



**Fisheries New Zealand**

Tini a Tangaroa

# Commercial Landing Exception Reviews Operational Guidelines

Fisheries New Zealand Information Paper No: 2023/14

ISSN 978-1-991080-84-4 (online)

ISBN 978-1-991080-85-1 (print)

**May 2023**



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These guidelines set out Fisheries New Zealand's approach to reviewing exceptions to the requirement to land all species that are subject to the Quota Management System against a new set of provisions that have been created in the Fisheries Act 1996. The guidelines are not intended to fetter the Minister's interpretation or discretion. That is, while the guidelines may apply to most situations this may not always be true and a decision maker needs to turn their mind to the specific situation as presented to them.

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# Contents

Page

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<b>1</b>	<b>Purpose</b>	<b>1</b>
<b>2</b>	<b>Background</b>	<b>1</b>
<b>3</b>	<b>Policy Intent</b>	<b>2</b>
<b>4</b>	<b>Section 72A – Minister may require or permit QMS fish to be returned or abandoned</b>	<b>3</b>
4.1	Legal context	3
4.2	Applying the exception provisions	3
4.3	First exception provision: Permit if an acceptable likelihood of survival (section 72A(2)(a))	3
4.4	Second exception provision: Permit if damaging or damaged stocks or species (section 72A(2)(b))	6
4.5	Third exception provision: Required return if there is a biological, fisheries management, or ecosystem purpose, and an acceptable likelihood of survival (section 72A(2)(c))	7
4.6	Additional considerations for an exception	9
<b>5</b>	<b>Application of statutory considerations</b>	<b>10</b>
5.1	International obligations	10
5.2	Treaty of Waitangi (Fisheries Claims) Settlement Act 1992	11
5.3	Purpose of the Fisheries Act	11
5.4	Environmental principles	11
5.5	Information principles	12
<b>6</b>	<b>Appendix One - Draft exception review schedule (as of May 2023)</b>	<b>i</b>

# 1 Purpose

1. This document provides policy guidance on assessing whether a Quota Management System ('QMS') stock or species may or must be returned or abandoned to the sea under the new 'exception provisions' that have been set out in section 72A(2) of the Fisheries Act 1996 ('the Fisheries Act').
2. These guidelines are not intended to be overly prescriptive and should provide flexibility to assess QMS species or stocks on a case-by-case basis. Assessment of exceptions may depart from these guidelines and may include relevant considerations that are not listed in this document.

# 2 Background

3. Under the Fisheries Act, commercial fishers are prohibited from returning or abandoning to the sea, or other waters, any fish or shellfish that are subject to the QMS. However, the Fisheries Act allows for exceptions to the rule.
4. Prior to 1 November 2022, exceptions to landing commercially caught QMS stocks or species were set out in Schedule 6 of the Fisheries Act and the commercial fisheries regulations. Exceptions included the mandatory return of those QMS species below a minimum legal size ('MLS'), the ability to return some QMS species to the sea if they are alive and likely to survive, and a small number of QMS species that can be returned near dead or dead.
5. The Fisheries Amendment Act 2022 ('the Amendment Act') came into effect on 1 November 2022. Section 72 of the Fisheries Act was changed to require all QMS species to be landed by commercial fishers unless an exception is provided under a new section 72A in the Fisheries Act. The amendments mean that:
  - all exceptions that allow or require commercial fishers to return or abandon QMS stocks or species to the sea are to be provided for in a new instrument,
  - the Minister for Oceans and Fisheries ('the Minister'), rather than Executive Council, has authority to add or remove stocks or species from the instrument, and
  - the Minister must be satisfied that any exceptions to the requirement to land all QMS species must meet at least one of the three new provisions that have been set out in sections 72A(2)(a), (b), or (c) of the Fisheries Act.
6. The Minister may require or permit QMS stocks or species to be returned or abandoned to sea or other waters, if they are satisfied that one of three new exception provisions are met:
  - Acceptable likelihood of survival, or
  - Damaging or damaged stocks or species, or
  - Biological, fisheries management, or ecosystem purpose, and an acceptable likelihood of survival.
7. The exception provisions are discussed in further detail in section 4 below.
8. The Amendment Act deemed the exceptions for the species in Table 1 (implemented under the previous rules) to have met at least one of the new provisions in section 72A. Details of these exceptions are specified in [section 7\(1\) in Schedule 1AA Part 3 of the Fisheries Act](#). These species have had or will have (for the exceptions currently found in the commercial fishing regulations), their exceptions continued indefinitely in a new instrument - the [Fisheries \(Landing and Discard Exceptions\) Notice](#) ('the Notice').

**Table 1. Continuing exceptions to the requirement to land all QMS species as provided for in the Fisheries Act.**

Species				
Rock lobsters	Prawn killer	Kina	Pipi	Bladder kelp
Deepwater crabs	Cockles	Green-lipped mussels	Surf clams	Pāua
Paddle crabs	Dredge oysters	Knobbed whelk	Freshwater eels	Scallops

9. However, there are 26 QMS species with exceptions approved under the previous rules (primarily finfish and sharks, see Table 2) that need to be assessed against the new exception provisions to determine whether they should remain as exceptions and be provided for in the Notice. Details of these exceptions requiring review are specified in [sections 6 and 7\(2\) in Schedule 1AA Part 3 of the Fisheries Act](#).

**Table 2. Existing exceptions to the requirement to land all QMS species that need to be assessed against new exception provisions in the Fisheries Act.**

Species				
Red cod	Kingfish	Blue shark	Butterfish	School shark
Spiny dogfish	Rough Skate	Mako Shark	Sea cucumber	Blue cod
Southern Bluefin	Smooth Skate	Porbeagle shark	Snapper	Queen scallop
Swordfish	Blue Moki	Trevally	Toothfish	Rig
Flatfish	Tarakihi	Scallop	Paddle crab (regional – TBC)	Rock lobster (regional - TBC)
Freshwater eels (regional - TBC)				

10. These remaining exceptions are to be reviewed by 2026 or will be revoked (see draft review schedule in **Appendix One**). The government has committed to reviewing 75 percent of MLS returns and 97 percent of live release exceptions in the first two years of implementation of the Amendment Act (i.e., by September 2024).

### 3 Policy Intent

11. The fisheries management system is designed around the purpose of the Fisheries Act, which is to provide for the utilisation of fisheries resources while ensuring sustainability.
12. The total allowable catch ('**TAC**') is the main control for ensuring that a stock is fished sustainably over time within the fisheries management system. Within the TAC, allowances for customary fishers, recreational fishers, and other sources of mortality caused by fishing are set, with commercial fishing limited by the total allowable commercial catch ('**TACC**'). Commercial fishers are required to cover all their catch of QMS species within Annual Catch Entitlements ('**ACE**') where ACE is an entitlement to catch a proportion of the TACC each year within the relevant Quota Management Area. If commercial fishers are unable to cover their catch with ACE, they are required to pay a deemed value, which is a fee generally set at levels to incentivise fishers to cover their catch with ACE.
13. Good information on total removals of fish supports robust decision-making when setting catch limits. Some sources of this mortality can only be estimated, but in relation to the TACC, accurate reporting supports a better fisheries management system.
14. To ensure that catch is appropriately accounted for in the system and that the incentives inherent in the system operate effectively, the Fisheries Act prohibits commercial fishers from returning QMS species to the sea, with some exceptions. The ability to provide exceptions was clarified and tightened by the Amendment Act to remove ambiguity around obligations of fishers, strengthen incentives to avoid unwanted catch, and reduce waste.
15. All catch and release practices come with a risk to survival, to varying degrees. Section 72 of the Fisheries Act establishes the general obligation to not return or abandon QMS species to sea or waters from which they are taken. Best practice is therefore to avoid catching unwanted species or sizes in the first place, through gear innovation or changes to fishing practices.
16. The amendments are designed around the following requirements:
- all fish caught, whether QMS species or not, must be reported as specified in the [Fisheries \(E-logbook Users Instructions and Codes\) Circular 2022](#),
  - all QMS fish mortality caused by commercial fishing must be reported and accounted within the fisheries management system, and

- all QMS species caught by commercial fishers must be landed unless included in the Notice issued by the Minister to provide for an exception.<sup>1</sup>
17. The policy intent of these changes is to encourage selectivity (so that fishers catch less unwanted fish and make greater use of the fish they do catch) by minimising the ability for fishers to lawfully return QMS fish to the sea.

## 4 Section 72A – Minister may require or permit QMS fish to be returned or abandoned

### 4.1 Legal context

18. As noted in para 6, under section 72A the Minister may make instruments that allow, or require, QMS stocks or species, and aquatic life to be returned or abandoned to sea. Section 72(A)(2) says an instrument made under section 72A may:
- a) permit a stock or species to be returned to or abandoned in the sea or other waters from which it was taken if the Minister is satisfied that the stock or species has an acceptable likelihood of survival if returned or abandoned in the manner specified by the instrument (**‘first exception provision’**), or
  - b) permit a stock or species to be returned to or abandoned in the sea or other waters from which it was taken if the Minister is satisfied that the stock or species:
    - (i) would damage other stocks or species taken by the commercial fisher if retained (e.g., ammoniating species); or
    - (ii) is damaged as a result of unavoidable circumstances (e.g., diseased or predated fish), (**‘second exception provision’**), or
  - c) require a stock or species to be returned to or abandoned in the sea or other waters from which it was taken if the Minister is satisfied that the return or abandonment is for a biological, a fisheries management, or an ecosystem purpose and the stock or species has an acceptable likelihood of survival if returned or abandoned in the manner specified by the instrument (**‘third exception provision’**).

### 4.2 Applying the exception provisions

19. Before 30 September 2026, Fisheries New Zealand will be reviewing the 26 QMS species exceptions against the new exception provisions. We do not propose to assess a QMS species or stock against all three exception provisions as part of each review. Each existing exception that requires review under the amended Fisheries Act will generally have a close fit with at least one of the three new exception provisions.
20. During pre-engagement in advance of each exception review, we will test with Iwi Fisheries Forums, industry representatives and other stakeholder groups the proposed exception provision(s) that will be used to inform an assessment. This will help avoid ruling out or ignoring the potential use of other provisions for a stock or species if there is information available to support that additional analysis.

### 4.3 First exception provision: Permit if an acceptable likelihood of survival (section 72A(2)(a))

21. Under the first exception provision, the Minister **may permit** a stock or species to be returned to or abandoned in the sea or other waters from which it was taken if they are satisfied that the stock or species has an acceptable likelihood of survival if returned or abandoned in the manner specified in the Notice.
22. Acceptable likelihood of survival is not defined in the Fisheries Act, however, section 72A(3) outlines matters that the Minister must have regard to (see section 4.3.1 below). Given the policy intent, we consider that an acceptable likelihood of survival means that a QMS stock or species is more likely than not to survive when released. However, it is at the Minister’s

<sup>1</sup> Note there are also general defence provisions provided under s 72 of the Act.

discretion whether the likelihood of survival for a particular exception is “acceptable”, which may not follow this view.

23. In determining what is acceptable, the Minister needs to consider the cumulative likelihood of survival of a stock or species at each stage of catch, handling, and release. For example, some species caught by bulk harvesting methods, subject to long sorting times on deck and exposure to air, could incur high levels of mortality. However, if that species is alive at the point of return, there may be information that suggests it is likely to survive post-release.
24. Alternatively, for a species caught by a more selective fishing method, with shorter handling and sorting periods, more of the species caught may be alive at the point of return.
25. The Minister will consider, based on the circumstances (i.e., how the stock or species is caught, handled, and returned) whether the release of that stock or species has an acceptable likelihood of survival.

### *Conditions*

26. We note that the Minister may impose any conditions or requirements they consider appropriate to give effect to their decision on what is acceptable (see section 72A(4) of the Fisheries Act and section 4.6 below for further information). For example, a condition may be that the species must be alive at the point of return or may only be returned if caught using a certain method.

#### **4.3.1 Informing acceptable likelihood of survival under section 72A(2)(a)**

27. Likelihood of survival will be informed (where information is available) by the:
  - species biology<sup>2</sup>,
  - quantitative, anecdotal, or other qualitative information on the species:
  - mortality when caught using certain methods or under different environmental conditions,
  - post-release survivability following different methods/conditions of capture, or
  - likely effectiveness of handling practices that provide an acceptable likelihood of survival that might be required for an exception.
28. Fisheries New Zealand notes that scientific estimates of catch mortality and post-release survival are very place-based and heavily influenced by the design of a study, which may not reflect normal fishing practices. While such studies are useful to inform and help characterise estimates of survival, they are not absolute.
29. Determining whether a higher or lower likelihood of survival may be acceptable to the Minister will be influenced by a range of factors. Best available information, including views and information provided by tangata whenua and stakeholders, will inform the Minister’s exercise of that discretion on a case-by-case basis.
30. In deciding the acceptable likelihood of survival under s 72A(2)(a), the Minister must have regard to several matters specified in section 72A(3)(a), (further discussed below):
  - a) The sustainability of the stock or species, and
  - b) The method by which the stock or species is taken, and
  - c) The handling practices for the stock or species taken, and
  - d) The social, cultural, and economic factors that the Minister considers relevant.

### Sustainability of the stock or species

31. When considering what is an acceptable likelihood of survival the Minister must have regard to the sustainability of the stock or species. Ensuring sustainability means maintaining the potential of the fisheries resource to meet the reasonably foreseeable needs of future generations, while avoiding, remedying, or mitigating the adverse effects of fishing on the aquatic environment.<sup>3</sup> This could include consideration of:

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<sup>2</sup> If information for the specific species or stock was either unavailable or unreliable it is appropriate to consider information on relevant closely related species or species information from other jurisdictions.

<sup>3</sup> See section 8 of the Fisheries Act 1996.

- the stock's status (i.e., biomass considerations against the stock's management target)
  - predicted climate scenarios' influence on stocks (i.e., distribution and abundance of stocks growth and reproduction in relation to increasing sea surface temperatures, ocean acidification, habitat change, cumulative impacts) where information is available.
32. For example, a sustainability concern exists for a stock when its biomass is below the management target for a prolonged period (or where the Harvest Strategy Standard requires a stock rebuild plan).<sup>4</sup> Stocks with sustainability concerns are managed to increase biomass towards or above the target in a way and at a rate acceptable to the Minister. Catch settings and other management controls are used to support this outcome, not a fisher's choice to return (or not) a stock or species to the sea under this exception provision.
33. In a situation where there is a sustainability concern, we consider there to be a greater weighting on a higher likelihood of survival of any release to strengthen the incentive on fishers to avoid the stock or species in the first instance. That is, the Minister may want greater confidence that the stock or species returned is going to be alive and continue to survive upon its return. The return of a stock or species with a lower likelihood of survival is unlikely to support productivity or rebuild and weakens the incentives for fishers to avoid catching them in the first place.
34. Climate change may also influence sustainability and survivability as warming sea surface temperatures may reduce post-release survival for some species compared to current levels. The Minister may not find the likelihood of survival acceptable if it is expected to reduce with warming waters. However, we note that providing for exceptions in the Notice means these exceptions and the conditions on them can be adjusted quickly and changes made as new information becomes available.

### Method used

35. Fishing method is a key factor influencing post-release survival. In considering whether a species or stock has an acceptable likelihood of survival, what Fisheries New Zealand recommends, or the Minister decides, may be constrained to only certain methods or how certain methods are used.
36. The characteristics of certain fishing activities may reduce the likelihood of survival, or create greater uncertainty, than others. Fisheries New Zealand will consider the damage that may be caused to a species because of a method's:
- gear type, configuration, and design,
  - deployment duration,
  - depth of capture, and
  - typical catch volumes.
37. Analysis of the method used for a particular species or stocks capture allows for differences in fishing practices to be distinguished (i.e., whether capture in a conventional trawl net is more damaging than in a precision seafood harvesting system). This analysis may also show variations between stocks and fisheries. For example:
- the shallower depth of captures for a stock in one area may increase survivability compared to another area where the fishery occurs in deeper waters, or
  - practices being employed for capture (i.e., hook types) that vary spatially and could impact the condition of the fish caught and likelihood of survival when released.

### Handling practices

38. Handling refers to how the stock or species are most likely going to be handled after they are removed from the fishing gear, but before and as they are returned. Handling practices can refer to:
- time between the catch being brought on deck and it being returned to the water,

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<sup>4</sup> Harvest Strategy Standard for New Zealand Fisheries: <https://www.mpi.govt.nz/dmsdocument/728-Harvest-Strategy-Standard-for-New-Zealand-Fisheries>



- handling method or use of tools to handle catch (for example, using spikes, gaffs, shovels, gloves, or fish sorters),
  - how they are handled on deck before being returned (for example, kept cool with running sea water, exposed on the deck to sun or shaded), and
  - how catch is returned to the water (for example, via release devices).
39. After a capture event, time on deck, air exposure, and handling methods have a significant effect on post-release survival. Injuries may also be incurred accidentally on board and upon return to the sea. Mitigating factors used on board (i.e., careful handling to avoid hand / instrument contact with the eyes or gills), quick release and to a depth suitable for the species, increases post-release survivability. Consequently, the likelihood of survival may be only be acceptable if certain practices are undertaken to ensure that likelihood is achieved.

#### Social, cultural, and economic factors that the Minister considers relevant

40. Assessment of relevant social, cultural, or economic factors is a provision that allows the Minister to consider other benefits and costs when deciding what is an acceptable likelihood of survival. Their consideration, however, sits in the context and must be balanced against the other factors the Minister must have regard to.
41. **Social factors** could include:
- The social benefits to others in allowing the return of the fish, should it continue to survive upon return. A species more valued by customary and recreational fishers, or from a conservation perspective, or managed as a non-target commercial fishery, could provide a benefit if returned alive as it enables its use by others. Consideration of this benefit might lead to higher likelihoods of survival being considered more acceptable.
42. **Cultural factors** could allow for the consideration of Mātauranga Māori and traditional practices, as well as provide for Māori to exercise their rangatiratanga in respect of traditional fisheries. An assessment of this factor could consider (but is not limited to):
- whether it is a taonga species (as listed in Settlement Acts, included in Iwi Fisheries Forum Plans, or as recorded by Fisheries New Zealand), and
  - the Māori perspective on what is an acceptable likelihood of survival (at the species or at a stock level), and
  - tangata whenua views or cultural practices of returning fish to the sea.<sup>5</sup>
43. For example, the return of a species that is likely to survive may provide local cultural benefits to iwi, making it easier for them to gather a species that is of importance to them. To provide for future harvest benefits, the Minister may find the likelihood of survival acceptable only if there is a high chance it is alive when returned.
44. **Economic factors** could allow for consideration of costs and benefits to commercial fishers when determining the likelihood of survival. This could include fishers' ability to maximise the value of the species that they catch (i.e., the preferred size of a species or the ability to return species and make space to catch and land those that are more desirable). A lower likelihood of survival may be considered acceptable by the Minister if the economic benefits are significant when balanced with the other matters that the Minister must have regard to.

#### **4.4 Second exception provision: Permit if damaging or damaged stocks or species (section 72A(2)(b))**

45. Under the second exception provision, the Minister **may permit** a stock or species to be returned or abandoned if it is likely to damage other stocks if retained (for example, an ammoniating species) or are damaged as a result of unavoidable circumstances (for example, diseased or predated fish). There is no requirement for the Minister to be satisfied that the stock or species has an acceptable likelihood of survival under this provision.

<sup>5</sup> Tangata whenua is defined in the Fisheries Act as: in relation to a particular area, means the hapū, or iwi, that is Māori and holds mana whenua over that area.

#### 4.4.1 Stocks or species that would damage other catch if retained

46. Some stocks or species may damage other catch if they are retained by fishers and stored together. The main example here are those species that ammoniate after capture (e.g., sharks) or have physical features that could damage fish held in proximity (e.g., spines on spiny dogfish).
47. Consideration will be given to what factors are influencing the damage caused and whether these could be eliminated. This could include analysis of:
  - why, and to what degree, would retaining the species cause damage to other catch,
  - whether normal practice has been, or is, to separate out or process stocks or species that would damage other catch, and whether this is feasible to continue or start, and
48. what factors are influencing the damage that may be caused (fishing methods or handling practices; limitations on holding capacity).

#### 4.4.2 Stocks or species that are damaged as a result of unavoidable circumstances

49. In some cases, stocks or species may be damaged from unavoidable circumstances, such as:
  - disease – includes catch infected by viruses, bacteria, parasitises or fungi that mean the fish is unsuitable for consumption or use on food safety grounds.
  - contamination – includes catch that has been tainted by foreign objects and are unsuitable for consumption or use on food safety grounds.
  - predation – includes catch that has been predated, decomposed, cannibalised, or infested by sea lice.
50. The Minister has discretion over what unavoidable means. Fisheries New Zealand considers unavoidable to mean that the fisher could not reasonably avoid the damage. The circumstances around damage caused by predation, for example, should be carefully considered to determine whether the fishing practices could be adjusted to reduce the likelihood or consequence of these events. For example, fishers may reduce the amount of time a set net is soaking in the water to lower the likelihood of lice damage. Consideration of this exception provision will include discussion on whether:
  - the damage to the stock or species was unavoidable, and
  - any stock or species returned is unsellable as a result of damage / contamination.

#### *Conditions*

51. As noted above, the Minister may impose any conditions or requirements they consider appropriate to give effect to their decision (see section 72A(4)(c) of the Act and section 4.6 below for further discussion).
52. Fisheries New Zealand considers that conditions are likely to apply to any returns under this exception provision as damage will generally only apply to some of the fish that have been caught. That is, we do not anticipate (in most circumstances) all catches of any stock or species will have incurred unavoidable damage and should be able to be returned.

#### 4.5 Third exception provision: Required return if there is a biological, fisheries management, or ecosystem purpose, and an acceptable likelihood of survival (section 72A(2)(c))

53. Under the third exception provision, the Minister **may require** a stock or species be returned if they are satisfied the return is for a biological, fisheries management or ecosystem purpose, and the species or stock has an acceptable likelihood of survival if returned or abandoned in the manner specified by the Notice.

#### 4.5.1 Biological, fisheries management or ecosystem purpose

54. Firstly, the Minister **must** be satisfied the return is required for a biological, fisheries management or ecosystem purpose. These terms are not defined in the Fisheries Act, but widely used in the Act. There may be a degree of overlap between the different purposes, and a return may serve one or more purposes.
55. Fisheries New Zealand considers:
- **A biological purpose** is a purpose that supports a stock or species survival and reproductive capability. For example, the mandatory return of pregnant or egg bearing females, which are an important component of stock productivity.
  - **A fisheries management purpose** is a rule or setting that supports the purpose and principles of the Fisheries Act. For example, the mandatory return of a tagged fish will avoid compromising research underway to help assess stock status. Or the mandatory return of a species under certain conditions may act as an allocative tool to give another sector access to the species. Note consideration of any fisheries management purpose should also be made in light of the Fisheries Act's obligations under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Deed of Settlement. The Minister is required to develop policies to protect and provide for Māori to exercise rangatiratanga in respect of traditional fisheries.
  - **An ecosystem purpose** is the species' role and importance in the ecosystem (i.e., their position in the food web, "what it eats and what eats it"). A species' ecological importance can be represented through the consequences of changing its abundance (e.g., whether a reduction in its abundance will have a significant negative consequence on another species or the habitat it lives in) or the role a certain sized species may play as a predator or breeder. Fisheries New Zealand does not consider an ecosystem purpose to include how a fish could be opportunistically used within the ecosystem following commercial capture and return of fish, particularly if they are unlikely to survive post release. An example of an exception for an ecosystem purpose might be the mandatory return of a keystone species of a certain size to ensure its functions in the ecosystem (for which no other species can fill) remains intact.

#### 4.5.2 Acceptable likelihood of survival

56. Secondly, before granting an exception under this provision the Minister is required to be satisfied that the stock or species has an acceptable likelihood of survival if returned or abandoned in the manner specified by the Notice.
57. As with the first exception provision, Fisheries New Zealand considers that an acceptable likelihood of survival means that a QMS stock or species is more likely than not to survive when released. However, the Minister may take a different view. The Minister also does not have to have regard to the matters relevant to acceptable likelihood of survival under the first exception provision (section 72A(3) and see para 30 above). Nonetheless, the below considerations will inform likelihood of survival:
- the species physiology (or similar species),
  - how a stock or species is caught (between and within certain methods, and areas),
  - the handling practices used post capture before a return, and
  - the environmental conditions (where relevant) the stock or species may be exposed to.

#### *Conditions*

58. As noted for the first exception provision, the Minister may impose any conditions or requirements they consider appropriate to give effect to their decision on what is acceptable (see section 72A(4)(c) of the Act and section 4.6 below for further discussion).

## 4.6 Additional considerations for an exception

59. Table 3 outlines additional considerations for the Minister when providing for an exception under section 72A of the Fisheries Act.

**Table 3. Additional considerations for the Minister when creating an instrument under section 72A .**

Section considerations	Requirements
<p><b>Section 72A(4)</b> The Minister may consider broad conditions when creating the instrument</p>	<p>The instrument may also -</p> <ul style="list-style-type: none"> <li>a) provide that it applies to the stocks or species, or classes of stocks or species, specified in the instrument by reference to size, weight, or other physical characteristics:</li> <li>b) provide that it applies in relation to— <ul style="list-style-type: none"> <li>i. the fishing methods, the use of fishing gear, or in the circumstances specified in the instrument; or</li> <li>ii. the classes of fishing methods, fishing gear, or circumstances specified in the instrument:</li> </ul> </li> <li>c) impose conditions and requirements that the Minister considers appropriate.</li> </ul>
<p><b>Section 72A(6)</b> The Minister <u>must</u> consult</p>	<p>Before making, amending, replacing, or revoking an instrument under section 72A, the Minister must consult any persons or organisations that the Minister considers are representative of the classes of persons having an interest in the proposed action.</p>

### 4.6.1 Section 72A(4) - Conditions

60. The Minister has broad discretion on the way in which a QMS stock or species may or must be returned or abandoned to the sea. The provisions of a return based on how the QMS species has been caught or conditions for its return may be used, for example, to:

- help achieve a likelihood of survival that the Minister considers acceptable, or
- restrict the mandatory return of a species to provide for a biological, fisheries management or ecosystem purpose to some physical characteristic (e.g., a size or when carrying eggs).

61. For exceptions that require an acceptable likelihood of survival, Fisheries New Zealand’s position is that, in most cases, a condition should be applied that the stock or species must be alive at the time of release. Whether a fish is alive at the time of release would be determined by the fisher.

62. However, there may be cases where the Minister is satisfied that the cumulative likelihood of survival from capture, handling and release is acceptable without a live release condition. For example, what is acceptable may be achieved when a certain method or handling practice is used and conditioned instead.

#### *Effectiveness, practicality, and monitoring*

63. A key consideration when assessing the need for and type of conditions, is the ability to verify that they are being followed, the cost and practicality of imposing the condition and the associated benefit. Costs may arise from conditions that:

- change operational practices on a vessel and require more time or crew,
- make operational practices on a vessel impractical,
- give rise to health and safety issues for crew, and
- making monitoring requirements impractical.

64. We note that there are always limitations in ensuring adherence to any conditions of a return, as per previous rules. For example, monitoring the return of any stock or species if conditioned as being alive at the point of return (as determined by the fisher) can be difficult. Consequently, in some circumstances there may be additional conditions required to provide a greater likelihood that the fish could be alive (e.g., only enabling such returns when caught using a certain method that has a low likelihood of causing damage or death in the first place).

65. Industry input into the workability of any proposed conditions for the return of a particular stock or species will be important. The sector is well placed to help inform the advice to the Minister on the relative trade-offs between the costs or practical challenges associated with any conditions or requirements that may apply to a return versus the benefit in being provided an exception for a return of a particular species or stock (if a trade-off is required).

## 5 Application of statutory considerations

66. In deciding whether to provide for, or remove, an exception in section 72A the Minister must take into account the purpose and principles of the Fisheries Act (Table 4).

**Table 4. Summary considerations of the purpose and principles of the Fisheries Act as part of an exception review.**

Section	Requirements
<b>Section 5(a)</b> International obligations	The Minister must act in a manner consistent with New Zealand's International obligations relating to fishing.
<b>Section 5(b)</b> Treaty obligations	The Minister must act in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ( <b>'the Settlement Act'</b> ).
<b>Section 8</b> The purpose of the Fisheries Act	The purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability. <ul style="list-style-type: none"> <li>• "Ensuring sustainability" is defined as: "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment".</li> <li>• "Utilisation" of fisheries resources is defined as "conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing."</li> </ul>
<b>Section 9</b> Environmental principles	The Minister must take into account the following environmental principles: <ol style="list-style-type: none"> <li>a) associated or dependent species should be maintained above a level that ensures their long-term viability,</li> <li>b) biological diversity of the aquatic environment should be maintained, and</li> <li>c) habitat of particular significance for fisheries management should be protected.</li> </ol>
<b>Section 10</b> Information principles	The Minister must take into account the following information principles: <ol style="list-style-type: none"> <li>a) decisions should be based on the best available information,</li> <li>b) decision makers should consider any uncertainty in the information available in any case,</li> <li>c) decision makers should be cautious when information is uncertain, unreliable, or inadequate, and</li> <li>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.</li> </ol>

### 5.1 International obligations

67. The Minister must act consistently with New Zealand's international obligations relating to fishing under section 5 of the Act when making a decision. New Zealand is party to several international conventions including the Convention of Biological Diversity, the United Nations Convention on the Law of the Sea, and associated UN Fish Stocks Agreement. These conventions generally require application of a precautionary approach to fisheries management and maintaining a healthy marine ecosystem.
68. A precautionary approach means that decision-makers are more cautious where information is uncertain, unreliable, or inadequate. The Minister will need to consider the extent of available evidence to inform the assessment against the relevant exception provision(s) and its limitations.

## 5.2 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

69. The Fisheries Act must also be interpreted, and decision made, in a manner consistent with the provisions of the Settlement Act. The Settlement Act is to be interpreted in a manner that gives best effect to the Deed of Settlement. Section 10 of the Settlement Act provides that non-commercial customary fishing rights continue to be subject to the Principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown. Section 10 also requires the Minister to consult and develop policies to help recognise for the use and management practices of tangata whenua in the exercise of non-commercial fishing. The Minister must consider if proposals would impose restrictions on non-commercial customary fishing rights, which are authorised by kaitiaki.
70. The Settlement Act requires the Minister to develop policies that protect and provide for Māori to exercise their rangatiratanga in respect of traditional fisheries, including having regard to kaitiakitanga.

## 5.3 Purpose of the Fisheries Act

71. The Minister's decision whether to provide an exception or not must be made considering the purpose of the Act, as set out in section 8: "To provide for the utilisation of fisheries resources while ensuring sustainability".
72. The Supreme Court has stated that the purpose statement incorporates "the two competing social policies reflected in the Act" and that "both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system". However, it has also made clear that "in the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability". Utilisation is to be provided for, but sustainability is to be ensured.
73. A proposed exception or removal of an exception will be assessed against how it provides for utilisation, enables people to provide for their social, economic, and cultural wellbeing or not. This includes how the proposal may impact (or not) customary fishers, recreational fishers, the commercial sector, and environmental interests.
74. The proposal will also be assessed in the context of ensuring sustainability of the species or stock, and its broader effects on the aquatic environment.

## 5.4 Environmental principles

75. Decision-makers, when making decisions in relation to the utilisation of fisheries resources or ensuring sustainability, section 9 of the Fisheries Act says must take into account the following environmental principles:
- a) associated or dependent species should be maintained above a level that ensures their long-term viability.
  - b) biological diversity of the aquatic environment should be maintained, and
  - c) habitat of particular significance for fisheries management should be protected.
76. The Minister must take into account the impact of a proposed exception, an amended exception, or removal of an exception in this light. There may be impacts or benefits on these principles that may be species or even area specific.

### 5.4.1 Associated or dependent species

77. Associated or dependent species are defined in the Act as any non-harvested species taken or otherwise affected by the taking of a harvested species. Associated or dependent species, such as marine mammals and seabirds, are examples of non-harvested species and under the Act should be maintained above a level that ensures their long-term viability.
78. This factor may take into consideration the interaction and role the QMS species or stock in question has in relation to associated or dependent species (e.g., as a prey preference). For example:
- the return of a stock or species may provide an important food source for some seabirds but may also interfere with the natural trophic interactions with associated and dependent species, or

- not providing for a return may (if the volume of previous returns was significant relative to overall returns) reduce the attraction of seabirds and marine mammal to vessels when fish are returned to the sea and may reduce injury or death from contact with fishing gear.

## 5.4.2 Biological diversity

79. The Act defines “biological diversity” as the variability among living organisms, including diversity within species, between species and of ecosystems. When making a decision under the Act, the Minister must take into account that biological diversity of the aquatic environment should be maintained. For example, the return of a stock or species (given expected or potential volumes) may or may not add significantly to the diversity of the stock or species present in the area.

## 5.4.3 Habitats of particular significance

80. Habitat of particular significance for fisheries management is not defined in the Act. Fisheries New Zealand recently consulted on draft guidelines for identification of habitats of particular significance for fisheries management. Alongside this, Fisheries New Zealand consulted on operational proposals to support the consideration of habitats of particular significance protection when making fisheries management decisions. Fisheries New Zealand considers protect in this context means taking measures that would avoid, remedy, or mitigate the adverse effect of a decision that could undermine the function the habitat provides for the fisheries resource.
81. The Minister must take into account the effect of a proposed exception, an amended exception, or removal of an exception, on the function of any habitat of particular significance in the relevant fishery where applicable.

## 5.5 Information principles

82. When making decisions in relation to the utilisation of fisheries resources or ensuring sustainability, section 10 says that the Minister must take into account the following information principles:
- decisions should be based on the best available information,
  - decision-makers should consider any uncertainty in the information available in any case,
  - decision-makers should be cautious when information is uncertain, unreliable, or inadequate, and 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.
83. The degree of uncertainty and the adequacy of the available information are matters for the Minister to assess and weigh in making decisions on whether to require or permit any QMS fish or other aquatic life to be returned or abandoned to the sea.

## 6 Appendix One - Draft exception review schedule (as of May 2023)

Year	Sustainability Round	Consultation Tentatively Begins	Species
2023-24	N/A	May 2023	Red cod
	October	July 2023	Spiny dogfish Rough skate Smooth skate
2024-25	April	December 2023	Kingfish Blue shark Mako shark Porbeagle shark Butterfish
	October	June 2024	Snapper Southern bluefin School shark Blue cod
2025-26	April	December 2024	Queen scallop Swordfish Moki Trevally Toothfish Sea cucumber
	October	June 2025	Rig Flatfish Tarakihi
2026-27	April	December 2025	Scallop Paddle crab (TBC) Rock lobster (TBC)
	October	June 2026	Eels (TBC)