IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-752
[2021] NZHC 1427

UNDER	The Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review under sections 13 and 20 of the Fisheries Act 1996
BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Applicant
AND	MINISTER OF FISHERIES First Respondent
	FISHERIES INSHORE NEW ZEALAND LIMITED Second Respondent
	TE OHU KAI MOANA TRUSTEE LIMITED Third Respondent

Hearing:	23-24 July 2020
Counsel:	S R Gepp and M C Wright for the Applicant N C Anderson and K F Gaskell for the First Respondent B A Scott and B J M McIntosh for the Second Respondent J P Ferguson and T T H Hullena for the Third Respondent
Judgment:	16 June 2021

JUDGMENT OF GWYN J

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Introduction

[1] The Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest & Bird) challenges decisions by the Minister of Fisheries (the Minister) in relation to the total allowable catch (TAC) (and consequentially the total allowable commercial catch (TACC)) for East Coast tarakihi fish stocks. The relevant decisions were made in September 2019 and related to the fishing year commencing 1 October 2019.

[2] Forest & Bird challenges the Minister's decisions on the basis of error of law, failure to have regard to a relevant consideration, reliance on an irrelevant consideration, and unreasonableness.

The parties

[3] The applicant, Forest & Bird, is an incorporated society under the Incorporated Societies Act 1908. Under cl 2 of its constitution, Forest & Bird's main purpose is to *"*take all reasonable steps within the power of the Society for the preservation and protection of the indigenous flora and fauna and the natural features of New Zealand." Forest & Bird participates in local, regional, national, and international marine advocacy to give effect to its constitutional purpose.

[4] Fisheries New Zealand (FNZ) is a business unit of the Ministry for Primary Industries (the Ministry). FNZ is responsible for the implementation of the Fisheries Act 1996 (the Act), on behalf of the first respondent, the Minister. This includes the management of wild fish stocks (such as East Coast tarakihi), aquaculture, and the wider aquatic environment. FNZ explained that a major part of its role is to assist the Minister in "setting catch limits and allowances that limit the total amount of fish that can be taken from a fish stock, while fairly allocating the resource between the competing sectors." FNZ undertakes a range of functions in its work with tangata whenua and stakeholders who have an interest in fishing or the effects of fishing on the aquatic environment.

[5] The second respondent, Fisheries Inshore New Zealand Limited (Fisheries Inshore), represents quota owners and commercial fishers across all the primary

inshore fish stocks, including tarakihi.[1] Amongst other things, Fisheries Inshore routinely makes submissions in response to consultation proposals from government. The Minister has an obligation to consult with organisations the Minister considers to be representative of classes of persons having an interest in the stock.[2]

[6] The third respondent, Te Ohu Kai Moana Trustee Limited (Te Ohu), is the trustee of Te Ohu Kai Moana, a trust established under the Māori Fisheries Act 2004.[3] Following the fisheries settlement reached between Crown and Māori in 1992, the Crown transferred assets to Te Ohu (or its predecessors) for the benefit of iwi and Māori. This included the transfer of quota shares in fish stocks.[4] Te Ohu is required to allocate and transfer the quota shares to iwi and, pending such allocation and transfer, to hold and manage the settlement assets.[5]

[7] Te Ohu's functions include funding research into sustainable management of fisheries, as well as protecting and enhancing the interests of iwi and Māori in fisheries, fishing, and fishing related activities. It actively engages in the review of sustainability measures by FNZ. This review forms part of the Minister's decision-making process in setting the TAC and TACC for each fishing year. Te Ohu also makes submissions to the Minister on these matters. The Minister consults with Te Ohu as a body representative of Māori interests in the fish stock or the effects on the aquatic environment.[6]

[8] Te Ohu also has a direct proprietary role in the East Coast tarakihi fishery: it holds quota for Ngāi Tai, Te Whānau a Apanui, Ngāti Porou, Rongowhakaata, Te Aitanga a Mahaki, Te Atiawa (Wellington), Ngāti Toa, Ngāi Tahu, Rangitāne o Wairau and Ngāti Toa.

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1 Fisheries Inshore Limited and Te Ohu Kai Moana Trustee Limited were joined as respondents to the proceeding by Mallon J on 9 April 2020: *Royal Forest & Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2020] NZHC 741.

2 Fisheries Act 1996, s 12.

3 Māori Fisheries Act 2004, ss 31, 32 and 33.

4 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

5 Māori Fisheries Act, s 34 and 130.

6 Fisheries Act, s 5(b): the Minister is required to act in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Tarakihi management

[9] Tarakihi is a species of fish that is managed under the Act. It is a relatively long-lived species that reaches at least 40 years of age. Females mature at six years, after which they produce large numbers of pelagic (floating) eggs several times during each protracted summer/autumn spawning season. Following a 7–12 month pelagic phase, where the fertilised eggs, larvae and juvenile fish tend to remain in surface waters, East Coast tarakihi mainly settle in nursery grounds off the east coast of the South Island, primarily the Canterbury Bight and Pegasus Bay. As they grow older they move progressively further northward, with the highest proportions of older fish found off the east of Northland.

[10] There are eight fishery quota management areas for tarakihi (known as TAR 1, TAR 2, TAR 3, TAR 4, TAR 5, TAR 7, TAR 8, and TAR 10), but tarakihi is managed as five stocks – East Coast tarakihi is one of those stocks. The East Coast tarakihi stock is made up of the eastern part of TAR 1, all of TAR 2, all of TAR 3, and the part of TAR 7 that is in eastern Cook Strait. There is scientific evidence to support the assumption that these areas are a single biological stock, or population, and that it makes sense to manage them as a single unit. The East Coast tarakihi stock contains the majority of the tarakihi catch.

The general decision-making process for setting a TAC and TACC

[11] A primary mechanism for managing the sustainability of fisheries is by the Minister setting the TAC and TACC for each fish stock. The TAC, in relation to any quota management stock, means a total allowable catch as set or varied for that stock by notice in the *New Zealand Gazette* under ss 13 or 14 of the Act. The TACC is the proportion of the TAC which can be harvested by commercial fishers, once allowances have been made for non-commercial catch and other forms of mortality.[7]

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[7] Quota is then allocated in the form of quota shares to quota owners. Quota shares generate an annual catch entitlement for commercial fishers under their fishing permits. The amount of the annual catch entitlement that can be caught is a function of the TACC. Currently, there are approximately 164 quota owners with tarakihi quota shares in the East Coast tarakihi fish stocks, and 199 commercial fishing permit holders who catch those entitlements utilising an annual catch entitlement.

[12] Before considering the current status of the East Coast tarakihi stock, it is necessary to summarise the key concepts which underpin the decision-making required of the Minister under the Act when setting a TAC (and from this, the TACC). These concepts are set out in two Ministry policy documents used to guide decision-making under the Act: the Harvest Strategy Standard (HSS),[8] and the associated Operational Guidelines (HSS Operational Guidelines).[9]

[13] The HSS has three core elements, which were explained in the affidavit evidence of Dr Pamela Mace, Principal Advisor, Fisheries Science, at FNZ:

(a) A specified target about which a fishery or stock should fluctuate, based on the requirement in the Act that fish stock should be maintained at or above a level that can produce the maximum sustainable yield (*MSY*). The HSS explains the *MSY* as the largest long-term average catch or yield that can be taken from a stock under prevailing ecological and environmental conditions. It is the maximum use that a renewable resource can sustain without impairing its renewability through natural growth and reproduction. In particular, fisheries should be managed to fluctuate around a target based on *MSY*-compatible reference points or better, with at least a 50 per cent probability of achieving the target (which is essentially the same thing as fluctuating around the target). These targets are either:

(i) B_{MSY}, the fish biomass (population size in terms of weight) associated with *MSY*; or

(ii) F_{MSY}, the fishing mortality rate (proportion of the stock removed each year by fishing) associated with *MSY*; or

(iii) approximations (proxies) to these quantities.

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8 Ministry for Primary Industries *Harvest Strategy Standard for New Zealand Fisheries* (October 2008). The proper role of the HSS is an issue for consideration under the third cause of action at [128]–[168] below.

9 Ministry for Primary Industries *Operational Guidelines for New Zealand's Harvest Strategy Standard* (June 2011).

(b) A soft limit, that triggers a requirement for a formal, time-constrained rebuilding plan if the existing stock falls below that level. The default soft limit is ½ B_{MSY} or 20 per cent B_0, whichever is higher (where B_0 is the biomass of fish in the absence of fishing). In the case of tarakihi, the biomass reference points are usually expressed in terms of SB_0 (where SB_0 refers to the spawning biomass, which is the mature part of a fish stock). The soft limit will be breached when the probability that stock biomass is below the soft limit is greater than 50 per cent. A stock that is below the soft limit will be designated as depleted (overfished) and in need of rebuilding.

(c) A hard limit, below which fisheries should be considered for closure. The default hard limit is ¼ B_{MSY} or 10 per cent SB_0, whichever is higher. The hard limit will be considered to have been breached when the probability that stock biomass is below the hard limit is greater than 50 per cent. A fishery that is determined to be below the hard limit will be designated as collapsed.

[14] Dr Matthew Dunn, Principal Scientist at the National Institute of Water and Atmospheric Research Limited (NIWA), who gave evidence for Forest & Bird, explained *MSY* in this way:

> It is assumed that a stock reduced in size by fishing will try to rebuild/recover if fishing is removed; there is considerable evidence for this being true. A sustainable yield from a fish stock can, in theory, be achieved by taking only the fish that represent population growth from each year, meaning the stock size remains the same from one year to the next. However, population growth varies with stock size. When a stock is very small, there are lots of food resources available to the fish but there are few fish available to reproduce, and so the population can only grow slowly. When the stock is large, there are many fish but they are competing for dwindling resources, which results in poor reproductive performance, and as a result the population again grows only slowly. Somewhere in the middle, when fish are abundant, but food resources remain plentiful, is the stock size that gives the fastest population growth rate, and therefore the maximum sustainable catch (or "yield"). That concept is the basis for MSY.

[15] The HSS provides that a stock that has fallen below the soft limit should be rebuilt to at least the target within a timeframe of between T_{MIN} and 2*T_{MIN} (where 2*T_{MIN} is T_{MIN} doubled), with an acceptable probability. T_{MIN} is the theoretical time

the stock would take to rebuild to the target in the absence of fishing. T_{MIN} is estimated scientifically, taking account of the biological characteristics of the stock including growth, natural mortality rate, and reproduction. T_{MIN} will therefore vary depending on the species and stock being considered.

[16] Dr Dunn explained that an "acceptable probability" of a rebuild having been achieved is described as 70 per cent, and that the reason for requiring a probability level greater than 50 per cent is that a stock that has been severely depleted is likely to have a distorted age structure (over-reliance on juvenile fish, with relatively few large, highly fecund fish).

The setting of a TAC for East Coast tarakihi

[17] The target B_{MSY} for the East Coast tarakihi is set at 40 per cent SB_0 (the target). This is consistent with a low productivity stock that shows characteristics of longevity greater than about 25 years, maturation at ages greater than four years, and relatively slow growth rates – this is broadly consistent with the known biology of tarakihi. The target was accepted and reported by the FNZ Working Group,[10] although it is described as an "interim target". In making his 2019 decision, the Minister concluded that a target level of 40 per cent SB_0 was appropriate, notwithstanding the industry's view that there is a need to have a stock specific standard, which it would set at 35 per cent SB_0.

[18] The soft limit for East Coast tarakihi is 20 per cent SB_0; the hard limit is 10 per cent SB_0.

[19] For East Coast tarakihi T_{MIN} is estimated to be five years, and therefore $2*T_{MIN}$ is 10 years.

The Fisheries Act 1996

[20] Before turning to the details of the Minister's decision, and Forest & Bird's claims, it is useful to set out the relevant provisions of the Act.

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[10] The FNZ Working Group includes scientific and fisheries expert reviewers, and industry representatives.

[21] Section 8 provides that the Act's purpose is to "provide for the utilisation of fisheries resources while ensuring sustainability", and:

> (2) In this Act,—
>
> **ensuring sustainability** means—
>
> (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment
>
> **utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

[22] Section 10 comprises information principles that must be taken into account by all persons exercising or performing functions, duties, or powers under the Act, in relation to the utilisation of fisheries resources or ensuring sustainability:

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

[23] Section 11 enables the Minister to set or vary sustainability measures (the TAC and TACC are sustainability measures):

> **11 Sustainability measures**
>
> (1) The Minister may, from time to time, set or vary any sustainability measure for 1 or more stocks or areas, after taking into account—
>
> (a) any effects of fishing on any stock and the aquatic environment; and
>
> (b) any existing controls under this Act that apply to the stock or area concerned; and
>
> (c) the natural variability of the stock concerned.

(2) Before setting or varying any sustainability measure under subsection (1), the Minister shall have regard to any provisions of—

(a) any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991; and

(b) any management strategy or management plan under the Conservation Act 1987; and

(c) sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act); and

(ca) regulations made under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012; and

(d) a planning document lodged with the Minister of Fisheries by a customary marine title group under section 91 of the Marine and Coastal Area (Takutai Moana) Act 2011—

that apply to the coastal marine area and are considered by the Minister to be relevant.

(2A) Before setting or varying any sustainability measure under this Part or making any decision or recommendation under this Act to regulate or control fishing, the Minister must take into account—

(a) any conservation services or fisheries services; and

(b) any relevant fisheries plan approved under this Part; and

(c) any decisions not to require conservation services or fisheries services.

(3) Without limiting the generality of subsection (1), sustainability measures may relate to—

(a) the catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14, any total allowable catch for that stock:

(b) the size, sex, or biological state of any fish, aquatic life, or seaweed of any stock that may be taken:

(c) the areas from which any fish, aquatic life, or seaweed of any stock may be taken:

(d) the fishing methods by which any fish, aquatic life, or seaweed of any stock may be taken or that may be used in any area:

(e) the fishing season for any stock, area, fishing method, or fishing vessels.

(4) The Minister may,—

(a) by notice in the *Gazette*, set or vary the catch limit (including the commercial catch limit) for any stock not within the quota management system:

(b) implement any sustainability measure or the variation of any sustainability measure, as set or varied under subsection (1),—

(i) by notice in the *Gazette*; or

(ii) by recommending the making of regulations under section 298.

(5) Without limiting subsection (4)(a), when setting or varying a catch limit (including a commercial catch limit) for any stock not within the quota management system, the Minister shall have regard to the matters referred to in section 13(2) or section 21(1) or both those sections, as the case may require.

[24] Section 13 is the operative provision for setting the TAC. It is common ground that in the case of tarakihi, the current level of the stock is below that which can produce *MSY* and therefore s 13(2)(b) applies:

13 Total allowable catch

(1) Subject to this section, the Minister shall, by notice in the *Gazette*, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.

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

(a) maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or

(b) enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered—

(i) in a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and

(ii) within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock; or

(c) enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

(2A) For the purposes of setting a total allowable catch under this section, if the Minister considers that the current level of the stock or the level of the stock that can produce the maximum sustainable yield is not able to be estimated reliably using the best available information, the Minister must—

(a) not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for the stock; and

(b) have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock; and

(c) set a total allowable catch—

(i) using the best available information; and

(ii) that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.

(3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under subsection (2)(b) or (c), or (2A) (if applicable), the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.

(4) The Minister may from time to time, by notice in the *Gazette*, vary any total allowable catch set for any quota management stock under this section by increasing or reducing the total allowable catch. When considering any variation, the Minister is to have regard to the matters specified in subsections (2), (2A) (if applicable), and (3).

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

(6) Except as provided in subsection (7), every setting or variation of a total allowable catch shall have effect on and from the first day of the next fishing year for the stock concerned.

(7) After considering information about the abundance during the current fishing year of any stock listed in Schedule 2, and after having regard to the matters specified in subsections (2), (2A) (if applicable), and (3), the Minister may, by notice in the *Gazette*, increase the total allowable catch for the stock with effect from such date in the fishing year in which the notice is published as may be stated in the notice.

(8) If a total allowable catch for any stock has been increased during any fishing year under subsection (7), the total allowable catch for that stock shall, at the close of that fishing year, revert to the total allowable catch that applied to that stock at the beginning of that fishing year; but this subsection does not prevent a variation under subsection (4) of the total allowable catch that applied at the beginning of that fishing year.

(9) The Governor-General may from time to time, by Order in Council, omit the name of any stock from Schedule 2 or add to that schedule the name of any stock whose abundance is highly variable from year to year.

(10) Subsection (1) does not require the Minister to set an initial total allowable catch for any quota management area and stock unless the Minister also proposes to set or vary a total allowable commercial catch for that area and stock under section 20.

[25] The TACC is set in accordance with ss 20 and 21.

20 Setting and variation of total allowable commercial catch

(1) Subject to this section, the Minister shall, by notice in the *Gazette*, set in respect of the quota management area relating to each quota management stock a total allowable commercial catch for that stock, and that total allowable commercial catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.

(2) The Minister may from time to time, by notice in the *Gazette*, vary any total allowable commercial catch set for any quota management stock by increasing or reducing that total allowable commercial catch.

(3) Without limiting the generality of subsections (1) and (2), the Minister may set or vary a total allowable commercial catch at, or to, zero.

(4) Every total allowable commercial catch set or varied under this section shall have effect on and from the first day of the next fishing year for the quota management stock concerned.

(5) A total allowable commercial catch for any quota management stock shall not—

(a) be set unless the total allowable catch for that stock has been set under section 13 or section 14; or

(b) be greater than the total allowable catch set for that stock.

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

(1) In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for—

(a) the following non-commercial fishing interests in that stock, namely—

(i) Maori customary non-commercial fishing interests; and

(ii) recreational interests; and

(b) all other mortality to that stock caused by fishing.

(2) Before setting or varying a total allowable commercial catch for any quota management stock, the Minister shall consult such persons and organisations as the Minister considers are representative of those classes of persons having an interest in this section, including Maori, environmental, commercial, and recreational interests.

(3) After setting or varying any total allowable commercial catch under section 20, the Minister shall, as soon as practicable, give to the parties consulted under subsection (2) reasons in writing for his or her decision.

(4) When allowing for Maori customary non-commercial interests under subsection (1), the Minister must take into account—

(a) any mataitai reserve in the relevant quota management area that is declared by the Minister by notice in the *Gazette* under regulations made for the purpose under section 186:

(b) any area closure or any fishing method restriction or prohibition in the relevant quota management area that is imposed by the Minister by notice in the *Gazette* made under section 186A.

(5) When allowing for recreational interests under subsection (1), the Minister shall take into account any regulations that prohibit or restrict fishing in any area for which regulations have been made following a recommendation made by the Minister under section 311.

The Minister's decisions

[26] Given the timing of the stock assessments, and the nature of Forest & Bird's claims, it is necessary to understand the decisions in both 2018 and 2019 (although only the decision in 2019 is under review).

The Minister's 2018 decision

[27] The first stock assessment of East Coast tarakihi took place in November 2017, to inform TAC changes to take effect from 1 October 2018. The 2017 stock assessment estimated the stock size in 2015-16, being the most recent year for which complete data was available, at 17 per cent SB_0. There was an 89 per cent probability that the stock was below the soft limit.

[28] An updated stock assessment was completed in April 2018, taking into account one extra year of catch, which did not substantially change the results of the 2017 assessment.

[29] Therefore, given the East Coast tarakihi stock was below the soft limit, the HSS specified setting of the TAC at a level that would rebuild the stock to the target within 5–10 years.

Advice and submissions to the Minister

[30] In July 2018 FNZ released a discussion paper and consulted on three options, and the fishing industry developed and provided to the Minister a draft Management Strategy for tarakihi fish stocks.[11]

[31] In August 2018, following consultation, FNZ provided its advice (titled "Review of Sustainability Measures for the October 2018/19 Fishing Year") to the Minister, which included three options:

(a) Option 1: Reducing TAC by 55 per cent, which was projected to require a period of 10 years to rebuild to the target.

(b) Option 2: reducing TAC by 35 per cent, which was projected to require a period of 20 years to rebuild to the target.

[11] This was the initial version of what in 2019 became the Industry Rebuild Plan, discussed below at [38].

(c) Option 3: reducing TAC by 20 per cent. The period required to rebuild the stock under this option was not determined.

The decision

[32] On 19 September 2018 the Minister released his decision on sustainability measures for 2019 (the 2018 Decision). The Minister determined that the target (40 per cent SB_0), with a 50 per cent probability of achievement, was the appropriate target, and the appropriate period of rebuild was 10 years. The Minister decided to reduce the TAC for each of TAR 1, TAR 2, TAR 3 and TAR 7, which resulted in a combined TAC reduction from 6,702 to 5,561 tonnes. He reduced the TACC by 20 per cent.

[33] The Minister noted that 50 per cent was "not a particularly high probability of rebuild", but that to rebuild with more certainty would require even greater reductions in the TAC. He considered that a probability of rebuild of 50 per cent was reasonable "given the status of the stock, the size of rebuild required, and the socio-economic impact associated with achieving a rebuild with greater certainty."

[34] The Minister decided a phased approach to implementation of the reductions in catch was required:

> In the first year, from 1 October 2018, I have decided to reduce the commercial catch by 20%. This is consistent with the proposal put forward in submissions by industry. A reduction in catch of 20% will begin the process of rebuilding the stock. I acknowledge that it will not rebuild the stock at the rate I want without significant further measures. However, it will give industry a short period to plan and adjust their operations to the change in catch that will be needed overall.

[35] The Minister's 2018 Decision also included acknowledgement of industry proposals that the change in catch could be implemented by way of voluntary measures:

> I would like industry to build on that package of measures, and the cross-industry agreement around them, to consider new and innovative ways to help this fishery rebuild. I anticipate this package could include development of new gear technology, monitoring and reporting, and different ways of fishing to improve selectivity amongst other things.

[36] The Minister asked for a report from industry on progress and a draft plan before the end of the year, with a final plan to be presented to him by no later than the middle of 2019, noting that the measures in the plan would be considered alongside any proposed catch reduction as part of the 1 October 2019 sustainability round process:

> The size of the reduction in commercial catch needed on 1 October 2019 will be dependent on the effectiveness of the suite of measures industry can develop as part of this plan.

The Minister's 2019 decision

[37] An updated stock assessment completed in April 2019 estimated the stock to be at 15.9 per cent SB_0. The probability of the stock being below the soft limit had increased to 96 per cent.

Advice and submissions to the Minister

[38] In May 2019 Fisheries Inshore, Te Ohu and Southern Inshore Fisheries Management Limited (Southern Inshore) provided to FNZ the Eastern Tarakihi Management Strategy and Rebuild Plan 2019 (the Industry Rebuild Plan). This was a further development of the draft Management Strategy provided to the Minister in July 2018. It was the industry's proposal about how tarakihi stocks could be rebuilt and maintained. A key aspect of the industry proposal was to shelve 20 per cent of the quota instead of reducing the TACC. Shelving quota is when commercial fishers who own quota voluntarily set aside a proportion of this for a particular species for a particular time or fishing season. The proposal did not specify a rebuild time period to reach the target.

[39] In June 2019 FNZ released a discussion paper for consultation, which contained three options:

(a) Option 1: TACC reduction of 31 per cent (shared unevenly across East Coast tarakihi), with a 50 per cent probability of achieving the target within 12 years.

(b) Option 2: TACC reduction of 35 per cent, with a 50 per cent probability of achieving the target within 11 years.

(c) Option 3: implementation of the Industry Rebuild Plan (with no TAC or TACC reductions), with the aim of achieving a lesser target, of 35 per cent SB_0, within 27 years.

[40] On 26 July 2019 Te Ohu, Fisheries Inshore, and Southern Inshore made a joint submission on these options. Te Ohu also made its own submission on the same date, as did Forest & Bird.

[41] Forest & Bird's submission advocated that the Minister reject all of options 1, 2 and 3, primarily due to their inconsistencies with the HSS guidance. Forest & Bird instead recommended reducing the TACC by 40 per cent to rebuild within 10 years, with a probability of success of 70 per cent.

[42] On 30 August 2019, FNZ provided its final advice paper, titled "October 2019 Sustainability Round Decisions" (Advice Paper), to the Minister on the sustainability and related measures for stock for the 1 October 2019 fishing year. This included the three options that were in the June 2019 discussion paper,[12] as well as a fourth option, included as a result of consultation:

(a) Option 1: TACC reduction of 31 per cent shared unevenly across East Coast tarakihi, with a 50 per cent probability of achieving the target within 12 years.

(b) Option 2: TACC reduction of 35 per cent, with a 50 per cent probability of achieving the target within 11 years.

[12] See above at [39].

(c) Option 3: implementation of the Industry Rebuild Plan (with no TAC or TACC reductions), with the aim of achieving a lesser target, of 35 per cent SB_0, within 20 years.[13] No probability was determined.

(d) Option 4: TACC reduction of 10 per cent, combined with the Industry Rebuild Plan, with the aim of achieving the target within 20 years. There was some uncertainty about the rebuild period, and FNZ noted that modelling for the TACC reduction alone (without the Industry Rebuild Plan) showed a 50 per cent probability that the target would be achieved in 25 years, and that it would take more than 30 years to reach the target with 70 per cent probability.

[43] FNZ advised the Minister that it preferred either option 2 or option 4, depending on the priority to "rebuild stock as quickly as possible, in a timeframe that most closely corresponds to the Harvest Strategy Standard", or "minimise the socio-economic impacts on fishers, their families and the regional communities".

The decision

[44] On 27 September 2019, the Minister released his decision on sustainability measures for 2019 (the 2019 Decision). The Minister substantially adopted option 4: he decided to reduce the TAC to 5,205 tonnes, reduce the TACC by a further 10 per cent, and implement the Industry Rebuild Plan. In addition, he required electronic monitoring (cameras) on vessels fishing within TAR 2 and TAR 3 areas.

[45] The Minister also noted that further work would be required before a different, species specific, management target for tarakihi could be set and he therefore confirmed that the target (of 40 per cent SB_0), as recommended by the HSS, was appropriate.

[46] The Minister's 2019 Decision said:

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[13] The industry had committed to a rebuild period of 20 years, but there was uncertainty about that period, and FNZ noted that in the absence of any additional management actions the rebuild period would be 27 years.

> The Industry Rebuild Plan commits to a range of management actions including, catch splitting arrangements, selectivity and gear trials, move-on rules, voluntary closed areas, and enhanced research that are intended to assist in the rebuild of this fishery. The Plan also commits to a maximum rebuild timeframe of 20 years.
>
> There is however, uncertainty as to the extent to which the measures outlined in the Industry Rebuild Plan will be successful in delivering a 20 year rebuild. To provide me with a greater level of certainty this will be achieved, I have decided to combine the Industry Rebuild Plan with a 10% reduction to commercial catch.
>
> In reviewing the Industry Rebuild Plan I have also sought a higher degree of confidence and assurance that the industry will adhere to the Plan. As a result, I have asked industry to strengthen monitoring and verification of catch through the use of on-board cameras in TAR 2 and TAR 3. In particular, I want added assurances around catch reporting, including the reporting of juvenile, sub-minimum legal size fish.
>
> …
>
> If industry fails to deliver on the commitments outlined in the Industry Rebuild Plan, I will look to introduce further catch reductions in October next year. I have instructed Fisheries New Zealand to regularly and closely monitor performance against the Industry Rebuild Plan and report any non-performance to me.
>
> …
>
> While my decisions last year will have begun the process of rebuilding the stock, I indicated at that time that those actions were unlikely to rebuild the stock at the rate I wanted. Consequently, I consider it necessary to take further action this year to provide confidence that the stock will rebuild in a way and at a rate that I consider appropriate. My decision reflects my understanding of the economic impacts on fishers, their families and the regional communities where they operate, balanced against my responsibility to ensure the sustainability of this fishery.
>
> The next stock assessment of East Coast tarakihi is scheduled to take place in early 2021 and will provide an update of abundance for the stock. This information will be used to assess the performance of the Industry Rebuild Plan and inform whether further management action is needed to protect the sustainability of the stock. However, as previously indicated, I will not hesitate to act sooner should the industry commitments that impact my decision not be met.

[47] The combined effect of the 2018 and 2019 Decisions is a reduction in TAC for East Coast tarakihi of 22.3 per cent. Forest & Bird points out that this scenario was not modelled by FNZ. Scenarios that modelled a 20 per cent reduction projected that it would take 19 years to reach the target (of 40 per cent SB_0) with a 50 per cent

probability. Dr Dunn estimates that the time for the stock to rebuild to the target with a 70 per cent probability is around 24 years.

Forest & Bird's causes of action

[48] Forest & Bird's statement of claim contains six causes of action, all relating to the 2019 Decision.

[49] The first cause of action alleges the Minister erred in law under s 13(2)(b)(ii) of the Act, because he did not vary the TAC to enable the level of East Coast tarakihi to be altered within a period appropriate to the stock.

[50] The second cause of action alleges the Minister made a further error of law, in that he did not vary the TAC in a way that will, in terms of probability of achievement, enable the level of East Coast tarakihi to be altered within a period appropriate to the stock. It alleges there is, at most, a 50 per cent probability of achieving the target within the time period; and this probability is not consistent with a mandatory requirement to set a TAC that will enable the target to be achieved within a reasonable time.

[51] The third cause of action alleges the Minister failed to have regard to a relevant consideration, namely the HSS, which specifies 70 per cent as the minimum standard for the acceptable probability of rebuild for a stock such as the East Coast tarakihi.

[52] The fourth cause of action alleges the Minister had regard to an irrelevant consideration, namely the Industry Rebuild Plan.

[53] The fifth cause of action alleges the Minister's decision in 2019 was unreasonable – given his decision in 2018 that the appropriate period for rebuilding the stock was 10 years, it was unreasonable to adopt measures in 2019 could achieve, at best, a 20 year rebuild period.

[54] The sixth cause of action alleges that the 2019 TACC decision was consequently affected by the material errors made in setting the TAC.

[55] I turn now to consider each cause of action in turn.

First cause of action: error of law – period appropriate to the stock (s 13(2)(b)(ii))

Submissions

Forest & Bird

[56] The first cause of action alleges the Minister erred in law under s 13(2)(b)(ii) of the Act, because he did not vary the TAC to enable the level of East Coast tarakihi to be altered within a period appropriate to the stock.

[57] Section 13(2)(b) required the Minister to set a TAC that would enable the level of East Coast tarakihi to be altered:

(a) in a way and at a rate that would result in the stock being restored to or above a level that can produce *MSY*, having regard to the interdependence of stocks (as required by s 13(2)(b)(i)); and

(b) within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock (as required by s 13(2)(b)(ii)).

[58] Section 13(3) required the Minister to have regard to relevant social, cultural and economic factors when considering the way in which and rate at which a stock is moved towards a level that can produce *MSY* under s 13(2)(b).

[59] Forest & Bird asserts that the Minister erroneously conflated s 13(2)(b)(i) and (ii) and, in doing so, applied s 13(3) considerations (social cultural and economic factors) in determining the "period appropriate" under s 13(2)(b)(ii).

[60] Forest & Bird alleges the Minister made an error of law by approaching his decision under s 13(2) of the Act as a balance between sustainability and socio-economic considerations when:

(a) under s 13(2)(b)(ii), sustainability is a bottom line that does not involve balancing competing considerations; and

(b) socio-economic considerations are not relevant to the period appropriate to the stock determined under s 13(2)(b)(ii).

[61] Forest & Bird says the words "way in which and rate at which" in s 13(3) reproduce the words of s 13(2)(b)(i) ("in a way and at a rate"), and are intended to apply only to s 13(2)(b)(i). It says that s 13(3) does not enable the Minister to extend the period appropriate to the stock in reliance on social, cultural and economic factors.

[62] Forest & Bird says the Minister's decision-making process did not involve making an assessment of the "period appropriate to the stock"; in that respect, he departed from the requirements of the legislative framework.

[63] Forest & Bird says that the requirements of both s 13(2)(b)(i) and (b)(ii) must be met.

The Minister

[64] The Minister agrees that the "period appropriate to the stock" is a timeframe suitable to rebuild a particular fishery, having regard to the biological characteristics of the stock and any environmental conditions. The Minister agrees the requirements of both s 13(2)(b)(i) and (ii) must be met. However, he says that an assessment of the biological characteristics and environmental conditions may determine a range of appropriate "timeframes" and, within that range, he may adopt a timeframe for rebuild that gives more or less weight to social, cultural and economic considerations. The Minister is not obliged to minimise the period for rebuild under s 13(2)(b)(ii), provided the period is ultimately appropriate from a sustainability perspective.

[65] The Minister says that Forest & Bird has produced no evidence to demonstrate that the rebuild period chosen was outside a range that would be appropriate to this stock, relying on the dictionary meaning of "appropriate" as "suitable" or "specially suitable".

[66] The Minister also emphasises that the 2018 and 2019 Decisions, taken together, are projected to move the East Coast tarakihi stock to the target level within 25 years with a 50 per cent probability.

Fisheries Inshore

[67] Fisheries Inshore, on the other hand, asserts that social, cultural and economic considerations are relevant in setting the period appropriate to the stock. It says that the considerations in s 13(2) 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.

[68] Fisheries Inshore's submissions in support of this view dealt at some length with New Zealand's international law obligations, the history of the legislation, and previous decisions in relation to New Zealand fisheries.

Te Ohu

[69] Te Ohu supported the submissions of the Minister and Fisheries Inshore on this cause of action.

Analysis

[70] I approach this cause of action in two steps. First, what does the statute require; second, how did the Minister go about making his decision?

What does the statute require?

[71] Section 13 is not drafted as clearly as it might be. Although the reference to a "period appropriate to the stock" in subs (2)(b)(ii) occurs after the reference to "way" and "rate" in subs (2)(b)(i), logically the period appropriate must be determined first; because "way" must mean measures designed to implement the target, and "rate" the speed at which the target is achieved within the designated "appropriate" period.

[72] Further, while subs (3) refers to "subsection (2)(b) or (c)", the requirement that the Minister have regard to such social, cultural and economic factors as he or she

considers relevant is specifically linked to the phrase "in considering the way in which and rate at which" a stock is moved towards *MSY*. That echoes the words of subs (2)(b)(i). As a matter of construction, logically subs (3) applies to (2)(b)(i) and not to (2)(b)(ii); it does not enable the Minister to postpone the stock's return to sustainability in reliance on social, cultural or economic considerations.

[73] That interpretation is consistent with the purpose of the Act to provide for the utilisation of fisheries resources while ensuring sustainability.[14] As the Supreme Court said in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* (*Supreme Court Kahawai case*):[15]

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

[74] As to international obligations, s 5 provides that the Act is to be interpreted, and all those exercising or performing functions, duties, or powers imposed by or under it shall act, in a manner consistent with New Zealand's international obligations relating to fishing. Those obligations include arts 61 and 62 of the United Nations Convention on the Law of the Sea (UNCLOS).[16] Article 61 provides:

> Article 61
> Conservation of the living resources
>
> 1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
>
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive

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14 Fisheries Act, s 8.

15 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [*Supreme Court Kahawai case*].

16 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

> economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
>
> 3. 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.
>
> 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
>
> 5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

[75] Fisheries Inshore submits that "as qualified by relevant environmental and economic factors" in art 61(3) must qualify situations of both maintaining and restoring populations of harvested species.

[76] However, while the provisions of UNCLOS provide useful context, they do not assist in deciding the specific question at issue. The requirement in art 61(3) is expressed generally. It does not specify at what point in the process of making decisions about sustainability measures (such as the TAC and TACC) the qualifiers of "relevant environmental and economic factors" should be taken into account. As Forest & Bird submits, Fisheries Inshore's interpretation of art 61(3) is not the way in which it has been implemented in the New Zealand legislation. Article 61(3) does not mean that maintenance and restoration of a fish population at *MSY* must always be qualified by economic factors. If that were so, maintenance at *MSY* under s 13(2)(a) would also be subject to economic factors.

[77] Fisheries Inshore's submissions also drew on the legislative history of the Act to support its interpretation. It notes that the Bill as introduced in 1984 allowed for the possibility of the fishery to be permanently below B_{MSY}, providing a "net national

benefit" test was met. However, that test was removed by the time of an interim report back on the Bill in December 1995.

[78] Fisheries Inshore emphasised that s 13(2)(b)(ii) requires only that the Minister set the TAC "having regard to" biological characteristics and any environmental conditions affecting the stock. This contemplates that he may consider other matters beyond these scientific considerations. Biological characteristics and environmental conditions are not decisive and therefore social, cultural and economic factors are permissible considerations under s 13(2)(b)(ii). It cites *Pacific Trawling Ltd v Minister of Fisheries* in support of the proposition.[17] There, Priestley J was considering s 75(2)(b) of the Act, and said:

> [83] As a matter of construction, … a s 75(7) variation of DV rates must be preceded by the Minister taking into account the s 75(2)(a) incentive criterion. As for s 75(2)(b) matters, the Minister "may have regard" to the criteria listed. As the Court of Appeal observed in *Sanford Limited & Ors v New Zealand Recreational Fishing Council Inc*, adopting its earlier decision of *New Zealand Fishing Association v Ministry of Agriculture and Fisheries*, the words "have regard to" did not equate with "give effect to". Where there is a mandatory obligation to "have regard" to something the matter must be considered, but it does not necessarily determine or influence the decision.

[79] The original text of subs (2)(b)(ii) was: "a period appropriate to the stock and its biological characteristics". "Environmental conditions" was originally part of s 13(2)(b)(i). In 1996, the provision was amended to move "environmental conditions" to s 13(2)(b)(ii), to clarify that environmental conditions qualify the period of rebuild, not *MSY*. It was said that "transient environmental conditions should not be used to modify the target stock level (i.e. the level that can produce *MSY*)."[18]

[80] In discussing subs (2) and (3) Departmental officials said:[19]

> These subsections deal with different aspects of the TAC setting process. Subsection (2) specifies that the primary management goal for the Minister is to ensure fish stocks are maintained at or above, or moved towards, a level that can produce the MSY. Subsection (3) requires the Minister to consider certain factors (social, cultural, and economic) when determining the way and rate in which this goal is achieved. These factors can not therefore alter the goal of managing a stock at or above the MSY level.

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17 *Pacific Trawling Ltd v Minister of Fisheries* HC Napier CIV-2007-441-1016, 29 August 2008 (citations omitted).

18 Fisheries (Remedial Issues) Amendment Bill, Departmental Report at [41].

19 At [42].

[81] I agree with Forest & Bird that the legislative history indicates that the factors relevant to determining the "period appropriate to the stock" are those contained in s 13(2)(b)(ii) (being the biological characteristics of the stock and any environmental conditions affecting the stock), and the drafting change was not intended to make social, cultural and economic factors relevant considerations under s 13(2)(b)(ii).

[82] As to case law, s 13(2)(b) of the 1996 Act has not been directly considered by the Courts. Fisheries Inshore relies on several authorities relating to the Fisheries Act 1983 (the 1983 Act) to support its submission that s 13(3) applies to all elements of s 13(2), not just to s 13(2)(b)(i). The 1983 Act, as the Minister acknowledges, did not contain an equivalent "period appropriate to the stock" provision.

[83] *Greenpeace v Minister of Fisheries* (*Orange Roughy case*) concerned the TAC provision in the 1983 Act. The Court said:[20]

> In arriving at what is an appropriate time period, all factors must be taken into account and these can reasonably include economic and socio-economic factors; that each TAC fixed must be such as not to compromise the MSY or the programme and period within which that objective is to be attained, but need not necessarily promote the MSY in the sense of shortening the timeframe within which it is to be achieved.

[84] Fisheries Inshore also relied on *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* (*Snapper case*), which concerned the timeframe selected by the Minister for rebuild of the snapper fishery and the Minister's obligations to have regard to the social and economic impacts of his decision, under the 1983 Act.[21] Fisheries Inshore relied on the following discussion of the Court of Appeal about the 1983 Act:[22]

> 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 Minister was required to address when considering

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20 *Greenpeace v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 at 29 *[Orange Roughy case]*.

21 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 [*Snapper case*].

22 At 12-13.

> 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.

[85] The Court then went on to consider s 13 of the 1996 Act:[23]

> 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 upon the *time frame and the ways to achieve* that statutory objective the Minister must consider all relevant social, cultural and economic factors.
>
> (Fisheries Inshore's emphasis)

[86] However, the issues the Court of Appeal was directly concerned with in the *Snapper case* involved the 1983 Act. It was also the 1983 Act that was in issue in the *Orange Roughy case*. Although the 1996 Act had been enacted by the time the Court heard the *Snapper case*, to the extent the Court refers to the 1996 Act, its comments are plainly obiter.

[87] In addition, the portion of the Court of Appeal's judgment in the *Snapper case* emphasised by Fisheries Inshore is a summary or paraphrasing of s 13(2)(b)(i) only. When the passages are read in their entirety, they support a different conclusion. The last sentence quoted at [85] above is framed in very general terms. The preceding sentence says, "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" (emphasis added). The next sentence then begins "In short", which indicates it is a summary of the above point; it then continues "the time frame and the ways to achieve that statutory objective…".

[88] The Court does not refer to the "period appropriate to the stock" at any point. The Court does refer to "time frame" but, as Forest & Bird emphasised, that phrase is not used in s 13 of the Act (or indeed in the 1983 Act) and the Court refers to "the ways to achieve" the statutory objectives, rather than the specific language of

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[23] At 14.

s 13(2)(b)(i). The earlier sentence in the Court's judgment, which focused on "the way in which and rate at which the stock is moved" is an accurate summary of what s 13(2)(b)(i) requires.

[89] Accordingly, I conclude that the cases considering the s 13 predecessor in the 1983 Act do not assist Fisheries Inshore's argument. Rather they tend to support Forest & Bird's interpretation of s 13(2)(b).

[90] Fisheries Inshore also relied on the Court of Appeal and Supreme Court decisions in *Sanford Ltd v New Zealand Recreational Fishing Council Inc* (*Court of Appeal Kahawai case)*,[24] and the *Supreme Court Kahawai case*,[25] which were about the 1996 Act, as applying s 13(3) to both limbs of s 13(2)(b). In the *Kahawai case*, the High Court considered the Minister's allocation decisions for kahawai in 2004 and 2005.[26] In the course of his judgment, Harrison J said:

> [49] While it may not have been articulated in this way, MFish's advice to the Minister to apply an arbitrary 15% reduction was a measure designed to result in kahawai being restored to or above a level that can produce the maximum sustainable yield: s 13(2)(b)(i). It was a cautious step, proposed in recognition of the effect upon the stock of the higher than originally assessed level of recreational catch or use. *In considering the way and rate at which this objective was carried out the Minister was bound to 'have regard to such social, cultural and economic factors as he … considers relevant': s 13(3). It is significant that these factors do not constitute the criterion for setting the level of the TAC itself but only arise for discretionary consideration when determining the manner and speed of restoring the stock to the level of maximum sustainable yield.*
>
> [50] Mr Galbraith's argument is that when advising the Minister on the TACs MFish was blinkered or blinded by its reliance on catch history data as the primary criterion to the exclusion of people's 'social, economic and cultural wellbeing'. But the argument must fail once it is recognised that 'social, economic and cultural wellbeing' is not the mandatory statutory guideline for fixing a sustainability measure. *The Minister was not bound to have regard to the concept of wellbeing at all but to 'such social, cultural and economic factors' which he considered relevant, and then only in structuring the stock's return to maximum sustainable yield, not in setting the level of the TAC itself.* In practice, it would be difficult to prove a breach of this duty. It would be open to the Minister, for example, to conclude that no such factors were relevant when considering a TAC for a particular stock.

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24 *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 [*Court of Appeal Kahawai case*].

25 *Supreme Court Kahawai case*, above n 15.

26 *New Zealand Recreational Fishing Council v Minister of Fisheries* HC Auckland CIV-2005-404-4495, 21 March 2007 [*High Court Kahawai case*].

(emphasis added)

[91] Fisheries Inshore noted that the High Court decision was overturned in the Court of Appeal, and the Court of Appeal's decision upheld in the Supreme Court. However, in the Supreme Court, the only ground pursued related to how the TACC was set under s 21, not how the TAC was set under s 13.[27] The Supreme Court said:[28]

> [44] While sustainability is the guiding criterion, the Minister has some flexibility under s 13 to consider aspirations of the fishing sectors for utilisation of the resource. *In considering the way in which, and rate at which*, a stock is moved towards or above a level producing a maximum sustainable yield, the Minister must have regard to "social, cultural and economic factors as he or she considers relevant". This imports into the process for setting the total allowable catch a key aspect of the definition of "utilisation" in s 8(2).
>
> (emphasis added)

[92] I conclude that the "period appropriate to the stock" in s 13(2)(b)(ii) of the Act is to be determined by the Minister based on technical advice concerning the stock's biological characteristics and environmental conditions. Perpetually maintaining a stock below *MSY* (which would be permissible if s 13(2)(b)(ii) is qualified by economic considerations) is not a tenable interpretation. The specific words of s 13(2)(b)(ii) are determinative – the Minister was required to alter the stock levels within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock, without reference to social, cultural and economic factors.

[93] Social, cultural and economic factors come into play only after the Minister has decided on "the period appropriate to the stock", when he or she comes to determine the way in which and the rate at which a stock is moved towards a level that can produce *MSY*.

<u>How did the Minister go about making his decision?</u>

[94] I turn now to consider the Minister's decision-making process and how he expressed his reasoning.

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27 *Supreme Court Kahawai case*, above n 15, at [2].
28 *Supreme Court Kahawai case*, above n 15 (footnotes omitted).

[95] In making the 2019 Decision the Minister had before him the FNZ Advice Paper. The Advice Paper referred to the consultation process undertaken for the East Coast tarakihi stock. FNZ then set out for the Minister's consideration the four options referred to at [42] above.

[96] FNZ advised the Minister that all four options were open to him, and that all provided for rebuild of the tarakihi fishery to ensure that the stock moves towards B_{MSY}. FNZ's preferred options were options 2 and 4.

[97] The Advice Paper noted:

> Options 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}. There is uncertainty whether the measures outlined in the Industry Rebuild Plan will lead to an expedited rebuild timeframe within the 20 year horizon proposed. Science modelling has indicated that increasing the age of fish caught by one year will accelerate the rebuild, but it is difficult to predict to what extent the measures proposed by industry will achieve this.
>
> It is not common for Fisheries New Zealand to propose options that are outside of 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.

[98] The sequence of the Minister's decision-making is not clearly set out in either the Advice Paper or the Minister's 2019 Decision. In particular, the "period appropriate to the stock" is not separately and specifically considered. Under the heading "State of the stock", the Advice Paper does refer to what the HSS says about a rebuild plan, including in relation to T_{min}:

> When a stock declines below the soft limit a formal, time-constrained, rebuilding plan is recommended. The Harvest Strategy Standard recommends that a rebuilding plan should aim to restore the stock to, at least, the target level of biomass within a timeframe of between T_{min} (minimum timeframe to achieve rebuild to target in the absence of fishing) and 2*T_{min} (twice the minimum timeframe), with a 50% probability. T_{min} for tarakihi has been determined to be 5 years for a target of 40% SB_0, or 4 years for a target of 35% SB_0. 35% SB_0 is the species specific management target for tarakihi that has been proposed by the industry.

[99] The factors on the basis of which the "period appropriate to the stock" is assessed are considered under the heading "Way and rate":

> *Biological characteristics of the stock and any relevant environmental conditions*
>
> Due to the rapid growth of tarakihi in their first eight years, there is potential to rebuild the stock in a shorter timeframe than other slower growing stocks. Projections suggest East Coast tarakihi stock has a 50% probability of rebuilding to a target of 40% SB_0 within five years in the absence of fishing. A 50% probability of reaching the target is considered acceptable, due to the natural variation caused by fluctuations in recruitment and environmental conditions.

[100] There is nothing in the Advice Paper that suggests the four options proposed identified a period "appropriate to the stock" as the starting point for the Minister's decision.

[101] Neither the Advice Paper nor the Minister's 2019 Decision give an explanation of why the "period appropriate to the stock" was changed from 10 years in 2018 to 20 years in 2019. The 2019 Decision does not acknowledge that a 20 or 25 year rebuild period is a departure from the 10 year rebuild period the Minister had previously decided on.

[102] The Minister has filed an affidavit in this proceeding, in which he noted in relation to his 2018 Decision that he "favoured a rebuild timeframe of ten years".

[103] In discussing his 2019 Decision, the Minister said:

> [41] I was conscious that a TACC reduction of 35% was most aligned with the ten year period of rebuild, which I preferred in the previous year, and guidance provided by the HSS.
>
> [42] Nonetheless, I had an obligation to balance the potential socio-economic impacts of my decisions against my responsibility to ensure the sustainability of East Coast tarakihi. I was concerned that the recommended ten year rebuild may have particularly significant socio-economic implications for this fishery.

[104] The Minister did not directly address the issue of the period appropriate to the stock, in terms of s 13(2)(b)(ii), either in the 2019 Decision, or in his affidavit.

[105] The Minister says, as noted above,[29] that assessment of biological characteristics and the environmental conditions may result in a range of periods

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[29] See above at [64].

"appropriate to the stock" and he is then permitted to consider social, cultural and economic factors in deciding which of the appropriate periods to choose. Forest & Bird acknowledges that there may be a range of advice on what constitutes the period appropriate to the stock, having regard to the relevant scientific considerations.

[106] However, the period must still be "appropriate to the stock". All of the four options put forward by FNZ would, as FNZ said to the Minister, provide for rebuild of the stock and for moving the stock towards the target. However, neither of those things is sufficient to meet the statutory test. Section 13 requires more than that the stock be moved towards the target over any timeframe – it requires the identification of a period "appropriate to the stock", having regard to the biological characteristics of the stock and any environmental conditions.

[107] In similar vein, the Minister submitted that Forest & Bird has provided no evidence that the rebuild period chosen by the Minister was outside a range that would be appropriate to the stock. In my view, that approach inverts the relevant question, which is how and on what information did the Minister go about determining the period appropriate to the stock.

[108] Fisheries Inshore's submission was that there has been a 30 per cent reduction in the TAC since 2017, therefore the Minister cannot be said to be "postponing sustainability". Plainly staged reductions are possible, but as I have already noted, s 13(2) requires more of the Minister than simply moving in the right direction. That would, as Forest & Bird puts it, allow for a constant shift of the goalposts despite no change in the relevant scientific information since 2017. Section 13(2) requires the setting of a "period appropriate to the stock".

Conclusion

[109] I find that the Minister did make an error of law, in that he did not make an assessment of the period of rebuild appropriate to the East Coast tarakihi, as required by s 13(2)(b)(ii) of the Act, before applying social, cultural and economic factors to the determination of way and rate of rebuild.

Second cause of action: error of law – probability of achievement

Submissions

Forest & Bird

[110] The second cause of action alleges the Minister made an error of law, in that he did not set a TAC that will, in terms of probability of achievement, enable the level of East Coast tarakihi to be altered within a period appropriate to the stock. Forest & Bird says that a probability of 50 per cent of achieving the target of within 25 years is insufficient to meet the obligations of s 13(2)(b).[30] Forest & Bird relied on Dr Dunn's evidence, and submitted the language of s 13 required the Minister to adopt a TAC with a 60 per cent probability of achievement or higher (although at the hearing Forest & Bird acknowledged that 60% has no legislative basis and was used in an "illustrative" sense).

[111] Forest & Bird's submission is that probability is inherent in the requirement to set a TAC that will result in the stock being restored. The higher the probability of achievement, the longer the timeframe to achieve the target. Also, within the given timeframe, the TAC reduction needed to achieve the target will be greater if a higher probability is used.

The Minister

[112] The Minister in response says that he had to set a TAC that will "enable" or facilitate the alteration of stock levels needed to meet the objectives in s 13(2)(b)(i) and (ii); whether the preferred rebuild period is, in fact, being achieved is a matter to be kept under review. The Minister also points out that the use of the word "enables" in s 13 recognises that measures besides the TAC can affect the rebuild of a stock. The Minister acknowledges the HSS guidance on probability, but says that does not mean he must satisfy himself a given rebuild timeframe will be achieved to 70 per cent at the outset.

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[30] The Minister's Decision does not refer to the level of probability for either of options 3 or 4. However the options were based on FNZ modelling for a TACC reduction alone that showed a 50 per cent probability that the target would be achieved in 25 years, and that it would take more than 30 years to reach the target with 70 per cent probability. The probability of reaching the target based on the TACC reduction together with the Industry Rebuild Plan was not modelled.

Fisheries Inshore

[113] Fisheries Inshore argues that the degree of certainty (probability) is a matter for the Minister. His or her obligation is simply to set a TAC that "enables" the desired rebuild. Implicit in the submission is that a TAC which enables the moving of the stock level in the right direction will meet the Minister's obligation under s 13.

Te Ohu

[114] Te Ohu supported the submissions of the Minister and Fisheries Inshore on this cause of action.

Analysis

[115] This cause of action gives rise to three questions:

(a) Is the Minister required to identify a probability level at the time of setting a TAC?

(b) Did the Minister identify a probability level in his 2019 Decision?

(c) Does adopting an approach with a probability of achievement of 50 per cent amount to an error of law, based on the requirements of s 13(2)(b)?

Is the Minister required to identify a probability level at the time of setting a TAC?

[116] Determining a probability figure is an integral part of the process of fixing a TAC in the context of a fish stock that is below the level which can produce *MSY*. This is reflected in the HSS Operational Guidelines which state:

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

[117] The rebuild target, the period appropriate to the stock, and the probability of achieving the target are all essential elements of the rebuild plan. The level of probability goes directly to achievement of the rebuild target within the appropriate

period for the stock. Failing to determine the probability level, or accepting it at a very low level, undermines the integrity of the process and potentially renders the rebuild target moot. The probability of the rebuild being achieved is not a subsidiary question that can be dealt with at some later point during the course of the rebuild, although it is desirable, and may be necessary, that the progress of the rebuild be monitored during the period of the rebuild. The probability level should be determined at the time of setting the TAC.

[118] Therefore, I conclude the Minister was required to identify a probability level at the time of setting the TAC.

Did the Minister identify a probability level in his 2019 Decision?

[119] It is not entirely clear whether the Minister did in fact identify a probability in his 2019 Decision; there was modelling by FNZ which underpinned the 10 per cent TACC reduction in option 4, but no modelling of probability in relation to the Industry Rebuild Plan alone (option 3) or a 10 per cent TACC reduction coupled with the Industry Rebuild Plan (option 4).

[120] However, given the primary measure adopted by the Minister was the 10 per cent TACC reduction, which FNZ had modelled and which had a 50 per cent probability of achievement of the target within 25 years, I find (by a fine margin) that a probability was adequately identified in the 2019 Decision.

Does adopting an approach with a probability of achievement of 50 per cent amount to an error of law, based on the requirements of s 13(2)(b)?

[121] The question then becomes: does s 13(2)(b) require the Minister to set a probability higher than the 50 per cent probability on which his 2019 Decision was modelled?

[122] Forest & Bird's submissions on this point focused on Dr Dunn's explanation of "verbal descriptions" used to explain probability figures regarding the status of a stock in relation to a target, where he explained 40–60 per cent means "about as likely

as not", and above 60 per cent means "likely".[31] Forest & Bird submits that a 50 per cent probability means that rebuild within the appropriate period is "as likely as not", and that does not satisfy the requirement of s 13(2)(b) which uses mandatory and directive language: the Minister "shall" set a TAC that enables the level of stock to be altered in a way that "will" result in the stock being restored "to or above" a level that can produce *MSY*, within a period appropriate to the stock. As Forest & Bird emphasised, the obligation in s 13(2)(b) is not merely to improve a stock from a current depleted state, but to rebuild it to *MSY* in a period appropriate to tarakihi.

[123] If the Minister were to adopt a rebuild target and appropriate period with a probability of achievement of, say, 10 per cent, the requirements of s 13(2)(b) would plainly not be met. What is less clear is where the cut-off point is. The Minister knew at the time of his 2018 Decision that a 50 per cent probability did not accord with the best available evidence as to what is necessary in terms of probability. As he candidly acknowledged at the time of his 2018 Decision a 50 per cent probability was "not particularly high".

[124] The significance of the probability of the rebuild being completed to the target level and within the appropriate period is expanded by the evidence of two of the experts who gave affidavit evidence in the proceeding. Dr Mace said:

> 30 When referring to the probability of rebuild, a 50% probability does not mean a 50% chance of rebuild versus a 50% chance of not rebuilding at all. Rather, the 50% probability level should be thought of as the median of a distribution around the target, rather like a bell-curve (although usually a slightly different shape). In other words, there will be a 49% probability of being somewhat above the target and a 49% chance of being somewhat below. There will also be a 20% probability of being well above and a 20% chance of being well below.
>
> 31 However, in the current case, even the bottom end of the probability distribution with a median of 50% will result in an East Coast tarakihi stock size that is well above the current level of 15.9% SB_0.

[125] Dr Dunn explained:

> 63. For a stock that is being rebuilt to B_{MSY}, achieving a 70% probability of being above the target means that there is a 7 out of 10 chance that

[31] Forest & Bird also relied on similar descriptions used in *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81.

> the stock size would be above the target, and in 3 out of 10 cases the stock size will be below the target. This is a higher certainty than a 50% probability, which means that in half of the cases the stock size will be above the target and in half of the cases it will be below the targets.

[126] I am not able to conclude that in this case setting a target with a 50 per cent probability of it being achieved within the specified period was an error of law. I consider the criticisms of the probability in relation to the guidance in the HSS in more detail below, under the third cause of action.

Conclusion

[127] On this cause of action, I conclude that:

(a) probability is an inherent component of the requirement to set a TAC that will result in the stock being restored to a level that can produce *MSY*, and not simply something to be assessed at a later point in the rebuild process, and therefore the Minister was required to identify a probability level at the time of setting the TAC;

(b) when read in conjunction with the Advice Paper, the Minister's 2019 Decision adopted an approach with approximately a 50 per cent probability of achievement; and

(c) it was not an error of law to adopt a TACC that had modelled a 50 per cent probability of achieving the target.

Third cause of action: relevant consideration – HSS guidance on acceptable probability

[128] Both the second and third causes of action relate to the level of probability for achieving the rebuild of the stock. While the second cause of action focused on whether the Minister erred in law by adopting an approach with a likely probability of 50 per cent, the third cause of action focuses on whether the HSS guidance on probability was a relevant consideration the Minister failed to consider.

Submissions

Forest & Bird

[129] The third cause of action alleges the Minister failed to have regard to a relevant consideration, namely the HSS, which specifies 70 per cent as the minimum standard for the acceptable probability of rebuild for a stock such as East Coast tarakihi.

[130] For completeness, I note Forest & Bird also initially alleged under this cause of action that the Minister made a material mistake of fact with respect to the HSS that social, cultural and economic factors are not taken into account by the HSS. This was not pursued at the hearing before me.

[131] Forest & Bird says that even if the Minister was entitled to set a TAC that would rebuild to *MSY* with a 50 per cent probability, in making that decision the Minister ought to have had regard to the best practice guidance as to the acceptable probability of rebuild for depleted stocks and why the higher probability is warranted. Forest & Bird noted the HSS level is the best practice, and having regard to it is consistent with the obligation to use best available information. Also, the Minister relied on the HSS to support other aspects of the 2019 Decision; in doing so he was required to rely on it accurately by having regard to its guidance on probability.

The Minister

[132] In response, the Minister submitted that the HSS statement on probability is not a mandatory relevant consideration, being one which a statute expressly or impliedly identifies as being required to be taken into account.[32] The Minister said his decision did not relate to whether the stock had in fact been fully rebuilt. The Minister also said that he was aware that the TAC reductions were estimated to reach the target within 25 years with a 50 per cent probability, and he was fully aware that this was a departure from the HSS.

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[32] *Petrocorp Exploration Ltd v Minister of Energy* [1991] 1 NZLR 1 (CA) at 33; *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 183.

[133] The Minister argued that, in any event, FNZ had knowledge of the HSS statement as to probability, and the collective knowledge of the department should be treated as the Minister's own knowledge.[33]

Fisheries Inshore

[134] Fisheries Inshore says there is no statutory requirement to "have regard to" the HSS; it is an out of date policy document, it contains a generic set of guidelines which may not apply in certain situations, and it does not bind the Minister.

[135] Even if the 70 per cent probability specified in the HSS was a mandatory relevant consideration which the Minister was required to have regard to, Fisheries Inshore said it does not necessarily determine or influence the Minister's decision. Fisheries Inshore said the Minister did in fact have regard to the "default guideline" of 70 per cent probability of rebuild, but decided not to apply it and explained why.

[136] Fisheries Inshore said the Minister is free to adopt parts of the policy contained in the HSS, while deciding not to adopt other parts.

Te Ohu

[137] Te Ohu's submissions on this cause of action were focussed on the arguments relating to mistake of fact which, as noted above,[34] was not pursued by Forest & Bird at the hearing.

Analysis

[138] I first consider the content and status of the HSS, before considering whether the Minister did in fact have regard to what the HSS says about acceptable levels of probability when he made his 2019 Decision.

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33 *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608 at 613; *Rangitira Developments Ltd v Sage* [2020] NZHC 1503 at [161].

34 See above at [130].

The relevant content of the HSS

[139] The relevant portions of the HSS relied on by Forest & Bird in this cause of action are:

> - Stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a timeframe between T_{MIN} and $2*T_{MIN}$ with an acceptable probability.
>
> - Stocks will be considered to have been fully rebuilt when it can be demonstrated that there is at least a 70% probability that the target has been achieved *and* there is at least a 50% probability that the stock is above the soft limit.

[140] The HSS footnotes this reference with:

> Use of a probability level greater than 50% ensures that rebuilding plans are not abandoned too soon; in addition, for a stock that has been depleted below the soft limit, there is a need to rebuild the age structure as well as the biomass, and this may not be achieved by using a probability as low as 50%.

[141] In addition, the HSS Operational Guidelines say:

> For both limits [soft limit and hard limit], the ultimate goal is to ensure full rebuilding of the stock to the biomass target with an acceptable probability (70%). The reason for requiring a probability level greater than 50% is that a stock that has been severely depleted is likely to have a distorted age structure (an over-reliance on juvenile fish, with relatively few large, highly fecund fish). In such instances it is necessary to rebuild both the biomass and the age composition.
>
> …
>
> … The minimum standard for a rebuilding plan is that 70% of the projected trajectories will result in the achievement of a target based on MSY-compatible reference points or better within the timeframe of T_{MIN} to $2*T_{MIN.}$ This equates to a probability of 70% that the stock will be above the target level at the end of the timeframe. …

[142] The respondents do not challenge the science behind the statements in the HSS and the HSS Operational Guidelines quoted at [139]–[141] above.

The status of the HSS

[143] The HSS was published in October 2008, after almost four years of intensive development and consultation. Its publication was accompanied by the first version of the HSS Operational Guidelines. It was intended that the HSS would be reviewed

approximately every five years, but that the HSS Operational Guidelines would be reviewed and updated more frequently. As Dr Mace notes, they have not been further revised since 2008 and 2011, respectively. Dr Mace observes that reasons for this include that the HSS still largely represents international best practice in terms of the purpose for which it was designed; it has taken several years for some sectors of the fishing industry and others to fully consider the HSS; and both the Fisheries Science and Fisheries Management sections of FNZ have needed to focus on higher priority issues.

[144] The HSS states that it is "a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fish stocks in New Zealand's Quota Management System". It also states that it will "form a core input to the Ministry's advice to the Minister of Fisheries on the management of fisheries, particularly the setting of TACs under sections 13 and 14". The HSS further states that:

> The metrics specified in the Harvest Strategy Standard are to be treated as defaults: i.e. they should be applied in most situations. Where proposed management options depart from the Harvest Strategy Standard, they must be justified in terms of the particular circumstances that warrant such departure.

[145] Dr Dunn says in his evidence:

> Fisheries NZ's Harvest Strategy Standard is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fish stocks in the [Quota Management System].

[146] Those statements are reflected in the Advice Paper to the Minister:

> The Harvest Strategy Standard (HSS) is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fish stocks in New Zealand's Quota Management System (QMS). It is intended to provide guidance as to how fisheries law will be applied in practice, by establishing a consistent and transparent framework for decision-making to achieve the objective of providing for utilisation of New Zealand's QMS species while ensuring sustainability. The HSS outlines the Ministry's approach to relevant sections of the Fisheries Act 1996. It is therefore a core input to the Ministry's advice to the Minister of Fisheries on the management of fisheries, particularly the setting of TACs under sections 13 and 14.

[147] The HSS establishes default targets and limits as a minimum standard. The principles in the HSS are stated to be "default rules". A "default" action or position

means a typical course of action, unless there are other considerations or exceptional circumstances. That is reflected in the HSS itself which says:

> Other standards that will subsequently be developed may result in modifications to the Harvest Strategy Standard to incorporate environmental and other considerations.

[148] There is no reference to the HSS in the Act. Nor does s 13 of the Act refer to the assessment of probability as part of the process of setting a TAC. But, as Dr Mace acknowledges "the HSS still largely represents international best practice in terms of the purpose for which it was designed", and it is the "best available information" in terms of s 10 of the Act.[35]

[149] Craig Lawson, Executive Chair of Fisheries Inshore, also discusses the HSS and the HSS Operational Guidelines, in his affidavit evidence on behalf of Fisheries Inshore. Mr Lawson emphasises that the HSS has not been updated since it was initially published in 2008; that it is a "policy statement rather than some rigid standard which must be adhered to"; and that it is a "generic set of default guidelines for use by the Ministry when providing advice to the Minister on making section 13 decisions under the Act".

[150] Mr Lawson notes that the seafood industry "has never adopted this policy document" and that it "is not appropriate to be using these default rules in the case of the tarakihi fishery where we now have a new and accepted stock assessment available." Fisheries Inshore has pointed to the East Coast tarakihi stock assessment as further information that justifies a departure from the HSS in respect of tarakihi. I understand this argument to be in support of adopting a different target, rather than directly addressing the guidance on probability. While industry representatives argued for a species-specific target of 35 per cent SB_0 in the Industry Rebuild Plan, rather than the HSS "default" target of 40 per cent SB_O, FNZ's advice to the Minister was that:

> … in the short term, and in the absence of adequate peer review of scientific evidence, the proxy target of 40% SB_0 as recommended by the Harvest Strategy Standard remains appropriate for East Coast tarakihi.

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35 See above at [22].

[151] It is not clear how the tarakihi stock assessment provides a basis for departing from the HSS guidance as to probability levels. Fisheries Inshore does not point to other stock-specific information that might justify such a departure and amount to the "best available information".

[152] I conclude that the HSS is the "best available information", in terms of s 10(a), in relation to acceptable probability levels, as well as for other matters relevant to the interpretation of s 13.

[153] I also find that, although the HSS is not referred to in the Act, it is an implied mandatory relevant consideration for the Minister in setting a TAC under s 13. As Cooke J held in *CREEDNZ Inc v Governor-General*:[36]

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. …
>
> Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account. …

[154] As McGechan J observed in *Taiaroa v Minister of Justice*:[37]

> When not expressly stated in the statute … implied mandatory considerations sometimes may be extracted from the purpose of the statute and probable legislative intention.

[155] In analysing a separate ground of review, of mistake of fact coupled with irrelevant considerations, McGechan J went on to say that if a decision-maker ignores or acts in defiance of an incontrovertible fact, or an established and recognised body of opinion, which plainly is relevant to the decision to be made, the decision may be invalidated.[38] However, the Court noted two points require emphasis:[39]

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36 *CREEDNZ Inc v Governor-General*, above n 32, at 183.

37 *Taiaroa v Minister of Justice* HC Wellington CP99/94, 4 October 1994 at 34.

38 At 42. See also *Northern Inshore Fisheries Co Ltd v Minister of Fisheries* HC Wellington CP235/01, 4 March 2002 at [47].

39 At 42.

> First, the fact "must be an established and recognised opinion"; and "it cannot be said to be a mistake to adopt one of two different points of view of the facts, each of which may reasonably be held". Second, … the fact or opinion must have been "actually or constructively within the knowledge of the Minister or the Ministry"…

[156] The HSS is an "established and recognised body of opinion". Notwithstanding Fisheries Inshore's view that it is not appropriate to use the HSS default guidelines for tarakihi, as I have found and as the Minister acknowledges, the HSS remains best international practice and the best available information. Fisheries Inshore does not advance any equally credible body of scientific opinion as described in *Taiaroa*.

[157] I do not accept the Minister's submission that the probability range was not a mandatory relevant consideration because the Minister's decision did not relate to whether the stock had in fact been fully rebuilt. It is correct that a stock will not be declared to be rebuilt until it can be determined that there is at least a 70 per cent probability that the target has been achieved. As the HSS Operational Guidelines acknowledge, if the initial rebuilding plan is underachieved or overachieved, it may need to be revised prior to the termination of the timeframe initially set. That might be necessary, for example, where there is an updated stock assessment. But that is different from saying that a 70 per cent probability of rebuild to the target is only relevant at the end of the rebuild, which is how I understand the Minister's submission. As Forest & Bird notes, the HSS Operational Guidelines state that the minimum standard for a rebuilding *plan* is that 70 per cent of projected trajectories will achieve the target, and, as I discussed in relation to the second cause of action, the setting of the probability is an integral part of setting the TAC.

Whether the Minister did in fact have regard to what the HSS says about acceptable levels of probability when he made his 2019 Decision

[158] I turn now to consider whether the Minister did in fact take into account what the HSS says about a minimum standard of acceptable probability when he made his 2019 Decision.

[159] The reasons expressed in the decision and the information supporting the decision provide the most cogent evidence of what was taken into account for the

purpose of the decision.[40] Prima facie, if a relevant factor is not stated as having been considered then it was not considered, although that presumption can be overcome.[41]

[160] FNZ's advice to the Minister was that a "50% probability of reaching the target is considered acceptable, due to the natural variation caused by fluctuations in recruitment and environmental conditions". When it advised the Minister that some of the four options put to him "step outside the HSS", that comment related only to the rebuild period, not to the departure from the HSS guidance on probability.

[161] Fisheries Inshore submitted that the Minister did have regard to the 70 per cent probability default in the HSS. However, to support that submission, Fisheries Inshore relied on aspects of the Minister's affidavit: a reference that relates to the Minister's 2018 Decision; and a general comment about committing to a 50 per cent probability of rebuild within 25 years, within a focus on the time period rather than the probability.

[162] There is evidence that the Minister did consider the HSS guidance on probability in making the 2018 Decision. In the 2018 Decision the Minister said:

> … The advice provided to me outlined the requirement for a 55% reduction from current commercial catch to provide a 50% probability of rebuild within 10 years.
>
> I note that this is not a particularly high probability of rebuild. However, to rebuild with more certainty would require even larger reductions. I consider a probability of rebuild of 50% reasonable given the status of the stock, the size of rebuild required, and the socio-economic impact associated with achieving a rebuild with greater certainty.

[163] I acknowledge that in some cases, such as *Telecom Auckland Ltd v Auckland City Council*, where a decision-maker has previously made a decision in respect of materially identical facts, it has not failed to consider relevant factors if it does not revisit the relevant factors when making a further decision.[42] However, that is not the case here. In *Telecom*, a detail of the decision had been considered a few weeks before,

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40 *Vipassana Foundation Charitable Trust Board v Auckland Council* [2017] NZHC 1457, at [48]; *Vipassana Foundation Charitable Trust Board v Auckland Council* [2019] NZCA 100, [2019] NZRMA 380 at [55].

41 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [15.50].

42 *Telecom Auckland Ltd v Auckland City Council* HC Auckland M185-93, 28 February 1997 at 10-11.

and revisiting it would have been pointless. That is quite different from the Minister failing to have regard to an integral part of the process in setting the TAC, when revisiting his decision a year later.

[164] Although FNZ's June 2019 discussion paper did note that the HSS deems a stock to be fully rebuilt when there is at least a 70 per cent probability the stock is at or above target, neither the Minister's affidavit, nor the Minister's 2019 Decision, refer to what the HSS says about probability. Neither document indicates that the basis for the 70 per cent minimum probability rebuild policy was considered.

[165] The Minister says, relying on *State Housing Action Inc v Minister of Housing and Minister of Finance*, that he was not required to be across all the "fine detail";[43] instead the collective knowledge of FNZ is to be treated as the Minister's own knowledge, and therefore the Minister was aware of the 70 per cent minimum probability rebuild policy.[44] I do not consider these authorities help the Minister's argument – it cannot be said that the HSS comments on probability of rebuild were a "fine detail" the Minister did not need to specifically turn his mind to. The HSS represents best practice, and the probability of rebuild is a key factor that goes to the statutory requirement in s 13(2)(b) to set a TAC that enables the level of stock to be altered at an appropriate rate.

[166] In setting the TAC, the Minister must have regard to what the HSS says about probability. While to "have regard to" is not the same as to "give effect to",[45] the phrase is generally understood to require a decision-maker to give the matter "genuine attention and thought".[46] The weight to be given to the HSS on this point is a matter for the Minister, but it is not solely at the Minister's discretion. While the HSS does not have legislative force, there is no counter argument from the respondents to the HSS statement that one cannot be satisfied that rebuild is complete until there is at least a 70 per cent probability that the target has been achieved.

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43 *State Housing Action Inc v Minister of Housing and Minister of Finance* [2016] NZHC 2924, [2017] 2 NZLR 281 at [34] and [50].

44 *CREEDNZ Inc v Governor-General*, above n 32, at 200-201; *Rangitira Developments Ltd v Sage* [2020] NZHC 1503 at [161].

45 *Pacific Trawling Ltd v Minister of Fisheries*, above n 17, at [83].

46 *New Zealand Fishing Association Inc v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551.

[167] I find the Minister did not consider the HSS guidance in relation to probability, in making his 2019 Decision.

Conclusion

[168] In conclusion, on this cause of action, I find, first, that the guidance on probability in the HSS and the HSS Operational Guidelines was a mandatory relevant consideration. Second, I conclude that the Minister failed to have regard to this relevant consideration when making the 2019 Decision.

Fourth cause of action: irrelevant consideration – the Industry Rebuild Plan

Submissions

Forest & Bird

[169] The fourth cause of action alleges that, in making the TAC decision, the Minister took into account an irrelevant consideration, being the Industry Rebuild Plan.

[170] Forest & Bird submitted that, under s 13, the TAC itself must enable the level of East Coast tarakihi to be altered in a way or at a rate that will result in the stock being restored to or above a level that can produce *MSY* within a period appropriate to the stock; Forest & Bird says the Industry Rebuild Plan provides for an alternative management approach. Forest & Bird says the Industry Rebuild Plan is not a social or economic factor and is not a relevant consideration under s 13(3). Additionally, it says it was not sufficiently certain to be a relevant consideration because it relies on voluntary adherence.

[171] Forest & Bird says that the Minister relied on the Industry Rebuild Plan and the industry's commitment to a 20 year rebuild timeframe in place of setting (in 2019) the TAC that the Minister had indicated (in 2018) was necessary to implement the phased rebuild within the appropriate period; he agreed to the implementation of the Industry Rebuild Plan in place of a greater TAC reduction. The Minister relied on the Industry Rebuild Plan to extend the rebuild period from 10 years to 20–25 years. Forest & Bird says that s 13(2)(b)(ii) does not provide for the period appropriate to the

stock to be extended based on industry's commitment to voluntary and unenforceable fishing methods.

The Minister

[172] The Minister's response to Forest & Bird's submission is that the Industry Rebuild Plan was a permissive consideration, pursuant to s 13(3) and s 11(1)(a) of the Act. It was not a consideration which it was legally improper or illegitimate for the Minister to have regard to.

[173] The Minister agrees that the Industry Rebuild Plan cannot replace the statutory obligation to set a TAC, but says it can be taken into account when considering the "way and rate" at which the level of stock is restored, pursuant to s 13(2)(b)(i). The Industry Rebuild Plan was, he says, a social factor and/or an economic factor in terms of s 13(3) – it is a social factor in the sense that it represents how the fishing industry wishes to manage the resource, and it is an economic factor in that it is aimed at maintaining the viability of fishing.

[174] The Minister says that the voluntary measures in the Industry Rebuild Plan, such as avoiding juvenile tarakihi through voluntary closed areas and move-on rules, could reasonably be expected to have an effect on the biomass of the East Coast tarakihi and the rate of rebuild, for the purposes of s 11(1)(a). In addition, the selectivity measures, including changes to fishing methods and gear, have the potential to benefit the productivity of the stock through increasing the size and age of fish caught.

[175] The Minister notes that, while the significance of these measures may be "immature" at present, the Industry Rebuild Plan can reasonably be considered as an effect on the fishery under s 11(a). It is permissible for the Minister to work with the industry over time to monitor the effects of these measures on the fishery.

[176] The Minister says the weight to be attributed to the Industry Rebuild Plan is a matter for him, provided it does not jeopardise the ultimate obtainment of B_{MSY}.

Fisheries Inshore

[177] Fisheries Inshore does not dispute the Minister took account of the Industry Rebuild Plan, but says it was a permissive consideration under ss 13(2) and 11(1)(a). Fisheries Inshore says the Industry Rebuild Plan is not an alternative management approach, adopted as an alternative to TAC reduction, but rather it supplemented and enhanced the rebuild plan.

Te Ohu

[178] Te Ohu endorses the submissions of Fisheries Inshore and the Minister, and says the Industry Rebuild Plan is a permissible relevant consideration, on the basis that considering it aligns with the purpose of the Act; it is purpose-built for the rebuild of East Coast tarakihi stocks; and it takes into account economic, cultural and social factors. Te Ohu points out that if the Minister had not considered the Industry Rebuild Plan, Te Ohu itself would have sought to review the Minister's decision.

Analysis

[179] I first consider the Industry Rebuild Plan, before considering whether it was an irrelevant factor in setting the TAC. Then I examine whether the Industry Rebuild Plan was material to the Minister's 2019 Decision.

The Industry Rebuild Plan

[180] The Industry Rebuild Plan was developed by Fisheries Inshore, working with Te Ohu and Southern Inshore in 2018–19. A draft "Management Strategy" was first provided to the Minister in July 2018.[47] The Minister asked for a report from industry, and the Industry Rebuild Plan was provided to FNZ in May 2019.

[181] The Industry Rebuild Plan is described by Te Ohu as a holistic approach to the rebuild of East Coast tarakihi, which enables social, economic and cultural factors (including considerations of particular importance to iwi) to be addressed. Kim Drummond, Fisheries and Aquaculture Policy Manager at Te Ohu, describes the

[47] As outlined above at [30].

Industry Rebuild Plan as providing for "multiple factors that allow the biomass to be rebuilt while mitigating unnecessary impacts on participants and owners."

[182] In Te Ohu's submission, the Industry Rebuild Plan also reflects the importance of the Treaty of Waitangi (the Treaty) relationship between iwi and the Crown (and Te Ohu's role collectively on behalf of iwi in upholding that partnership), and the specific role of Te Ohu as the custodian of the Fisheries Settlement. It comprises advice from Te Ohu to the Minister in fulfilment of Te Ohu's statutory purpose of advancing interests of iwi, as well as its statutory function in relation to research into sustainable management of fisheries.

[183] Dr Jeremy Helson, Chief Executive of Fisheries Inshore, describes the Industry Rebuild Plan as a comprehensive plan that will contribute very significantly to the rebuild of the tarakihi stock:

> … only one element of which is the reduction of catch which has been given effect to through the Minister's TAC and TACC decision. The rest of the measures in the rebuild plan are industry led management measures and work programmes …

[184] Dr Helson's evidence summarises the "industry-led management measures" contained in the Industry Rebuild Plan:

(a) catch reduction;

(b) catch spreading;

(c) reporting sub-minimum legal size tarakihi (now superseded by electronic reporting requirements);

(d) assessing the *MSY* for the East Coast tarakihi fishery;

(e) selectivity measures (changes to fishing gear) to reduce juvenile fishing mortality;

(f) regional management and monitoring measures that include closed areas and "move-on" rules;

(g) a research project into the proof of concept of a discard chute to collect length data on those fish legally returned to the sea;

(h) enacting s 77 of the Act, which relates to the imposition of overfishing thresholds;

(i) developing a management evaluation procedure; and

(j) installing cameras on a substantial portion of the trawl fleet in TAR 2 and TAR 3 to confirm the level of sub-minimum legal size tarakihi caught and returned to the sea.

[185] Finally, the industry's commitment in the Industry Rebuild Plan was to rebuild to an interim target of 35 per cent SB_0, not the target of 40 per cent SB_0 that the Minister had determined was appropriate in 2018. Rebuilding to 40 per cent SB_0 would, of course, take longer than rebuilding to 35 per cent SB_0.

Was the Industry Rebuild Plan an irrelevant factor in setting the TAC?

[186] Forest & Bird's submission is that the Industry Rebuild Plan was an irrelevant consideration in setting the period appropriate to the stock; at best, the effects of the Industry Rebuild Plan, if successful, may be a permissible relevant consideration in relation to the "way and rate" of rebuild in the future.

[187] Whether a factor is an irrelevant factor depends on whether it is or is not relevant to the empowering provision. An irrelevant consideration is a matter that the decision-maker is not permitted (expressly or impliedly) to take into account in the exercise of their discretion.[48] To establish that a factor was an irrelevant consideration, it must be demonstrated why it was legally improper or illegitimate to have regard to it.[49] A consideration may be a permissible consideration relevant to one criterion of a decision, but irrelevant to another.[50]

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48 *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [113].

49 *Mary Moodie Family Trust Board (Inc) v Attorney-General* [2015] NZHC 365; [2015] NZAR 379 at [149].

50 *Tuitupou v New Zealand Immigration and Protection Tribunal* [2015] NZHC 3158.

[188] The effect of s 13(2)(b) is to require the Minister set in place a rebuild plan for the fishery. As I have already found under the first cause of action, s 13(2)(b)(ii) required the Minister to first set a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock. The Minister must then determine the way and the rate at which the stock will be rebuilt. Section 13(3) enables the Minister to have regard to "such social, cultural and economic factors as he or she considers relevant" in considering the way in which and rate at which the stock is moved towards or above a level that can produce *MSY* under s 13(2)(b).

[189] I agree with the respondents that steps taken independently by the industry which have the effect of speeding up the rebuild of the stock can be taken into account as part of the way and rate assessment (under s 13(2)(b)(i)), and may affect the Minister's decision about whether and what reduction in the TAC is necessary. Plainly, measures which may contribute significantly to rebuild of East Coast tarakihi, as Dr Helson asserts,[51] may be relevant to the way and rate at which the rebuild target is achieved.

[190] Forest & Bird says the Industry Rebuild Plan cannot be relevant at all (even under s 13(2)(b)(i) or s 13(3)) because it is not sufficiently certain and the measures are voluntary. Forest & Bird characterises the Industry Rebuild Plan measures in the following terms:

> The Industry Rebuild Plan measures all fall into one or more of the following categories:
>
> (a) They do not add to existing legal requirements, for example they require reporting on sub-minimum legal size tarakihi when that is already required by law.
>
> (b) They are voluntary and therefore unenforceable, for example in requiring signatories to voluntarily "move-on" if they catch too many juvenile tarakihi.
>
> (c) They are research projects which have the potential in future to assist in rebuild, but do not have any present effect on the age or volume of tarakihi caught.

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[51] As noted above at [183].

[191] While I acknowledge Forest & Bird's concerns, I do not consider that these arguments alone render the Industry Rebuild Plan an irrelevant consideration when considering way and rate under s 13(2)(b)(i). These specific factors go to the weight which the Minister gives to the Industry Rebuild Plan.

[192] But it does not necessarily follow that the Industry Rebuild Plan was also relevant to the setting of the period appropriate to the stock under s 13(2)(b)(ii). That is determined having regard to the biological characteristics of the stock and any environmental conditions affecting the stock.

[193] I conclude that the Industry Rebuild Plan is not therefore relevant to setting the period appropriate to the stock under s 13(2)(b)(ii).

Was the Industry Rebuild Plan material to the Minister's 2019 Decision?

[194] There is no dispute that the Minister did take the Industry Rebuild Plan into consideration. Fisheries Inshore says it was simply as an "enhancement" to the decision. However, that description is not consistent with the description in the Advice Paper and the Minister's 2019 Decision.

[195] The Advice Paper detailed option 4 as:

> - Option 4 is a blended option which includes a reduction to the TACC as well as adoption of the Industry Rebuild Plan.
>
> Option 4 is an additional option, included post consultation. It represents a middle ground between the higher TACC reductions proposed under Options 1 and 2 and the approach under Option 3 (implementation of the Industry Rebuild Plan). … As with Option 3, Option 4 also proposes the adoption of the Industry Rebuild Plan, but is aimed at increasing the certainty rebuild when compared to retaining the TACC at its current level.

[196] The Advice Paper then framed Option 4 in the following terms:

> If you considered it a priority to rebuild the stock as quickly as possible, in a timeframe that most closely corresponds to the Harvest Strategy Standard, Fisheries New Zealand recommends Option 2.
>
> Alternatively, if you consider minimising the socio-economic impacts on fishers, their families and the regional communities an important factor to have regard to, then Fisheries New Zealand recommends Option 4. While this option proposes a catch reduction to ensure an increased rate, and certainty of

> rebuild when compared to Option 3, the proposed reduction to the TACC is not as severe as for Option 2. Therefore, this option minimises the financial impact on the fishing industry in the short term, allowing them to continue to implement the Industry Rebuild Plan and support the innovative measures proposed through this plan.

[197] I conclude from these references in FNZ's Advice Paper and the Minister's 2019 Decision itself, that the Industry Rebuild Plan was an integral part of the Minister's decision.

Conclusion

[198] As I have found in relation to the first cause of action, neither the Minister's Decision nor the Advice Paper on which it was based, articulated the period appropriate to the stock or how that was ascertained. The Minister's 2019 Decision was in that sense a global decision and the Industry Rebuild Plan was an integral part of that decision.

[199] I agree with Forest & Bird that the Industry Rebuild Plan was the significant factor which influenced the Minister to set a longer time period than he had indicated was necessary in 2018. From that I infer that he had regard to the Industry Rebuild Plan in relation to the appropriate period for rebuild, as well as the way and rate of rebuild.

[200] In conclusion, I find that the Minister did have regard to the Industry Rebuild Plan in setting the TAC, notwithstanding that the Industry Rebuild Plan was not a relevant factor in relation to the period appropriate to the stock.

Fifth cause of action: unreasonableness

Submissions

<u>Forest & Bird</u>

[201] The fifth cause of action alleges that the Minister's 2019 decision was unreasonable. The Minister decided in 2018 that the appropriate period for rebuilding the East Coast tarakihi stock was 10 years, and that the TAC reduction made in 2018 would start the rebuild but would not achieve a rebuilt stock in that period. Forest &

Bird submits it was unreasonable for the Minister to decide in 2019 that a suite of voluntary measures aimed at achieving a 20 year rebuild period justified adopting a 20 year rebuild period, rather than the 10 year period that the Minister had determined to be appropriate in 2018.

The Minister

[202] The Minister says in response, first, that he was bound to approach his 2019 TAC decision with an open mind – he could not lawfully fetter his discretion in 2018. The Minister submits he was required to provide for the input and participation of tangata whenua and consult with interested parties and genuinely take account of their submissions, before making his 2019 TAC decision.[52]

[203] The Minister submits he recognised the potentially very significant socio-economic impacts which could result from a 10 year rebuild period. He invited industry to submit new and innovative ways to rebuild the East Coast tarakihi fishery, and he submits it was reasonable for him to take into account the package of voluntary measures subsequently proposed by the industry.

[204] The Minister also notes that with the TAC reduction alone – in addition to the reduction in the previous year – the fishery was predicted to rebuild within 25 years. The Minister was aware this was a departure from the HSS and the preferred period of rebuild he had indicated in 2018.

[205] The Minister submits he was required to balance the competing interests of providing for utilisation of fisheries resources, while ensuring sustainability – in doing so, he carefully considered submissions, the best available scientific information, and assessments of economic impacts, whilst taking into account any uncertainty in the information.

[206] Ultimately, the Minister says, the 2019 Decision was open to him. The weight to be attributed to social, cultural and economic factors was a matter for him. He was not constrained by indications made in 2018.

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52 Fisheries Act, s 12.

Fisheries Inshore

[207] Fisheries Inshore adopted and relied on the Minister's submissions, noting the high hurdle for Forest & Bird to meet the *Wednesbury* unreasonable test.[53]

[208] Fisheries Inshore also emphasised that the combined effect of the Minister's 2018 and 2019 Decisions is in conformity with the essential purpose of the Act, both to ensure the long-term sustainability of East Coast tarakihi stocks and, specifically, to ensure fish stocks that are below *MSY* are rebuilt within a timeframe considered appropriate by the Minister.

[209] Fisheries Inshore characterised Forest & Bird's claim as a complaint about the rate and certainty of the rebuild.

Te Ohu

[210] Te Ohu supports the submissions of the Minister and Fisheries Inshore, and says the Minister's approach is one of "reduce, research and reassess" in order to sustain the stock, the fishers, and the associated economy. Te Ohu says the co-development and co-management approach of the Industry Rebuild Plan reflects a meaningful, productive and Treaty-consistent relationship between Te Ohu, the industry, and the Crown, for the benefit of New Zealand fisheries.

Analysis

[211] Forest & Bird acknowledges that the *Wednesbury* test of unreasonableness, that a conclusion must be so unreasonable that no reasonable decision-maker could have come to it, imposes a "high hurdle", but says it is met in this case.[54]

[212] Ultimately I have decided that it is not necessary to undertake an analysis of unreasonableness in the present case. I consider Forest & Bird's arguments under this cause of action have already been more appropriately addressed in the preceding analysis: I have already found the Minister made an error of law by conflating

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53 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
54 *Associated Provincial Picture Houses Ltd v Wednesbury Corp*, above n 53.

ss 13(2)(b)(i) and (ii) and not separately identifying a "period appropriate to the stock" before applying social, cultural and economic factors to the determination of way and rate of rebuild; I have found that the HSS was a mandatory relevant consideration which the Minister failed to have regard to; and I have found that the Minister took account of an irrelevant consideration, the Industry Rebuild Plan, in determining the period appropriate to the stock under s 13(2)(b)(ii). Based on those errors, I would grant the relief sought by Forest & Bird.

Conclusion

[213] It is well accepted that the evidence available to an applicant for judicial review may point towards a number of grounds of review, sometimes overlapping.[55] That is certainly the case here. For that reason, I have not found it necessary to go on and reach a finding on the fifth cause of action.

Sixth cause of action

[214] All parties are agreed that if the Court orders the TAC decisions to be remade, then the Minister's decisions under ss 20 and 21 in relation to the TACC must also be revisited as the TACC decisions flow directly from the TAC.

Summary

[215] To summarise, I find:

(a) The Minister made an error of law, in that he did not make an assessment of the period of rebuild appropriate to the East Coast tarakihi stock as required by s 13(2)(b)(ii) of the Act.

(b) The Minister did not make an error of law in adopting an approach that had modelled a 50 per cent probability of achievement.

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55 *Attorney-General v E* [2000] 3 NZLR 257 (CA) at [55].

(c) The guidance on probability in the HSS and the HSS Operational Guidelines was a mandatory relevant consideration, and the Minister failed to have regard to this when making the 2019 Decision.

(d) The Minister had regard to an irrelevant consideration, the Industry Rebuild Plan, in relation to the period appropriate to the stock under s 13(2)(b)(ii) of the Act.

(e) Given the overlap between Forest & Bird's causes of action, it has not been necessary for me to reach a finding on unreasonableness.

(f) The 2019 TACC decisions were consequently affected by the material errors made in setting the TAC.

Relief

[216] Forest & Bird originally sought orders setting aside the 2019 TAC and TACC decisions and declaring the *Gazette* notice to be invalid to the extent that it relates to the 2019 TAC and TACC decisions, together with a direction that the Minister reconsider the 2019 TAC and TACC decisions in light of this Court's decision.

[217] Given the lapse of time between the filing of the proceeding and the hearing, at the hearing Forest & Bird sought an order that the Minister's 2019 Decision has continuing effect until the 2019 Decision can be lawfully retaken, in light of this judgment. That is so because if I were to order that the 2019 Decision be set aside, the position would revert to the (higher) levels set in 2018, which would be a perverse outcome. Forest & Bird acknowledges that, given the decision could not be retaken in time for the commencement of the 2020 fishing year, it is appropriate for declaratory relief to be granted that guides the Minister's decision in 2021. It notes, however, that the Minister's 2019 Decision providing a 25 year rebuild period should not form the "baseline" for the 2021 decision.

Outcome

[218] Accordingly, the Minister's 2019 Decision has continuing effect, pending the decision to be taken by the Minister in 2021, with effect from 1 October 2021.

[219] In making his 2021 decision as to the TAC and TACC for East Coast tarakihi, the Minister should have regard to the findings contained in this judgment.

Costs

[220] I have upheld four of Forest & Bird's causes of action (having not found it necessary to consider the unreasonableness cause of action). I indicate that for the purposes of costs, I consider Forest & Bird the successful party.

[221] If the parties are unable to agree on costs, Forest & Bird should file any submissions on costs (limited to 10 pages) within 10 working days of the date of this judgment; and the respondents should file any submissions in response (also limited to 10 pages each) within a further 10 working days.

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Gwyn J

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