



# **Fisheries New Zealand review of commercial landing exceptions**

## **Overview of policy context and legislative requirements in relation to exception reviews**

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# Contents

Page

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<b>1</b>	<b>Introduction</b>	<b>1</b>
<b>2</b>	<b>Policy context</b>	<b>1</b>
2.1	Reviewing commercial landing requirements	1
<b>3</b>	<b>Legal requirements</b>	<b>2</b>
3.1	Providing for exceptions to the landing requirement	2
3.2	Matters the Minister must have regard to when considering acceptable likelihood of survival under the first provision	3
3.3	Consultation requirements	3
<b>4</b>	<b>Statutory considerations</b>	<b>3</b>
4.1	Section 5(a) – International obligations	3
4.2	Section 5(b) - Treaty of Waitangi (Fisheries Claims) Settlement Act 1992	3
4.3	Section 8 - Purpose of the Fisheries Act	3
4.4	Section 9 – Environmental principles	4
4.5	Section 10 – Information principles	5

# 1 Introduction

1. Fisheries New Zealand (FNZ) periodically seeks input on proposed exceptions to landing requirements for selected fish stocks/species in New Zealand's Quota Management System (QMS).
2. This document provides an overview of key legal requirements as they relate to decision making on commercial landing exceptions and signposts the relevant provisions in the Fisheries Act 1996 (**the Fisheries Act**). You can access the full version the Fisheries Act at [www.legislation.govt.nz](http://www.legislation.govt.nz).

## 2 Policy context

3. Under the Fisheries Act, there is a general rule that commercial fishers must land all QMS species unless there is an exception. Changes to the Fisheries Act in 2022 tightened and simplified the rules for how an exception to the landing requirement can be provided. That is, the Minister for Oceans and Fisheries may determine that a QMS species or stock may or must be returned to the sea based on a new set of provisions (see section 3 of this paper for more detail).
4. The new rules are intended to further encourage commercial fishers to catch less unwanted fish over time, make greater use of the fish they do catch by minimising their ability to lawfully return QMS fish to the sea, and help improve the accuracy of fisher reported catch information. All catch and release practices come with a risk to survival, to varying degrees. Best practice is therefore to avoid catching unwanted species or sizes in the first place, through gear innovation or changes to fishing practices.
5. There are economic incentives inherent within the QMS (for example, balancing commercial catch with Annual Catch Entitlement (ACE) or paying deemed values) for the commercial sector to maximise value and manage catch within set limits. For these incentives to operate effectively they require accurate reporting of the fish that has been caught and dead fish to be accounted for in the fisheries system (e.g., attributed to either the individual fisher or at a sector level across quota owners).
6. The ability to return QMS fish to the sea creates opportunity to manage (legally) or avoid (illegally) costs and can undermine these economic incentives. Returning QMS fish to the sea risks the under- or misreporting of the volumes or species that have been taken unless there are effective tools in place to support verification of those returns. The ability to grant exceptions, however, recognises the pragmatic benefits of legal discarding in some circumstances (for example, where fish are alive and likely to survive).
7. When assessing any landing exception, FNZ considers it important to weigh the relative costs and benefits of optimal operation of the QMS against allowing or requiring QMS fish to be returned to the sea under certain circumstances. The new provisions provide the Minister for Oceans and Fisheries with significant discretion around whether a landing exception should be provided. However, in assessing whether an exception should be granted there is a need to carefully consider the fundamental principle that dead QMS fish (or those unlikely to survive post release) should in most cases be landed, reported, and accounted for in the QMS for the system to operate effectively.
8. FNZ considers that landing exceptions should only be granted in circumstances where integrity of the reporting regime (that is, accurate reporting of mortality caused by commercial fishing) can be assured. In providing for a return, the Minister may (for example) require certain conditions to meet a provision or to support this reporting.

### 2.1 Reviewing commercial landing requirements

9. As of 2023, there are over 20 QMS species with existing exceptions that, under the 2022 amendments to the Fisheries Act, must be reviewed by September 2026 (or earlier) as set by regulations. The reviews will assess whether a species meets the relevant new provision(s) and

can continue, or whether it needs to be amended or removed. If an exception is provided for, it will be under the new Fisheries (Landing and Discard Exceptions) Notice.

10. In addition, new commercial landing exceptions proposed may be assessed against the new provisions to determine whether other returns should be provided for. If such requests are received, FNZ will undertake a preliminary assessment to determine whether there are sufficient grounds to warrant a review, based on the information available and the alignment of the proposed exception with the provisions of the Fisheries Act.
11. [The Commercial Landing Exception Reviews: Operational guidelines](#) provides policy guidance on assessing whether a QMS stock or species may or must be returned or abandoned to the sea under the new exception provisions. Assessment of exceptions may depart from these guidelines and may include relevant considerations to a particular species or stock.

### 3 Legal requirements

12. Section 72 of the Fisheries Act establishes the general obligation to not return or abandon QMS species to sea or any other waters unless there is an exception.

#### 3.1 Providing for exceptions to the landing requirement

13. Under section 72A, the Minister may require or permit a QMS species or stock to be returned or abandoned and may make instruments for the purposes of section 72(2) or 72(3) of the Fisheries Act. An instrument made under section 72A(2) 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 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 (for example, an ammoniating species); or
    - ii. is damaged as a result of unavoidable circumstances (for example, diseased or predated fish), (**'second provisions'**), 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 provision'**).
14. In providing for an authorised or mandatory return under s72A, the Minister may:
  - a) Provide that it applies to the stock or species, or classes of stocks or species, specified in the instrument by reference to size, weight, or other physical characteristics:
  - b) Provide that it applies in relation to –
    - i. The fishing methods, the use of fishing gear, or in the circumstances specified in the instrument; or
    - ii. The classes of fishing methods, fishing gear or circumstances specified in the instrument
  - c) Impose conditions and requirements that the Minister considers appropriate.

### **3.2 Matters the Minister must have regard to when considering acceptable likelihood of survival under the first provision**

15. In considering the acceptable likelihood of survival of a stock or species under the first provision, the Minister must have regard to—
- 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.

### **3.3 Consultation requirements**

16. 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.

## **4 Statutory considerations**

17. The Minister's decision whether to provide an exception or not must be made considering the purpose and principles of the Fisheries Act.

### **4.1 Section 5(a) – International obligations**

18. When making a decision under the Fisheries Act, section 5(a) requires the Minister to act consistently with New Zealand's international obligations relating to fishing. 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 United Nations Fish Stocks Agreement. These conventions generally require application of a precautionary approach to fisheries management and maintaining a healthy marine ecosystem.
19. A precautionary approach means that decision-makers are more cautious where information is uncertain, unreliable, or inadequate (refer also to the information principles below). The Minister will need to consider the extent of available evidence to inform the assessment against the relevant exception provision(s) and its limitations.

### **4.2 Section 5(b) - Treaty of Waitangi (Fisheries Claims) Settlement Act 1992**

20. The Fisheries Act must also be interpreted, and decisions made, in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the **Settlement Act**). Section 3 of the Settlement Act says it is to be interpreted in a manner that gives best effect to the Deed of Settlement. Section 10(a) 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.
21. Section 10(b) requires the Minister to consult with tangata whenua and develop policies to help recognise for the use and management practices of Māori in the exercise of non-commercial fishing rights. Consistent with this section, FNZ has worked with iwi to develop engagement processes to inform FNZ on how tangata whenua wish to exercise kaitiakitanga with respect to species in which they share rights and interests, and how those rights and interests may be affected by providing (or not) a commercial landing exception for a QMS species.

### **4.3 Section 8 - Purpose of the Fisheries Act**

22. The Minister's decision whether to provide an exception or not must be made considering the purpose of the Fisheries Act: "To provide for the utilisation of fisheries resources while ensuring sustainability".

23. Ensuring sustainability means maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations while avoiding, remedying or mitigating the adverse effects of fishing on the aquatic environment.
24. 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.<sup>1</sup>
25. A proposed exception or an exception under review will be assessed against how it provides for utilisation, and 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.
26. 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.

#### **4.4 Section 9 – Environmental principles**

27. Decision-makers, when making decisions in relation to the utilisation of fisheries resources or ensuring sustainability, must take into account that:
  - 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.
28. 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 are species or even area specific.

##### *Associated or dependent species*

29. Associated or dependent species are defined in section 2 of the Fisheries Act as any non-harvested species taken or otherwise affected by the taking of a harvested species. Hector’s dolphins and seabirds are examples of non-harvested associated or dependent species that should be maintained above a level that ensures their long-term viability.

##### *Biological diversity*

30. Section 2 defines “biological diversity” as the variability among living organisms, including diversity within species, between species and of ecosystems.

##### *Habitat of particular significance*

31. Habitat of particular significance for fisheries management is not defined in the Fisheries Act. FNZ is undertaking work to identify habitat of particular significance for fisheries management. This will support taking into account that habitat of particular significance for fisheries management should be protected when making fisheries management decisions. FNZ considers protect in this context means taking measures that would avoid, remedy, or mitigate the adverse effect of a decision that could undermine the particularly significant function the habitat provides for fisheries resources.

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<sup>1</sup> *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54 at [39].

## 4.5 Section 10 – Information principles

32. Decision-makers, when making decisions in relation to the utilisation of fisheries resources or ensuring sustainability, must take into account the following information principles:
- 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, and
  - 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 the Fisheries Act.

33. The High Court, reflecting on the challenges in obtaining full information about fisheries, has noted that:<sup>2</sup>

*The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide upon the weight which can be given it with such care as the situation requires.*

34. 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.

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<sup>2</sup> *Greenpeace New Zealand Inc v Minister of Fisheries* [1995] 2 NZLR 463 (HC) at [32].