualifying years to ensure that individuals were not penalised for one bad year, and the average of these two years was used. However, this meant that the total of those assessed catch histories, recorded as PMITQ, was generally greater than the highest total catch for any of the qualifying years for the stock in question. So, aside from any reductions to total catch required for sustainability reasons, in most stocks reductions to PMITQs were also required just to get the total of catch rights back to existing catch levels.

For some inshore species, the Government offered to receive tenders to buy packages of PMITQ from fishers. Many of the tenders were for amounts greater than the government valuations indicated the rights were worth and were refused. About a third of the required reductions for those species were bought. In a second round, the Government offered fishers 80% of what they had paid in the first round as a last chance to sell rights back, under condition that if insufficient rights were offered the next move would be uncompensated pro rata reductions. About another third was bought. A total of \$42 million was spent on the buy-back.

Those that chose not to sell, and to have their rights reduced without compensation, became entitled (originally through section 28T, later replaced by 28OE) to have those reduced PMITQ rights restored in the future as quota, should the TACC for the relevant stock be increased. The procedure followed is that the 28N rights are recorded for each fisher as a tonnage, and so when a TACC for a stock is increased, any outstanding 28N rights are honoured first before other quota holders receive an increased catch allocation.

28N rights are not transferable. They can only be redeemed to the original quota holder that had their PMITQ reduced, and that quota holder must have continuously owned ITQ in the relevant stock. The 'loophole' in this provision is that where the PMITQ holder was a registered company, the 28N rights were also issued in the company name, and the ownership of companies can be changed (ie they and their quota assets can be sold) without changing the name of the owner of quota assets on the quota registry. In this case any 28N rights are retained even though the company has been sold.

Changes to the QMS

Initially, the QMS was a tonnage based system where the government needed to buy and sell quota in the market to effect any required changes to the TACC. In 1990 this was changed to a proportional system where adjustments to catches required for sustainability reasons are made by simply setting the TACC at the required level, with individual catching rights being adjusted proportionally.

Proportional adjustment changed the situation with respect to stocks with 28N rights, particularly where cuts are required to catch levels for rebuilding. Under the original system, any reduction of a TACC after the 1986 levels were set would have been fully compensated (ie willing-buyer, willing-seller). So, when the TACC was raised after a rebuild, tonnage 28N rights were honoured and then remaining tonnage was sold on the market. After the change, proportional reductions are uncompensated, but 28N rights still apply in the case of a TACC increase from the lower level. This effectively redistributes the shares that stakeholders have in the fishery. Where large cuts are required the effect on shares is amplified, with stakeholders without 28N rights potentially losing large proportions of their share by the time the TACC is restored to the same level as it was before the rebuild. This situation still pertains. Under the Fisheries Act 1996, these rights are carried forward and clarified under section 23 as preferential allocation rights. Implementation of the adjustments to holdings under the Fisheries Act 1996 with quota shares results in a proportional reduction of share holdings for all quota owners in a stock and the creation of new shares for 28N rights holders to provide the tonnage equivalent to their 28N rights at the current TACC level, and to maintain the total number of shares at 100 million.

What Stocks have 28N Rights?

The numbers in the tables below were valid as of March 2008 and are subject to change over time. The last TACC increase that discharged 28N rights was for school shark (SCH1) in 2007. This has been the only such change since 2004. However, if a client sells all of their quota in a stock, any 28N rights they hold for that stock disappear (since they are not transferable). Small changes like this have occurred for about 20 of the stocks listed since 2004, presumably as older independent fishers retire. If further information on these rights is required, including names of who holds them, application should be made to FishServe – the quota registry.

The total 28N rights derived from the pro rata reductions in the buyback stocks was around 5,000 tonnes. A total of 2,861 tonnes of 28N rights is still on the books. Significant rights are still outstanding in HPB2, HPB3, PAU4, RCO3, SNA1, SNA8, TRE1, and TRE7 (see Table 2).

Table 1: Discharged 28N rights

Stock Code	Date	Old TACC Amount (kg)	New TACC Amount (kg)	Before Increase s28n rights	Number of clients with s28n rights before increase	After Increase s28n rights	Number of clients with s28n rights after increase
BAR1	1/10/1996	9969500	11000000	778300	39	0	0
BNS3	1/10/1992	175000	350000	34600	13	0	0
BYX2	1/10/1991	1274300	1480000	157000	14	0	0
ELE3	1/10/1995	423600	500000	25300	24	0	0
GUR3	1/10/1991	524000	600000	33800	46	0	0
GUR7	1/10/1991	678200	815000	20300	36	0	0
LIN3	1/10/1994	2166600	2800000	4200	10	0	0
MOK1	1/10/1993	157400	200000	46800	50	4381	50
MOK1	1/10/1995	200000	400000	4072	45	0	0
MOK3	1/10/1992	71400	120000	11500	25	0	0
SNA2	1/10/1992	157400	250000	26000	17	0	0
SNA7	1/10/1997	160300	200000	58100	15	19334	15
SPO1	1/10/1991	688100	825000	13000	41	0	0
SPO2	1/10/1991	70900	85000	19500	23	5400	23
SPO3	1/10/1991	363900	430000	172300	71	106200	71
SPO3	1/10/2000	453900	600000	106864	28	0	0
SPO7	1/10/1991	294100	350000	48200	50	0	0
STA2	1/10/1991	37400	100000	6600	6	0	0
STA3	1/10/1991	733900	900000	14700	27	0	0
STA7	1/10/1991	527700	700000	500	3	0	0
ELE3	1/10/2002	825000	950000	300	1	0	0
SNA2	1/10/2002	252300	315000	1400	1	0	0
BNS2	1/10/2004	873400	1048000	104652	11	0	0
SCH3	1/10/2004	321905	387000	44900	19	0	0
SCH7	1/10/2004	533700	641000	71900	23	0	0
SCH8	1/10/2004	440600	529000	5500	7	0	0
SPO2	1/10/2004	72014	86000	3187	8	0	0
TAR2	1/10/2004	1632800	1796000	19300	5	0	0
TAR3	1/10/2004	1169470	1403000	49500	17	0	0
SCH1	1/10/2007	668470	689000	36800	19	16267	19
Total rights redeemed				1767,493			

Table 2. Quantity of 28N rights not redeemed: Mar 2008

Stock Code	Total 28N rights as at Oct 04 (kgs)
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BAR1	78900
BCO4	700
BCO7	3500
BYX2	16470
BYX3	300
GMU1	27400
GUR1	66350
GUR3	6000
HPB1	1200
HPB2	32300
HPB3	51800
HPB7	3300
JDO1	6300
LIN2	7600
LIN7	108800
MOK1	2075
MOK3	800
PAU2	419
PAU3	80
PAU4	26303
PAU5A	410
PAU5B	483
PAU5D	180
PAU7	1090
RCO3	177300
SCH1	16267
SCH2	2700
SKI2	43200
SKI7	152500
SNA1	490735
SNA7	17372
SNA8	933300
SPO1	500
SPO3	1000
SPO7	300
STA2	500
STA3	2900
TRE1	278500
TRE7	209200
WAR2	4000
WAR3	88000

Total	2861,034
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2. Analysis of shared fisheries in which 28(N) rights may be an issue

Introduction

The working group agreed having considered the information provided by MFish dated March 2008 that not all of the fisheries with 28(N) rights are fisheries where both the commercial and the amateur sectors have significant interests. Therefore the information provided by MFish could usefully be analysed to more closely identify those fisheries that could be categorised as Shared Fisheries.

Note: This analysis does not attempt to address customary non-commercial fisheries of significance to that sector as there is no catch information available to complete the analysis.

Method

A two step method is applied.

Step one - for the purpose of this analysis the working group agreed to use an arbitrary threshold to identify those fisheries that could be said to have significant interest for both the commercial and amateur sectors. This threshold may be disputed. The working group agreed to use a threshold of 15% (of the total catch) as a useful cut-off point to highlight fisheries where the amateur catch is considered significant.

Step two – the working group applied a further elimination factor to the residual fisheries. This applied where it could be shown that the number of 28(N) rights still held were insignificant in relation to the amateur catch or to the TACC. For this purpose the working group applied a lower threshold admitting all remaining fisheries where the amateur catch could be shown to be greater than 7%.

Results

- 41 fisheries have outstanding 28N rights (table 3).
- Of these, 5 have estimated recreational catches that are greater than 15% of the total (refer column titled 28(N) rights as % of rec catch estimate)
- These fisheries include: GUR1, JDO1, SNA1, SNA8 and TRE
- Of these 5 remaining fisheries 28N rights **could** be an issue in only 4 because unredeemed 28N rights constitute a relatively large percentage of the recreational catch in each of these fisheries (i.e. greater than 7%).
- These fisheries include: GUR1, SNA1, SNA8 and TRE1 (highlighted blue)

Discussion

The analysis highlighted four fisheries (GUR1, SNA1, SNA8 and TRE1) for further investigation.

Table 3. Quantity of 28N rights not redeemed: Mar 2008

Stock Code	Total 28N rights as at Oct 04 (kgs)	Commercial catch 1999-2000¹ (kg)	Rec catch estimate 1999-2000² (kg)	28N rights as % of rec catch estimate	TACC	28N rights as %TACC
BAR1	78900	10004660	279300	28.2	9970000	0.8
BCO4	700	-			757000	0.1
BCO7	3500	-			70000	5.0
BYX2	16470	-			1569000	1.0
BYX3	300	-			1010000	0.0
GMU1	27400	1125000	102000	27.5	926000	3.0
GUR1	66350	988760	222800	29.8	2288000	2.9
GUR3	6000				800000	0.8
HPB1	1200	385900	342300	0.4	481000	0.2
HPB2	32300					
HPB3	51800					
HPB7	3300					
JDO1	6300	536140	227200	2.8	704000	0.9
LIN2	7600					
LIN7	108800					
MOK1	2075					
MOK3	800					
PAU2	419					
PAU3	80					
PAU4	26303					
PAU5A	410					
PAU5B	483					
PAU5D	180					
PAU7	1090					
RCO3	177300					
SCH1	16267	821240	65900	24.6	668000	2.4
SCH2	2700					
SKI2	43200					
SKI7	152500					
SNA1	490735	4550820	6242100	7.9	4500000	10.9
SNA7	17372					
SNA8	933300	1608760	597500	156.2	1500000	62.2
SPO1	500	628920	17400	2.9	692000	0.1
SPO3	1000					
SPO7	300					
STA2	500					
STA3	2900					
TRE1	278500	1444700	677400	41.1	1506000	18.5
TRE7	209200	2288660	80700	259.2	2153000	9.7
WAR2	4000					
WAR3						

¹ From MFish Catch Effort reference library

² From: Boyd and Kelly (2002)

3. Why 28N rights are an issue for the amateur sector

The peak amateur fishing sector groups advocate that fisheries management should have a major strategy of "More fish in the water" "Kia maha atu nga ika i roto i te wai". This strategy will best be achieved by rebuilding stocks to a level above B_{MSY} .

However the amateur sector sees their aspirations to achieve this goal is thwarted by the QMS. If the rebuilding strategy is to occur then (as the resource is a common property one) all harvesters must act in unison. The amateur sector believes that maintaining stocks at a level above B_{MSY} is not a strategy supported by the commercial sector.

The Amateur sector recognises the most significant objection by the commercial sector is that their yield would be decreased (since a level of fishing above B_{MSY} would not maximise the level of sustainable catch).

The amateur sector considers that there are other reasons why rebuilding of stocks may not be supported by the commercial sector. One reason is the problem of 28N rights. All quota holders must equally take a reduction in allocation to assist rebuilding. But if on reallocation of quota (when the stock rebuilds) a sector of quota holders (those with 28N rights) receive most if not all of the reallocated quota; then there is no incentive to encourage non 28N rights holders to rebuild stocks.

For this reason the amateur sector sees 28N rights as an issue for their sector and the achievement of their goals.

4. SeaFIC perspective on 28N rights

SeaFIC considers that 28N rights are an internal allocative mechanism that does not affect the amateur sector.

SeaFIC does not agree that 28N rights are a relevant factor in relation to the commercial sector's attitudes to rebuilding of stocks in any of the shared fisheries where 28N rights constitute more than 10% of the recreational catch and the estimated recreational catch is greater than 15% of the total catch. This is because in all of these fisheries the stocks already exceed B_{MSY} and/or are already in rebuild phases.

The following information comes from 2007 Plenary Reports.

GUR 1W

The stock assessment model was based on data up to the end of the 1997–98 fishing year. The assessment for the GUR 1W stock is reasonably optimistic. Both trawl and CPUE indices are increasing, and the model indicated that B_{mid99} was about 80% of B_0 (range 40–147%, performance index 3%), suggesting that the stock has been only lightly exploited and is also benefiting from several recent years of strong recruitment. Current biomass appears to be greater than stock size that will support the B_{MSY} . Current catch levels appear to be sustainable, and continued catches at the current level will allow the stock to remain above B_{MSY} .

GUR 1E

The abundance indices all suggest that the biomass in GUR 1E declined in the early 1980s, but recovered slightly during the 1990s. Current biomass appears to be above B_{MSY} (B_{mid99} was estimated at 59% of B_0 ; range 9–83%, performance index 58%) and current catch levels are probably sustainable. Continued catches at the current level will allow the stock to remain above B_{MSY} .

SeaFIC comment: GUR1E and GUR1W are both above B_{MSY} and therefore there is no need for any rebuild. 28N rights are irrelevant in relation to attitudes of quota holders on rebuilding.

SNA 1

These stocks were last assessed in 2000. The status of the two sub-stocks differs.

East Northland

The base case East Northland stock assessment indicates that the current recruited biomass is at about the B_{MSY} reference point and is expected to exceed B_{MSY} at the end of the twenty-year projection period (with 67% probability). This conclusion is robust to all sensitivities investigated, except when a low natural mortality was investigated. Even in this sensitivity, the stock is expected to increase to near B_{MSY} at the end of the projection period.

SeaFIC comment: The East Northland substock is already in a rebuild phase and will exceed B_{MSY} by 2020. Attitudes of holders of 28N rights cannot therefore be a factor that could thwart the achievement of the amateur sector's stock management goal.

Hauraki Gulf/Bay of Plenty

The base case Hauraki Gulf/Bay of Plenty stock assessment indicates that the current recruited biomass is less than the B_{MSY} reference point but is expected to increase over the next twenty years under the current TACC and estimated levels of recreational and unreported catch. It is expected to exceed the B_{MSY} reference point at the end of the projection period (with 100% probability). This conclusion is robust to all sensitivities investigated.

SeaFIC comment: The Hauraki Gulf/Bay of Plenty substock is already in a rebuild phase and will exceed B_{MSY} by 2020. Attitudes of holders of 28N rights cannot therefore be a factor that could thwart the achievement of the amateur sector's stock management goal.

For SNA 1 as a whole, catches at the level of the TAC will allow the stock to increase over the next 20 years.

SNA 8

The 2005 stock assessment indicated that current biomass (start of year 2004–05) was between 8% and 12% B_0 and the biomass was predicted to slowly increase at the TACC level of 1500 t. However, from 1 October 2005 the TACC was reduced to 1300 t to ensure a faster rebuild of the stock. At this TACC level the rebuild to B_{MSY} (20% B_0) occurred after 2018 in all cases assuming either constant recreational effort, or capped recreational catch at the alternative levels of 300 t or 600 t per year. Rebuilding tended to be slower for runs that allowed the recreational catch to rise with increasing biomass.

SeaFIC comment: SNA 8 is rebuilding. Cuts to TACC in 2005 have increased the rate of rebuild. Attitudes of holders of 28N rights cannot therefore be a factor that could thwart the achievement of the amateur sector's stock management goal.

TRE 1

The assessment for TRE 1 was not accepted due to the lack of a reliable abundance index, therefore there is no current information to change previous views on the status of the stock. Recent catches reported for TRE 1 are less than the estimated MCY levels and below the TAC. The TAC is probably sustainable, probably allowing the stock to attain a size at or above B_{MSY} . This hypothesis is supported in TRE 1 by the results of catch sampling from the TRE 1 purse seine fishery.

SeaFIC comment: It would seem that the fishery is rebuilding. Attitudes of holders of 28N rights cannot therefore be a factor that could thwart the achievement of the amateur sector's stock management goal.

5. Te Ohu Kaimoana's view on the effect of 28N rights on the incentives on various participants

Background

28N rights were given to some quota owners when the Crown found it necessary for sustainability purposes to drastically reduce the TACC for some species.

At that time the quota system was quantity based and not proportional. The scheme operated so that if the fishery could allow a greater catch, the Crown would sell the new rights to the market and if the catch needed to be reduced the Crown bought back rights from fishers.

Faced with the need to severely reduce quota the Crown offered compensation or a priority right to increases in the TACC to holders of 28N rights as the stock recovers and the TACC is increased. Some quota owners accepted the compensation – others opted for 28N rights.

With the change to proportional quota the way this now operates whenever a 28N stock has a TACC increase, it means that other quota owners maintain the same catch level as immediately prior to the TACC increase but have quota shares transferred from their ownership to the 28N rights holders without compensation.

Te Ohu Kaimoana has a number of concerns with 28N rights and the way this operates in relation to the Fisheries Settlement

The Court judgements on the nature of customary Maori fisheries rights set out that Maori customary fishing rights were very strong rights including:

- commercial and non-commercial components,
- applied to past, present and any future fisheries, and
- able to use any level of technology to harvest that fish (i.e. the had a development component)

The Maori Fisheries Settlement was for 10% of all fisheries in the QMS in 1986 and 20% of subsequent fisheries along with money to allow the purchase of 50% of the shares in Sealord as well as recognition of customary non-commercial rights and rights to participate fully in fisheries management decisions.

In light of the generosity of iwi and Maori in settling for these minor shares of each fishery, Iwi consider that the Settlement provided that Iwi would always hold 10% of the early fisheries and not have these reduced without compensation. Iwi expected that in line with Court decisions the Crown was and remains under a duty of active protection of Settlement assets and that it must find mechanisms to ensure the Settlement is not eroded.

As with other policy issues Iwi do not consider that the resolution of one grievance can be solved by transferring a grievance from one party to the other.

The problem with 28(N) rights

The amateur sector seem to be arguing that as different parts of the commercial sector are affected differently by 28N rights, these differences will create different incentives with respect to fisheries management of those species viz Non- holders of 28N rights and will resist a TACC decrease (to achieve sustainability; or increase the

biomass above B_{MSY} ; or to create a faster rebuild of a stock) because when the fishery has reached the new target, the 28(N) right non-holders will have access to a lesser proportion of the fishery.

Disincentive to achieve sustainability

Te Ohu Kaimoana does not agree. Iwi have always been part of the fishery and because of mechanisms in the MFA always will be. There are no incentives for Iwi to resist changes to achieve sustainability targets and have never done so where the data and fishing experience is clear. Other quota owners also have the same incentives.

Disincentives to increase biomass above B_{MSY}

Te Ohu Kaimoana does not agree. Iwi along with other commercial quota owners face the same incentive to maximise the value of their catch within sustainability limits. This will reflect market conditions - in some cases this will mean that a catch less than the maximum provides greatest economic value in which case the stock will be above B_{MSY} ; in others the greatest value over time is to harvest so that the stock is at B_{MSY} . The incentive on both 28N and non 28N rights holders are the same.

Reducing commercial take to ensure faster rebuild of the stock to at or above B_{MSY}

Te Ohu Kaimoana agrees that theoretically because of the different incentives that will operate, non 28(N) rights holders will be more antagonistic than 28(N) rights holders to such TACC reductions (and subsequent increases) because it will change the ultimate shares of the fishery that non 28(N) rights holders will then have.

However because the short-to-mid term effects (a proportional decrease) are the same on all commercial quota owners and because the non 28(N) rights holders will subsequently still be able to catch their minimum entitlements, Te Ohu Kaimoana knows of no fishery where this consideration has been a divergent factor between 28N and Non28N quota rights holders in any decision on opposing or supporting a TACC decrease or increase.