IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA426/2021
[2023] NZCA 359

BETWEEN	FISHERIES INSHORE NEW ZEALAND LIMITED Appellant
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
AND	MINISTER OF OCEANS AND FISHERIES Second Respondent
AND	TE OHU KAI MOANA TRUSTEE LIMITED Third Respondent

Hearing:	15 and 16 March 2022
Court:	Brown, Courtney and Goddard JJ
Counsel:	B A Scott and A Kraack for Appellant S R Gepp and M C Wright for First Respondent N C Anderson and K F Gaskell for Second Respondent J P Ferguson and C Conroy-Mosdell for Third Respondent
Judgment:	10 August 2023 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C The appellant and second and third respondents must pay the first respondent costs for a standard appeal on a band A basis, with second counsel certified, and usual disbursements.

REASONS

Para no

The judgment of Brown and Courtney JJ was delivered by COURTNEY J.

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Para no

Introduction

[1] Under the Fisheries Act 1996, the Minister of Oceans and Fisheries (the Minister) must set a total allowable catch (TAC)[1] and a total allowable commercial catch (TACC)[2] in respect of fish stocks that are subject to the quota management system (QMS). If a stock has fallen below the level that can produce the maximum sustainable yield (MSY) — the greatest amount that can be taken from a fish stock over time without affecting the stock's ability to sustain itself through natural growth and reproduction — s 13(2)(b) of the Fisheries Act requires the Minister to alter the TAC to enable the stock to be restored to that level. This appeal raises questions about how TACs are set under s 13(2)(b).

[2] The appeal arises from the 2019 TAC set for the East Coast tarakihi stock.[3] This stock has significant commercial value, and is important to both recreational fishers and Māori. In 2018 and 2019, following assessments indicating that the East Coast tarakihi stock had fallen below recognised limits for sustainability, the Minister reduced the TAC and TACC. The 2018 decision reduced the TACC by 20 per cent. There was no challenge to that decision. The 2019 decision reduced the TACC by a further 10 per cent and implemented an industry rebuild plan: the Eastern Tarakihi Management Strategy and Rebuild Plan (IRP).

[3] The Royal Forest & Bird Protection Society of New Zealand Inc (Forest & Bird) successfully challenged the 2019 decision in proceedings before the High Court.[4] Fisheries Inshore New Zealand Ltd (Fisheries Inshore) appeals the

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1 Section 13.

2 Section 20. The total allowable commercial catch (TACC) is the proportion of the total allowable catch (TAC) which can be harvested by commercial fishers after allowances for non-commercial catch and other forms of mortality.

3 The East Coast tarakihi stock represents the majority of the tarakihi catch in New Zealand. It comprises all or part of the stock within the quota management areas known as TAR 1, TAR 2, TAR 3 and TAR 7 which are found along the East Coast of New Zealand and the eastern part of the Cook Strait.

4 *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 1427 [Judgment under appeal]. Gwyn J ordered that the 2019 decision would have continuing effect until the setting of the 2021 TAC but that, in making his decision on the 2021 TAC, the Minister was to have regard to the findings contained in her judgment: at [218]–[219]. Subsequently, the Judge stayed the requirement for the Minister to make a decision with effect from 1 October 2021 until the Minister had received, considered and consulted on an updated East Coast tarakihi assessment: *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 2282 at [96]; and *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2021] NZHC 2468 at [9].

High Court's judgment. Te Ohu Kai Moana Trustee Ltd (Te Ohu) supports the appeal. The Minister, while not seeking to uphold his original decision, cross-appeals on a narrow point of interpretation. As noted by Goddard J below at [159], the Minister's interpretation argument is not strictly speaking a cross-appeal, as the Minister does not contend for a different outcome from that reached in the High Court. However, for ease of reference we refer to it as such.

[4] The appeal and cross-appeal raise questions not previously considered about how the TAC should be set under s 13(2)(b). The parties identified two broad issues for determination.

Issue 1 — the approach to setting the TAC under s 13(2)(b)

[5] The parties framed the first issue as: when varying the TAC under s 13(2) to rebuild the East Coast stock whose current biomass is below that which can produce the MSY, was the Court in error in finding that the Minister:

(a) must first assess the period of rebuild appropriate to the stock by reference only to the biological characteristics of the stock and any environmental conditions affecting the stock and without considering whether the period could be lengthened due to the social, cultural and economic impact of catch reductions referred to in s 13(3);

(b) must then separately consider the way in which and rate at which the stock is moved to a level that can produce MSY as a distinct step (without considering the period of the rebuild) and, significantly, that social, cultural and economic factors in s 13(3) are only relevant to this second step; and

(c) was not permitted to consider the IRP when determining the appropriate period under s 13(2)(b)(ii), as it was an irrelevant consideration under that subparagraph?

[6] It is common ground that the IRP falls within the description of social, cultural and economic factors.

[7] Issue 1 can conveniently be reframed as asking whether the "appropriate period" within which the rebuild must occur under s 13(2)(b)(ii) is to be determined separately from the way in which and rate at which the rebuild occurs, and whether social, cultural and economic factors can be taken into account in determining the "appropriate period".

Issue 2 — probability of rebuild

[8] The second issue, which relates to the probability of any rebuild plan being achieved, is framed differently by Fisheries Inshore, the Minister and Te Ohu, on the one hand, and Forest & Bird on the other.

[9] Fisheries Inshore, the Minister and Te Ohu consider that the second issue should be framed as: is the 70 per cent probability of rebuild, specified as the default probability in the Operational Guidelines for the Harvest Strategy Standard (HSS) — a policy statement administered by the Ministry for Primary Industries | Manatū Ahu Matua — a mandatory relevant consideration when the Minister decides to set a new TAC under s 13(2)(b)(ii)?[5]

[10] Forest & Bird considers that the issue should be framed as:

(a) Does the HSS specify a 70 per cent default probability of rebuild (and reasons for that default probability) that is relevant to rebuilding plans relating to stocks below the "soft limit"?

(b) Was the 70 per cent probability of rebuild and the reasons for that probability specified as the default probability in the Operational Guidelines (and, if the answer to (a) is yes, the HSS) a mandatory

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5 See Ministry of Fisheries | Te Tautiaki i nga tini a Tangaroa *Operational Guidelines for New Zealand's Harvest Strategy Standard, Revision 1* (June 2011) [Operational Guidelines] (this was the version of the Operational Guidelines that was in place at the time of the 2018 and 2019 decisions); and Ministry of Fisheries | Te Tautiaki i nga tini a Tangaroa *Harvest Strategy Standard for New Zealand Fisheries* (October 2008) [HSS]. The Operational Guidelines and the HSS were developed and introduced by the Ministry of Fisheries, but are now administered by Fisheries New Zealand, a business unit of the Ministry for Primary Industries | Manatū Ahu Matua, after the former Ministry was merged into the latter in 2012.

relevant consideration when the Minister decided to set the TACs for East Coast tarakihi in 2019?

[11] For reasons we explain later, we intend to approach the second issue broadly as proposed by Forest & Bird.

The statutory framework

The purpose of the Fisheries Act

[12] The Fisheries Act has the dual purposes of providing for the utilisation of fisheries resources while ensuring sustainability.[6] These concepts are both defined in s 8(2):

> (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.

[13] In *New Zealand Recreational Fishing Council Inc v Sanford Ltd* (Supreme Court Kahawai case) the Supreme Court, referring to these "competing social policies", observed that:[7]

> [39] … 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 [the weight] given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.
>
> [40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the *conserving* of fisheries resources. Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand,

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6 Section 8(1).

7 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [Supreme Court Kahawai case] at [39] and [40] (footnote omitted).

> reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

Section 13 — setting the TAC

[14] Part 3 of the Act contains "sustainability measures". The Minister is required to set a TAC for each stock managed under the QMS with the objective of maintaining the stock at a level that can produce the MSY, defined as follows:[8]

> **maximum sustainable yield**, in relation to any stock, means the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.

[15] A fish stock is measured in units of weight referred to as biomass (B), being (conventionally) the weight of the fish in the stock. Virgin biomass, or B_0, is used to represent the theoretical size of the stock without fishing. The stock size that produces the fastest population growth that can be fished while maintaining that growth is known as B_{MSY}. The biomass that can produce MSY is referred to as B_{MSY}. The biomass reflects a variety of factors, including food resources and the stock's own population dynamics. Population growth will be highest when fish numbers are abundant and food resources plentiful. This does not necessarily occur when there is no fishing because a large population competing for limited food will have poor reproductive performance. However, when a stock has become depleted, a reduction in fishing may be needed to allow the stock to recover to that level.

[16] Section 13 relevantly provides:

> **13 Total allowable catch**
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> (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—

[8] Fisheries Act 1996, s 2 definition of "maximum sustainable yield".

(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).
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> …

The legislative history of s 13(2)(b) and (3)

[17] Fisheries Inshore and Te Ohu both maintain that social, cultural and economic factors are relevant to determining the "period appropriate to the stock" under s 13(2)(b)(ii). However, a review of the legislative history of s 13(2)(b) and (3) shows the progressive separation of social, cultural and economic factors from scientific factors in the setting of TACs, in order to ensure sustainability.

[18] In defining MSY, New Zealand legislation initially drew on the United Nations Convention on the Law of the Sea (UNCLOS).[9] Relevantly, art 61 provides for coastal states to determine the allowable catch of living resources in their exclusive economic zones, with art 61(3) providing that:

> 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.

[19] This breadth of relevant considerations in determining the MSY was previously reflected in the Territorial Sea and Exclusive Economic Zone Act 1977, where TAC was defined as meaning:[10]

> "Total allowable catch", with respect to the yield from any fishery, means the amount of fish that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended subregional, regional or global standards.

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

10 Section 2(1) definition of "total allowable catch". This Act is now called the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, following the Territorial Sea and Exclusive Economic Zone Amendment Act 1996. It no longer defines or references total allowable catch.

[20] The Fisheries Act 1983, which provided for fishery management plans that could, among other things, set a TAC, defined that as:[11]

> **total allowable catch**, with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards.

[21] Under the Fisheries Amendment Act 1986, which introduced the quota management system, the definition of TAC remained the same. In the Fisheries Amendment Act 1990, provision was made for the Minister to set a TACC, after having regard to the TAC and allowing for (among other things) "Maori, traditional, recreational and other non-commercial interests in the fishery".[12]

[22] On its introduction, the Fisheries Bill 1994, which preceded the current Fisheries Act 1996, provided for the setting of a TAC on terms that included the "net national benefit" as a relevant consideration in determining the "period appropriate to the stock".[13] Net national benefit was defined as "the sum of all costs and benefits of any kind, both monetary and non-monetary".[14] The Fisheries Bill permitted a TAC to be set below a level that would produce the MSY, after consideration of the net national benefit, risks to the sustainability of the stock and adverse effects on the environment. The relevant provisions were cl 11(2)(c) and (3):

> (2) Except as provided in **subsection (3)** of this section, the Minister shall specify a total allowable catch that, on the balance of the evidence before the Minister,—
>
> …
>
> (c) Enables the stock to be altered in a way and at a rate that will result in the stock being maintained at a level at or above the level that can produce the maximum sustainable yield within a period appropriate to the stock, having regard to the stock characteristics, the net national benefit, and the interdependence of stocks.
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> (3) The Minister may specify a total allowable catch that is consistent with a stock level below the level that produces the maximum sustainable yield if—

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11 Section 2(1) definition of "total allowable catch".
12 Section 5(1), which inserted s 28D(1)(a) into the Fisheries Act 1983.
13 Fisheries Bill 1994 (63-1), cl 11(2)(c) and (3)(a).
14 Clause 2(1) definition of "net national benefit".

(a) The Minister is satisfied that such a total allowable catch will provide a greater net national benefit than would be achieved by a total allowable catch specified in accordance with **subsection (2)** of this section, having regard to the interdependence of stocks; and

(b) The Minister has considered the risks to the sustainability of the stock and adverse effects on the environment.

[23] The concept of net national benefit was abandoned at the Select Committee stage (and with it the possibility of managing stock at a level below MSY). The Primary Production Select Committee produced an interim report which attached proposed amendments to the Bill.[15] The proposed amendment removed the reference to "net national benefit", and the new provision, cl 13(2)(b), read:[16]

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

…

(b) Enables the level of the stock to be altered in a way and at a rate that will result in the stock being restored to a level at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks and within a period appropriate to the stock having regard to the stock characteristics; or

…

[24] The Committee subsequently released its final report with further revisions, including the splitting of cl 13(2)(b) into two limbs and proposed amendments to cl 13(2)(b) altering the matters to be taken into account in setting the TAC.[17] It also added a new sub-cl 13(3). The new cl 13 provided:[18]

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

…

(b) Enables the level of any stock whose current level is *below* that which can produce *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

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15 Primary Production Select Committee *Interim Report on the Fisheries Bill: Report of the Primary Production Committee* [1993–1996] I AJHR 11A.

16 At 36.

17 Fisheries Bill 1996 (63-2) (select committee report) at x–xi.

18 Fisheries Bill 1996 (63-2) (emphasis added).

stocks and any environmental conditions affecting the stock; *and*

(ii) within a *period appropriate* to the stock and its biological characteristics; or

…

(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 paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall have regard to such social, cultural and economic factors as he or she considers relevant.

[25] In its report the Committee explained that the concept of net national benefit had been removed and it recommended sub-cl 13(3) be included to ensure that sustainability would be the key concern in setting the TAC:[19]

> The TAC setting provision in the Bill, as introduced, allowed the Minister to set a TAC at a point below the level that produces the MSY if doing so would provide a greater net national benefit. There was concern from environmentalists and the Parliamentary Commissioner for the Environment that this provision could result in unsustainable catch limits being set. These submissioners wanted all references to the net national benefit deleted. Industry submissioners were strongly supportive of the ability of the Minister to set a TAC below MSY if doing so was in the net national benefit. The [Fishing Industry Board] argued that, to be consistent with international law, the Bill needed to provide for economic factors to be taken into account when setting a TAC. Article 61 of UNCLOS specifies that relevant economic factors should be taken into account when setting constraints on commercial fishing activity.
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> We accept that the Bill needs to be consistent with New Zealand's international obligations. However, we are convinced that "net national benefit" is a vague term which would be difficult to measure and recommend that it be deleted. *We strongly believe that sustainability concerns should be the key factor used to determine a TAC. We recommend subclause 13 (3) which requires the Minister to have regard to such social, cultural and economic factors as are considered relevant when considering the way in, and rate at which, a stock is moved towards its sustainable level. This is consistent with UNCLOS, does not detract from the philosophy that setting a TAC should be primarily based on sustainability concerns, and recognises recent management practice.*

[26] The Fisheries Act was introduced in 1996 in the revised form. Soon after, however, s 13 was amended to its current form, with consideration of "any environmental factors affecting the stock" moved from s 13(2)(b)(i) to s 13(2)(b)(ii).[20]

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19 Fisheries Bill 1996 (63-2) (select committee report) at xi (emphasis added).

20 Fisheries (Remedial Issues) Amendment Act 1998, s 4(2).

The explanatory note to the Bill which made that amendment stated that the reference to environmental factors was to be moved from subpara (i) to (ii) because the effects of changing environmental factors could be relevant in considering the rate at which a stock size would change.[21]

[27] In the Supreme Court Kahawai case (which was concerned with the setting of the TACC under s 21) the Supreme Court described the operation of s 13 in the following terms:[22]

> [42] Section 13 provides the mechanism by which the Minister sets the total allowable catch for each species subject to quota management in a quota management area. The power is to be exercised subject to the various considerations expressed in the section.
>
> [43] The guiding criterion in s 13 is sustainability. It is expressed in terms of attaining a maximum sustainable yield for setting a total allowable catch for that stock in the quota management area. The determination of the total allowable catch is a "sustainability measure" under the Act, being a measure set or varied under Part 3 for the purpose of ensuring sustainability. The power to set or vary sustainability measures may be exercised after taking into account the effects of fishing on the stock, applicable catches and notional volatility of the stock. In broad terms the Minister is required by s 13 to set a total allowable catch at a figure which maintains the stock at or above a level which can produce the maximum sustainable yield. When the current level of stock is below that which can produce the maximum sustainable yield, the Minister must set the total allowable catch at a level that enables the stock to move towards or above the level that can produce the maximum sustainable yield. …
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> [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).

The Harvest Strategy Standard

[28] The HSS, issued in 2008, assists in decision-making under s 13. The HSS is a statement of how the Ministry for Primary Industries | Manatū Ahu Matua (the Ministry) intends to give effect to its obligations under the Act and functions as a technical standard to be used by the Ministry when advising the Minister on setting

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21 Fisheries (Remedial Issues) Amendment Bill 1997 (97-1) (explanatory note) at ii.

22 Supreme Court Kahawai case, above n 7 (footnotes omitted).

TACs and managing fisheries in accordance with the Minister's decision.[23] In relation to its scope, it states:[24]

> The Harvest Strategy Standard is a key input to the setting of TACs under the Fisheries Act.
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> …
>
> However, the Harvest Strategy Standard is not the only input into the setting of TACs. The Harvest Strategy Standard is concerned with the application of best practice in relation to the setting of fishery and stock targets and limits, but it is focussed on single species biological considerations and related uncertainties, and includes only limited consideration of economic, social, cultural or ecosystem issues.

[29] In relation to s 13(2)(b) the HSS states:[25]

> The Harvest Strategy Standard assists in decision-making under this section by providing that depleted stocks should be rebuilt back to a target based on MSY-compatible reference points or better, and ensuring that the specified rate of rebuilding takes due account of relevant biological and environmental factors. In section 13(3), it is also stated that when deciding on the way and rate at which a stock is rebuilt … "the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant". The Harvest Strategy Standard allows rebuilding plans to take these factors into account by enabling the adoption of targets "better than" MSY-compatible reference points, and permitting flexible rebuilding timeframes.

[30] The HSS has three core elements:[26]

(a) A specified target about which a fishery or stock should fluctuate. For stocks managed under s 13, the target is based on MSY-compatible reference points or better, with a 50 per cent probability of achieving the target.

(b) A "soft limit" that triggers a requirement for a formal, time constrained rebuilding plan if the existing stock falls below that level. A stock that is below the soft limit will be designated as depleted (overfished) and in need of rebuilding.

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23 HSS, above n 5, at 22.
24 At 3.
25 At 23 (footnote omitted).
26 At 7.

(c) A "hard limit", below which fisheries should be considered for closure. 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.

[31] The stock assessments that preceded the 2018 and 2019 TACs showed that the East Coast tarakihi stock had likely fallen below the soft limit. The HSS provides that stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a specified time frame. This time frame is expressed as being between T_{min} and $2*T_{min}$ where $2*T_{min}$ is T_{min} doubled, with "an acceptable probability".[27] T_{min} is the theoretical time stock would take to rebuild to the target in the absence of fishing. It is a function of the biology of the species, the extent of stock depletion below the target and prevailing environmental conditions.[28]

[32] Whether the "acceptable probability" of the rebuild being achieved is actually specified in the HSS is a question that Forest & Bird says ought to be considered under Issue 2. Fisheries Inshore says that it is not specified and that, in any event, Forest & Bird did not raise the issue on its pleading and therefore cannot raise it now. We come to these competing arguments later.

The Operational Guidelines

[33] The Operational Guidelines, also introduced in 2008 and revised in 2011, support the implementation of the HSS.[29] They do not have the same status as the HSS.

[34] In relation to the time frames for rebuilding, the Operational Guidelines provide:[30]

> The Harvest Strategy Standard specifies that where the probability that a stock is at or below the soft limit is greater than 50%, the stock should be rebuilt to the target within a time period between T_{min} and $2*T_{min}$ (where T_{min} is the

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27 At 8.
28 At 8, n 7.
29 Operational Guidelines, above n 5.
30 At 11–12 (emphasis added).

theoretical number of years required to rebuild a stock to the target with zero fishing mortality).

Mathematical projection models will generally need to be developed to estimate T_{min} and to compare and contrast alternative rebuilding strategies. These will usually be probabilistic models that incorporate uncertainty in the projections. *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.* A stock will not be declared to be rebuilt, and therefore absolved from further rebuilding, until it can be determined that there is at least a 70% probability that the target has been achieved. This means that if the initial rebuilding plan is underachieved/overachieved, it may need to be revised prior to the termination of the timeframe initially set. This may result in a more restrictive, or more lenient, rebuilding plan as time progresses.

T_{min} reflects the extent to which a stock has fallen below the target, the biological characteristics of the stock that limit the rate of rebuild, and the prevailing environmental conditions that also limit the rate of rebuilding. Allowing a rebuilding period up to twice T_{min} allows for some element of socio-economic considerations when complete closure of a fishery could create undue hardships for various fishing sectors and/or when the stock is an unavoidable bycatch of another fishery. The probability of rebuild should be increased where the information is highly uncertain or where multiple sectors have significant interests in the fishery.

The 2018 decision

[35] Stock assessments of East Coast tarakihi undertaken in November 2017 and April 2018 indicated that the stock had fallen below the soft limit. It was common ground that the T_{min} was five years. Under the HSS the appropriate time frame for rebuilding the stock was therefore between five and 10 years.

[36] In 2018 Fisheries New Zealand advised the Minister on the options available to address the sustainability of the East Coast tarakihi stock. These were:

(a) reduce TAC by 55 per cent with a projected rebuild period of 10 years;

(b) reduce TAC by 35 per cent with a projected rebuild period of 20 years; or

(c) reduce TAC by 20 per cent, the rebuild period for which was not (or not able to be) determined.

[37] On 19 September 2018 the Minister decided on a phased approach, involving an initial reduction of the TACC of 20 per cent as the start of the process of rebuilding. The Minister specifically acknowledged that this reduction would not rebuild the stock at the rate he wished without significant further measures but would give the industry a short period to plan and adjust its operations. Specifically, the target set by the Minister was based on a 50 per cent probability of achievement within a rebuild period of 10 years.

[38] The Minister asked the industry to provide a plan that would be considered alongside a proposed catch reduction in the 2019 year, noting that the size of the reduction in the commercial catch that would be implemented in October 2019 would depend on the effectiveness of the measures the industry could develop as part of the plan.

The 2019 decision

[39] The updated stock assessment in April 2019 showed a very high probability of the stock being below the soft limit.

[40] In May 2019 Fisheries Inshore, Te Ohu and another industry group, Southern Inshore Fisheries Management Ltd, produced the IRP, which contained a range of management steps for East Coast tarakihi. The IRP included agreement to key performance indicators, reporting requirements and the use of onboard cameras in some areas. The industry also committed to a maximum rebuild time of 20 years.

[41] With the benefit of the IRP, Fisheries New Zealand produced a discussion paper identifying three options. Following consultation with both the industry bodies and Forest & Bird, Fisheries New Zealand provided its final advice paper with four 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; or

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

(c) Option 3: implementation of the IRP with no TAC or TACC reductions, with the aim of achieving a lesser target within 20 years.[31] No probability was determined; or

(d) Option 4: TACC reduction of 10 per cent, combined with the IRP, with the aim of achieving the target within 20 years. There was uncertainty about the rebuild period.[32]

[42] Fisheries New Zealand advised that it preferred either option 2 or option 4, depending on the priority — whether it was to rebuild stock as quickly as possible in a time frame that most closely corresponded to the HSS or to rebuild stock in a time frame that minimised the socio-economic impacts on fishers, their families and regional communities.

[43] The Minister's decision, released on 27 September 2019, substantially adopted option 4. The Minister reduced the TACC by a further 10 per cent, implemented the IRP and required electronic monitoring on vessels fishing within TAR 2 and TAR 3 areas from 2020. Explaining his decision, the Minister said:

> The [IRP] 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 [IRP] 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 [IRP] with a 10% reduction to commercial catch.
>
> …
>
> If industry fails to deliver on the commitments outlined in the [IRP] I will look to introduce further catch reductions in October next year. …
>
> …

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31 This 20-year period was taken from industry groups' commitment to a maximum 20-year rebuild time frame. The paper noted that in the absence of the IRP, the rebuild time frame would be 27 years.

32 Modelling for the TACC reduction alone, without the IRP 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 a 70 per cent probability.

> Abundance of East Coast tarakihi is currently very low, with the most recent stock assessment estimating it to be 15.9% SB_0 (spawning stock biomass). The assessment also indicates that the stock has been near the current level since the early 2000s, and has declined slowly since the mid-1970s to a low point in 2013. This is significantly below the proxy management target of 40% SB_0, as recommended by the [HSS]. It is also below the level that requires a time constrained rebuild plan. I consider that further work is required before a different species specific management target for tarakihi can be set, and therefore consider 40% SB_0 to be an appropriate target at this time.
>
> 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 impact on fishers, their families and the regional communities where they operate, balanced against my responsibility to ensure the sustainability of this fishery.

[44] In his affidavit filed in the proceeding the Minister said of the 2019 decision:

> 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.

[45] The Minister went on to note that he had agreed to the implementation of the IRP for the following reasons:[33]

> 46. The science advice indicated the further TAC and TACC reductions in 2019 (alone) would have a 50% probability of rebuilding East Coast tarakihi within 25 years. However, in addition to the TAC and TACC cuts the [IRP] commits to a maximum rebuild timeframe of 20 years. Although this is a longer time period than I favoured in 2018, and a departure from the HSS, I concluded that by working in partnership with key industry participants, and acknowledging the innovative measures the government had either introduced, or was seeking to introduce, this time frame was likely to be a 'worst case scenario'. I also concluded that a genuine 'mood for change' had occurred within the industry and the vast majority of participants sought to proactively adopt, and in many cases, fast-track, technologies and fishing practices that would, in my mind at least, ensure continuity of employment and fishery rebuild.

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[33] Footnotes omitted.

Issue 1: Is the "appropriate period" within which the rebuild must occur under s 13(2)(b)(ii) to be determined separately from the "way and rate" of rebuild under s 13(2)(b)(i), and can social, cultural and economic factors be taken into account in determining the "appropriate period"?

The High Court decision

[46] It will be recalled that s 13(2)(b) requires the Minister to set a TAC that enables the level of any stock whose current level is below that which can produce the MSY 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 …

And that s 13(3) provides:

> 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.

[47] Fisheries Inshore argued that the "way", "rate" and "period" in s 13(2)(b)(i) and (ii) inform one another, so that all the factors in s 13(2)(b) must be considered together. Further, the social, cultural, and economic impacts of setting a TAC referred to in s 13(3) are relevant to both the "way" and "rate" and the "period".

[48] Gwyn J did not accept either argument. She considered that the enquiries required by s 13(2)(b)(i) and (ii) had to be considered separately, and that, logically, the appropriate rebuild period under s 13(2)(b)(ii) must be determined first:[34]

> [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.

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[34] Judgment under appeal, above n 4.

[49] The Judge also considered that the determination of the "appropriate period" within which the rebuild had to occur was to be carried out without reference to social, cultural, and economic factors. Those factors were relevant only to determining the way and rate of the rebuild, which were assessed separately under s 13(2)(b)(i):

> [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. …
>
> …
>
> [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).

[50] The Judge concluded that:

> [92] … 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*.

[51] The Judge considered that the sequence of the Minister's decision-making had not been clearly set out in either the advice paper or the Minister's 2019 decision.[35] In particular, the "period appropriate to the stock" had not been separately and

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35 At [98].

specifically considered.[36] Nor was there any explanation why the "period appropriate to the stock" had changed from 10 years in 2018 to 20 years in 2019.[37] The Minister's affidavit had not clarified that point.[38] The Judge therefore concluded that the Minister had erred in not making an assessment of the period of rebuild appropriate to the East Coast tarakihi stock as required by s 13(2)(b)(ii) before applying social, cultural and economic factors to the determination of way and rate of rebuild.[39]

Fisheries Inshore's argument

[52] Fisheries Inshore maintains the same arguments it advanced in the High Court: s 13(2)(b)(i) and (ii) are to be read together "in the round" rather than determined separately and in a different order to that provided for. Fisheries Inshore asserts that social, cultural, and economic factors are to be taken into account in the composite enquiry and the Judge erroneously inverted the subparagraphs and wrongly treated them as discrete. The arguments advanced on behalf of Fisheries Inshore can be summarised as follows.

[53] First, only s 13(2)(b)(i) contains the target to be achieved by rebuilding the stock (that is, the stock being restored to or above a level that can preserve the MSY). As a result, the question of the appropriate period in s 13(2)(b)(ii) is inextricably linked to the way and rate at which the stock would be restored. They inform each other, have consequences for each other and must be considered together in order to reach the target of restoring the stock to its MSY.

[54] Secondly, the conjunction of (i) and (ii) indicates that the required analysis was composite rather than sequential. Mr Scott, for Fisheries Inshore, pointed out that the Fisheries Bill 1994, in which the concepts of altering a stock "in a way and at a rate" and "within a period appropriate to the stock" first appeared, had both requirements situated in the same subparagraph. Their separation into two subparagraphs by the Primary Production Select Committee in its final report on the Fisheries Bill reflected

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36 At [98].
37 At [101].
38 At [104].
39 At [109].

common drafting practice, to ensure that each requirement would be considered. It did not indicate that each should be considered in isolation from one another.

[55] Thirdly, properly interpreted, s 13(2)(b)(ii) permits factors other than the biological characteristics of the stock and environmental conditions affecting the stock — specifically, the factors provided for in 13(3) — to be taken into account in determining the "period appropriate to the stock" within which the rebuild must occur. Additionally, on a proper interpretation, s 13(3) applies to both s 13(2)(b)(i) and (ii).

[56] Fourthly, a rebuild period determined only by the biological characteristics of the stock and the environmental conditions affecting the stock is already reflected in the T_{min} calculation under the HSS, which gives the theoretical time required to rebuild the stock in the absence of any fishing. If any degree of utilisation is to be permitted (which it must) a value judgement is needed, which necessarily engages wider questions.

[57] Fifthly, the fact that s 13(2)(b)(ii) refers to "stock" necessarily reflects the fact that any given fish stock has some aspect of utilisation — often by groups with differing ambitions — which requires recognition in determining the appropriate period for the purposes of s 13(2)(b). We deal with this argument briefly now. "Stock" is defined as "any fish, aquatic life, or seaweed … that are treated as a unit for the purposes of fisheries management".[40] The defined meaning relates clearly to the fish alone. There is no reason to think that it has an extended meaning in the context of s 13(2)(b)(ii).

The Minister's argument

[58] The Minister accepts that there was not, on the record, an adequate assessment of the period appropriate to the stock under s 13(2)(b)(ii) and does not seek to uphold the original decision. He has, however, cross-appealed on an aspect relating to how the appropriate period under s 13(2)(b)(ii) is identified.

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[40] Fisheries Act, s 2(1) definition of "stock".

[59] The Minister accepts that the period appropriate to the stock that is selected for the purposes of s 13(2)(b)(ii) is to be determined by reference to the scientific factors identified in s 13(2)(b)(ii) only, without reference to social, cultural and economic factors. To that extent his position is consistent with Forest & Bird. However, the Minister and Forest & Bird diverge on the next step of the Minister's argument.

[60] The Minister says that the Judge wrongly interpreted s 13(2)(b)(ii) as requiring the selection of a specific number of years as the appropriate period and that, although the Fisheries Act does not require him to rebuild a depleted stock as quickly as possible, nor to adopt a precautionary rebuild period, the Judge's approach of requiring the appropriate period to be determined separately from the way and rate of rebuild, and only by reference to scientific factors, could have that effect.

[61] The Minister argues that the words "a period appropriate to the stock" contemplates the possibility of a range of periods, up to a maximum period, that may be regarded as appropriate to the stock.[41] These would be identified through an evaluation of the benefits and risks to the stock associated with particular periods of rebuild and the exercise of judgement. The Minister asserts that he is entitled to select a rebuild target within the range and, in doing so, may take account of social, cultural and economic considerations. On the Minister's approach, the appropriate period could be determined first or used as a cross-check against the potential target rebuild periods but, either way, the key question is whether the selected target can properly be supported in light of the scientific factors.

A preliminary point

[62] Before considering these arguments we address Mr Scott's suggestion that the Judge had proceeded under the misapprehension that allowing social, cultural and economic factors to be taken into account when determining an appropriate period would improperly postpone the return to B_{MSY} or perpetually maintain the stock below that level.[42] He submitted that this would not be the effect of an "in the round"

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41 In addressing the basis on which the maximum period might be determined, the Minister employed the concept of T_{max}, drawn from the approach taken in Canada and Australia. This concept is not referred to in the HSS, nor the Operational Guidelines, and for that reason we prefer not to use it.

42 Referring to Judgment under appeal, above n 4, at [72] and [92].

interpretation of s 13(2)(b) because the scheme of s 13 necessarily involves a postponement of returning a fishery to B_{MSY} — as soon as any catch is permitted during the rebuild period that will necessarily be the result. However, it is permitted where the fishery can sustainably accommodate the continued catch, which reflects the dual purpose of utilisation while ensuring sustainability. He pointed out that none of the respondents had advocated for an interpretation that allowed the stock to be perpetually maintained below B_{MSY} and observed that, in any event, the statements of this Court in *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* (the Snapper case) would have precluded such a suggestion.[43]

[63] We do not read the Judge's comments as indicating any misunderstanding of the appellants' arguments. Rather, we read them as indicating a concern that the interpretation contended for could have the consequence of indefinitely postponing the return to B_{MSY}. Because s 13(2)(b)(i) requires any alteration to the TAC to have the effect of restoring the stock to B_{MSY}, it is not open to the Minister to set a TAC that cannot be shown to have that effect. However, although the Minister cannot postpone return to B_{MSY} indefinitely in a literal sense, that could be the consequence in a practical sense because Fisheries Inshore's approach could result in an excessively long rebuild period that would meet the statutory requirement so long as it moved the stock towards B_{MSY}, no matter how slowly. We infer that this was the concern being expressed by the Judge.

Our view

[64] We agree that it is not possible to read s 13(2)(b)(ii) in isolation from s 13(2)(b)(i). Doing so would require the Minister to simply alter the TAC "within a period appropriate to the stock", without any objective. These subparagraphs are obviously conjunctive and meant to work together. That does not mean, however, that a single composite enquiry is envisaged. The separation of cl 13(2)(b) into subparagraphs by the Select Committee may have been down to drafting practice (it is not explained in the Committee's report) but the removal of non-scientific considerations from cl 13(2)(b) into the new sub-cl 13(3) gives a clear indication —

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[43] Referring to *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 [Snapper case] at 14.

even without the Committee's explanation — of how the TAC was intended to be set. The explanation contained in the final report makes it clear beyond doubt that the overarching concern was sustainability. The precedence of sustainability over utilisation would not be achieved through a single composite decision. This is apparent from the observation in the Supreme Court Kahawai case of the "inherent unlikelihood" of decision-makers being able to fully accommodate both policies.[44]

[65] Section 13(2)(b) requires the Minister to set a TAC that enables the level of stock to be altered in a way and at a rate that will result in it being restored to MSY or above, and does so within a period appropriate to the stock. Although s 13(2)(b)(i) does not refer to a rebuild period, the selection of a way in which and rate at which rebuild will occur will necessarily produce a rebuild period as a function of permitting fishing on those terms. However, it is clear from the text that s 13(2)(b)(ii) operates as a control on that rebuild period. It can only fulfil that function if it is determined separately. This is because, as we come to next, the factors that can be taken into account in determining the way and rate of the rebuild include social, cultural and economic factors, whereas the factors that can be taken into account in determining the period within which the rebuild is to occur are the more limited "scientific" factors, and will most likely produce a shorter rebuild period.

[66] Mr Scott argued that, properly interpreted, the wording of s 13(2)(b)(ii) requiring the TAC to be altered within a period appropriate to the stock "having regard to" the biological characteristics of the stock and any environmental conditions affecting the stock does not preclude other factors (specifically social, cultural and economic factors) from being taken into account. He relied for this argument on *Pacific Trawling Ltd v Minister of Fisheries*, where Priestley J said that "[w]here 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."[45] Mr Scott submitted that the Judge had erred in not applying the test in *Pacific Trawling* or explaining why it did not apply.

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44 Supreme Court Kahawai case, above n 7, at [39].

45 *Pacific Trawling Ltd v Minister of Fisheries* HC Napier CIV 2007-441-1016, 29 August 2008 at [83], citing *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160 [Court of Appeal Kahawai case] at [94]; and *New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551.

[67] Neither *Pacific Trawling* nor the cases cited in it have the effect contended for. The relevant provision in *Pacific Trawling* expressly allowed the Minister to consider "any other matters" that the Minister considered relevant.[46] Nor is *Sanford Ltd v New Zealand Recreational Fishing Council Inc* (Court of Appeal Kahawai case) apt, because the question being considered was whether the requirement to "have regard" to a matter imposed any greater obligation than to merely consider it.[47] The Court was not concerned with whether other, unspecified, factors might be considered.

[68] In any event, while the requirement for a decision-maker to "hav[e] regard to" specified factors is generally treated as requiring only that those factors be considered, rather than given effect to, this is not the meaning intended in the context of s 13(2)(b)(ii). The words "having regard to" do not indicate factors that the Minister may or may not treat as influential in the decision. They are, rather, a statement of the criteria to be taken into account in determining an appropriate period within which the rebuild must occur. If the Minister were entitled to merely consider but not act on those factors, there would be no clear criteria by which to make that assessment.

[69] Mr Scott also argued that the High Court's interpretation of s 13(3) as applying only to s 13(2)(b)(i) rather than the whole of s 13(2)(b) was erroneous because it:

(a) failed to recognise the interconnection between the two subparagraphs;

(b) did not account for the application of s 13(2A)–(3);

(c) failed to apply the plain wording of the subsection; and

(d) failed to recognise that the broader interpretation was consistent with international law, the purpose of the Act, and previous decisions of this Court.

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46 Fisheries Act, s 75(2)(b)(vi).
47 Court of Appeal Kahawai case, above n 45, at [94].

[70] For convenience we repeat s 13(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.

[71] We start with the natural and ordinary meaning of the text. We see no significance in the fact that s 13(3) refers only to "subsection (2)(b) or (c)". The opening words of s 13(3) make it perfectly clear that it will only be engaged when the "way" and "rate" are being considered. This is not inconsistent with the reference to s 13(2)(b). Further, reading "subsection (2)(b) or (c)" as including the period appropriate to the stock enquiry under subsection (2)(b)(ii) would make no sense unless one disregarded the opening words of s 13(3), which is not tenable. The only sensible interpretation of s 13(3) is that it is limited to consideration of the way in which and rate at which stock is moved towards the requisite level.

[72] This reading is not undermined by the fact that s 13(3) also applies to the alternative TAC setting procedure in s 13(2A). The circumstances in which a s 13(2A) enquiry is undertaken are entirely different and, significantly, subs (2A) does not require the identification of a period appropriate to the stock. But in any event, it is the words "[i]n considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield" that, again, directs the consideration of social, cultural and economic factors towards the "way" and "rate" enquiry alone. This interpretation is not a reading down of s 13(3) but simply a reading of the natural and ordinary meaning of the words. Moreover, it is entirely consistent with the dominant consideration of sustainability as opposed to utilisation.

[73] We do not accept that this Court has, in previous cases, made statements that would permit the interpretation of s 13(3) now contended for. Mr Scott relied particularly on *Greenpeace New Zealand Inc v Ministry of Fisheries* (the Orange

Roughy case) and the Snapper case.[48] The Judge dismissed both as not relevant, given that they were decided under the 1983 Act.[49] Mr Scott did not accept this.

[74] The Orange Roughy case concerned the judicial review of the setting of a TACC under the 1983 Act. One of the matters the Minister was required to have regard to in setting the TACC was the TAC, which was defined as:[50]

> … with respect to the yield from a fishery, means the amount of fish … that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards.

[75] Although a 10-year rebuild period had been selected, a staged implementation had been adopted to mitigate the effect on the industry that would result from the reduction in permitted catch. The Minister's decision postponed the reduction in catch in the first year. The parties were divided over whether, in setting the TAC, the objectives of conservation or sovereignty and economic management ought to prevail. Gallen J considered that, while it was appropriate to place emphasis on conservation, including the restoration of stocks to a level that can produce MSY, that obligation had to be seen in light of relevant environmental and economic factors.[51] He concluded that:[52]

> In summary to this point then, I conclude that the MSY is that yield which could be sustained from the virgin biomass without depleting it, but that yield is a potential yield an objective which the setting of the TAC must be directed towards; that the attainment of that objective must be predicated within a reasonable time period so that a programme may be seen as extended through that time period. *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 by and 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. …

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48 *Greenpeace New Zealand Inc v Minister of Fisheries* HC Wellington CP 492/93, 27 November 1995 [Orange Roughy case]; and Snapper case, above n 43.

49 Judgment under appeal, above n 4, at [86].

50 Fisheries Act 1983, s 2(1) definition of "total allowable catch".

51 Orange Roughy case, above n 48, at 19.

52 At 29 (emphasis added).

[76] Mr Scott relied on the italicised words in Gallen J's statement as supporting Fisheries Inshore's interpretation that social, cultural and economic factors were relevant to determining the appropriate period under s 13(2)(b)(ii). He argued that the Judge erred in dismissing the Orange Roughy case as irrelevant because it was decided under the 1983 Act.

[77] We agree with the Judge that the Orange Roughy case does not assist in the interpretation of the current Act. First, Gallen J's conclusion was made in the context of his view that sustainability did not have priority over utilisation, which must now be read in light of the statement in the Supreme Court Kahawai case that the overriding objective is sustainability.[53] Secondly, the 1983 Act did not require determination of a period appropriate to the stock. Gallen J's interpretation of the relevant statutory provision was undertaken without the benefit of the much more specific provisions of the current s 13. Given the significantly different statutory context, particularly the fact that the definition of total allowable catch under the 1983 Act was based on a maximum sustainable yield qualified by, among other things, relevant economic factors, it is not possible to treat Gallen J's comments as assisting in the interpretation of the current statutory framework in which social, cultural and economic factors have been explicitly separated from biological and environmental factors.

[78] The Snapper case concerned a successful challenge to the Minister's decisions setting the TACC for the 1995/1996 and 1996/1997 fishing years.[54] The determinative issue was whether the definition of TAC under the 1983 Act imposed an obligation on the Minister to move the fishery to MSY over time. The Court held that it did, though subject to the "qualifiers" of social, cultural and economic factors included in the definition of TAC.[55] By the time the case was decided, the current Act was in force and the Court did not see any need to order reconsideration by the Minister because that would effectively occur when the decision was made under the current Act for the 1997/1998 year.[56] However, for the assistance of the parties in relation to the

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53 Supreme Court Kahawai case, above n 7, at [39]–[40].
54 Snapper case, above n 43.
55 At 12–15.
56 At 27.

forthcoming year's decision, the Court made the following observations regarding s 13 of the current Act:[57]

> It is thus made clear that in setting the TAC for a fishery whose yield is below MSY the Minister has an obligation to move the stock in question towards or above a level which can produce MSY. It is similarly made clear that what used to be called the qualifiers (now expressed as such 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. For the future the Minister might think it wise in making his decision to refer expressly to the social, cultural and economic factors which he has considered to be relevant to his decision, and any matters pressed upon him which he has not considered to be relevant.

[79] Mr Scott had relied on these comments as indicating that in setting the TAC under s 13(2), there did not need to be a separate analysis of what is an appropriate period and that the "qualifiers", including economic factors, applied to the time frame for the rebuild. The Judge did not accept that the Snapper case had any significance for the decision before her, treating the comments above as plainly obiter.[58] Mr Scott submitted that the Judge's characterisation of these comments was wrong because the comments were made after full argument on the effect of the current Act and for the purpose of assisting the parties in the setting of the TAC under that Act.

[80] Strictly, the statements regarding s 13 were obiter. As the Court made clear, it was the decisions made under the 1983 Act that were for determination.[59] No issue arose for determination under the current Act. We also agree with the Judge that, in any event, when the passage is read as a whole it does not clearly support the view that the "period appropriate to the stock" in s 13(2)(b)(ii) is subject to social, cultural and economic factors.[60] The brevity of the comments suggests that the issue was not the subject of substantial argument and cannot fairly be regarded as a considered view of the correct interpretation of s 13. We read the passage as summarising, in a very

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57 At 14–15.
58 Judgment under appeal, above n 4, at [86].
59 Snapper case, above n 43, at 5.
60 Judgment under appeal, above n 4, at [88].

general way, the effect of s 13(2)(b), rather than purporting to be an exercise in statutory interpretation.

[81] Mr Scott criticised the Judge's reliance on the High Court's decision in *New Zealand Recreational Fishing Council Inc v Minister of Fisheries* (High Court Kahawai case).[61] The Kahawai case was concerned with the relevance of social, cultural and economic considerations in the context of a reduction to the TAC for kahawai. In considering the argument that the Minister had failed to take into account the non-commercial fishing sector's social, economic and cultural wellbeing in reducing the TAC for kahawai, Harrison J said:

> [49] … [The Ministry's advice regarding reduction of the TAC] … 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 [the Ministry] 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. …

[82] In this case, the Judge relied on these statements when considering the interpretation of s 13(3).[62] In doing so, she noted that the High Court decision was overturned on appeal and the Court of Appeal's decision upheld by the Supreme Court but did not consider that Harrison J's view was undermined because in the Supreme Court the only ground of appeal pursued related to s 21, not s 13(3).[63] Mr Scott submitted that the Judge erred in relying on Harrison J's statements because of the outcome on the subsequent appeals. There is no merit in this submission.

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

62 Judgment under appeal, above n 4, at [90].

63 At [91].

The application of s 13(3) was not the subject of either appeal. Further, the statements set out above were not criticised in either this Court or the Supreme Court. To the contrary, in the Court of Appeal Kahawai case, O'Regan J observed that:[64]

> Section 13(3) is limited in scope. It comes into play only where the Minister is considering the way in which and the rate at which a stock is moved towards or above B_{MSY}. It requires only that the Minister consider such of those factors as he or she considers relevant.

[83] We are satisfied that, to the extent previous cases have included observations about the interpretation of s 13(3), the observations made support the approach taken by the Judge.

[84] Mr Scott argued that the Judge's interpretation of s 13(3) fails to give effect to the dual purpose of the Act. This submission was made in reliance on the Supreme Court Kahawai case, in which he said the Supreme Court emphasised that, provided sustainability can be ensured, fisheries can be utilised and there is flexibility under s 13 to allow for utilisation. With respect, we do not read the statements by the Supreme Court as so broad. The Supreme Court said:[65]

> [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).

[85] It is plain to us that the flexibility referred to was limited to the additional considerations that could be taken into account in deciding the way and rate of movement of the fishery towards MSY. The comments do not support an interpretation that social, cultural and economic factors could be taken into account in determining the appropriate period for restoration of the fishery.

[86] Lastly, we turn to Mr Scott's argument that because a rebuild period selected under s 13(2)(b)(ii) can be longer than T_{min} — under the HSS it can be up to $2*T_{min}$ — the appropriate period under s 13(2)(b)(ii) necessarily permits some level of fishing

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64 Court of Appeal Kahawai case, above n 45, at [50].
65 Supreme Court Kahawai case, above n 7 (footnote omitted).

and that means that the effects of fishing, that is, the socio-economic factors, need to be taken into account.

[87] In our view the answer to this argument lies in the fact that recognised best practice represented by the HSS builds some allowance for socio-economic factors into the calculation of the appropriate rebuild period of T_{min} to $2*T_{min}$. A number of the expert witnesses commented on this.

[88] Dr Pamela Mace, a Principal Advisor of Fisheries Science for Fisheries New Zealand, who was instrumental in producing the HSS, explained the basis on which the appropriate period within which a rebuild could occur is identified:

> 25. As with most other metrics in the HSS, those chosen for the rebuilding timeframe are default values, and as such they can be varied so long as there is appropriate justification. The reason for not choosing a default multiplier higher than 2 for T_{min} (where T_{min} is the minimum time to rebuild a stock, which requires that there is absolutely no fishing of that stock) in the HSS is because there are highly consequential reasons for rebuilding as quickly as feasible.
>
> 26. A rebuilt fish stock confers several benefits, particularly for East Coast tarakihi for which the rebuilt state represents a stock size that is about 2.5 times (250%) higher than the current level. …
>
> 27. However, achieving these longer-term benefits requires short-term pain, that is potentially appreciable, associated with a loss of revenue during some of the rebuilding period, particularly in the early stages of the rebuilding period when TACCs are lower and stocks have yet to increase significantly. These short-term financial considerations and other socio-economic factors such as potential business collapses also need to be taken into account.
>
> 28. … Determining an appropriate period of rebuild in a given case is a difficult question to answer as the trade-offs involve short-term appreciable consequences relative to longer-term gains, and while the latter may take longer to achieve, a longer rebuilding period will alleviate some of the short-term consequences.
>
> 29. In my view, reasonable minds may have different views about appropriate rebuilding periods, including many of my science colleagues.
>
> …
>
> 35. The multiplier of 2 in the default T_{min} to [$2*T_{min}$] rebuilding timeframe takes some level of account of socio-economic factors, in that T_{min} is the rebuilding time in the complete absence of fishing, which would mean closing both the East Coast target tarakihi fisheries and all other

> fisheries in this area that incidentally capture tarakihi as a bycatch species. However, it is usually very difficult to completely eliminate fishing, even if a fishery is closed, as the species in question is likely to continue to be caught at some level in association with other fisheries legitimately still operating. Also, it is not necessary or advisable to completely close fisheries when a stock is not estimated to be below the hard limit.
>
> 36. The HSS and associated Operational Guidelines do not make explicit recommendations on how socio-economic factors should be taken into account as they are both primarily concerned with biological considerations. …

[89] Matthew Dunn, a principal scientist with the National Institute of Water and Atmospheric Research Ltd, confirmed that:

> 50. … [T_{min}] is estimated scientifically and takes account of the biological characteristics of the stock, including growth, natural mortality rate, and reproduction. [T_{min}] will therefore vary with the species and stock under consideration.
>
> 51. A rebuild period of [2*T_{min}] makes an allowance for fishing to take place whilst the stock is rebuilding. …

[90] Dr Marc Griffiths, a Principal Advisor at Fisheries New Zealand, explained that:

> [2*T_{min}] is longer than T_{min} (being the closure of the fishery) and insofar as it enables a longer period of rebuilding, it does take some account of socio-economic factors. However, the [2*T_{min}] proxy does not include socio-economic considerations specific to individual fisheries, or cultural considerations. In my view, this is the role of FNZ managers and the Minister.

[91] We draw the following conclusions from this evidence. A "period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock" is necessarily based on expert scientific opinion. Opinion may differ, but the consensus of scientific opinion as to best practice is reflected in the HSS, which builds in an allowance for some fishing to recognise general social, cultural and economic factors.

[92] However, the fact that scientific opinion makes some allowance for general social, cultural and economic factors in assessing what an appropriate period is does not mean that, in selecting the appropriate period under s 13(2)(b)(ii), the Minister is free to make further allowance for social, cultural and economic factors specific to the

case at hand under s 13(3). Those factors are properly limited to assessing the way and rate of the rebuild. As we have previously concluded, the "period appropriate to the stock" referred to in s 13(2)(b)(ii) constrains the rebuild period that would otherwise result from determining the way and rate of rebuild under s 13(2)(b)(i) by providing an outer limit within which the rebuild must occur. A rebuild period based on social, cultural and economic factors can be expected to be longer than one set by reference only to the scientific factors. Section 13(2)(b)(ii) will only fulfil its function as a control on the rebuild period if the "appropriate period" is determined only by reference to those factors. We therefore respectfully disagree with Goddard J's characterisation of s 13(2)(b)(i) and (ii) as two sides of the same coin and his suggestion that to decide the way and rate of rebuild also decides the period of rebuild.[66]

[93] It follows that we do not accept the Minister's argument that s 13(2)(b)(ii) contemplates a range of periods. We agree with Forest & Bird's response that the Minister's approach is misconceived because the requirement in s 13(2)(b)(ii) to rebuild "within" a period appropriate to the stock means that rebuilding within the longest period appropriate to the stock or any shorter period would always satisfy s 13(2)(b)(ii). There is no need for the unnecessary gloss of allowing for a range of periods from which a specific period is selected on the basis of considerations other than those permitted by s 13(2)(b)(ii).

[94] We do not, however, see the need to identify the "appropriate period" within which the rebuild must occur before the "way and … rate" of the rebuild. Once it is understood that the period appropriate to the stock is the dominant enquiry because it provides the outer limit within which the rebuild can occur, it does not matter whether the period is fixed first or used as a cross-check that the way and rate selected can produce the desired result within the appropriate period. Having said that, we acknowledge the practicality of identifying the appropriate period first.

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66 Below at [203], [214], [232] and [237].

Was the Minister entitled to consider the IRP under s 13(2)(b)(ii)?

[95] It will be clear from our analysis that the IRP would need to be a scientific factor for it to be a relevant consideration under s 13(2)(b)(ii). Fisheries Inshore and Te Ohu did not claim that the IRP was a scientific factor, and nor could they have. The Minister agreed with Forest & Bird that the IRP was an irrelevant consideration under s 13(2)(b)(ii).

[96] It follows that the IRP was an irrelevant consideration in determining the appropriate period under s 13(2)(b)(ii) and the Judge did not err on this point.

Submissions on behalf of Te Ohu

[97] Te Ohu is the trustee of the Te Ohu Kai Moana trust established under s 31 of the Maori Fisheries Act 2004. Section 32 of the Maori Fisheries Act outlines the trust's purpose as being to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities in order, among other things, to further the agreements reached between the Crown and Māori in September 1992 under a deed of settlement, the key terms of which are recorded in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Fisheries Settlement Act).[67]

[98] Te Ohu has a variety of interests in the East Coast tarakihi stock, including as an owner of quota shares as trustee for iwi and as an owner of income shares in Aotearoa Fisheries Ltd, which has direct and indirect interests in quota shares.[68] Te Ohu supports the arguments made by Fisheries Inshore and advances supplementary arguments. In relation to Issue 1 it says, essentially, that Te Ohu's statutory role and mandate under the Fisheries Settlement Act and the wider context of Te Tiriti require that social, cultural and economic considerations relating to iwi Māori (including the IRP) be taken into consideration in decision-making relating to fisheries. It also relies on specific provisions of the Fisheries Act — ss 5 and 12 —

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67 The Fisheries Deed of Settlement 23 September 1992 finally settled the litigation brought by Māori to challenge the validity of the QMS. Its key terms are recorded in the preamble of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

68 Te Ohu was joined to the High Court proceeding as a respondent on its own application: *Royal Forest and Bird Protection Society of New Zealand Inc v Minister of Fisheries* [2020] NZHC 741.

as being to the same effect. On this basis, it says that s 13(2)(b) and (3) should be interpreted so as to take into account and fully recognise the relevant social, cultural and economic considerations affecting iwi Māori and the Judge's interpretation fails to do that.

[99] The Fisheries Settlement Act included the acknowledgement by Māori that the QMS was a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand. It also included an undertaking by the Crown to amend the Fisheries Act 1983 so as to authorise the allocation to Māori of 20 per cent of any new quota issued as a result of extension of the QMS to fish species not included in the QMS at the date of the settlement.[69] The Fisheries Act 1996 reflects those aspects of the Fisheries Settlement Act. Section 5 of the Fisheries Act contains a general direction that the Act be interpreted in a manner consistent with the Fisheries Settlement Act. Section 12(1) requires the Minister to consult with people, including Māori, having an interest in fish stocks or the effects of fishing on the aquatic environment. It also requires the Minister to provide for the input and participation of tangata whenua having a non-commercial interest in the stock or an interest in the effects of fishing on the aquatic environment in the area concerned. Those obligations arise in relation to (among others) the setting and varying of TACs under s 13(1) and (4). Notably, they do not arise in relation to the setting and varying of TACs under s 13(2) and (3).

[100] Mr Ferguson, for Te Ohu, simply raised ss 5 and 12 of the Fisheries Act in a general way. He did not identify any specific aspect in which the Judge's interpretation ran counter to the Fisheries Settlement Act. Nor did he assert a failure to consult and, given the evidence of Mr Drummond for Te Ohu, there does not seem to be any basis on which he could have done so. Mr Drummond described extensive engagement with Fisheries New Zealand from June 2018 in relation to the setting of the TACs and the formulation of the IRP for use in that process.

[101] As we have discussed, the legislative history of the Fisheries Act culminated in the decision to adopt sustainability as a predominant purpose. While the

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[69] Treaty of Waitangi (Fisheries Claims) Settlement Act, preamble, recording the terms of agreement of the Fisheries Deed of Settlement 23 September 1992, cls 3.2 and 4.2.

Fisheries Act explicitly acknowledges and protects the scope of the Fisheries Settlement Act, the latter is not inconsistent with that purpose and does not require the Fisheries Act to be interpreted in a way that would undermine it.

[102] As is evident from our earlier conclusion, interpreting s 13(2)(b) so as to allow social, cultural and economic considerations to be taken into account in identifying the period under s 13(2)(b)(ii) within which the rebuild could be undertaken would undermine the statutory purpose. In any event, it cannot fairly be suggested that not taking them into account in the appropriate period enquiry results in them being stripped out of the decision-making process, given that they are to be taken into account in the "way and … rate" enquiry. Nor, given the extensive, specific provisions made in recognition of the Fisheries Settlement Act, could a general reliance on Te Tiriti, without more, justify departing from an orthodox exercise in statutory interpretation.

Issue 2: 70 per cent probability of achieving rebuild plan as a relevant consideration

The issue on appeal

[103] The parties have different views on how the second issue should be framed. This reflects their differing views of the pleaded third cause of action, which is the focus of the appeal. We start with the Judge's determination of the second cause of action, which, although not under challenge, provides important context for the third cause of action.

[104] In its second cause of action, Forest & Bird alleged that the 2019 decision had, at most, a 50 per cent probability of achieving the targeted rebuild and that level of probability meant that the decision failed to meet the statutory requirement of enabling the tarakihi stock to be altered within a period appropriate to the stock. The Judge accepted that the probability of achieving a rebuild target was a relevant consideration in setting the TAC but did not accept that proceeding on the basis of a 50 per cent probability was an error of law:[70]

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[70] Judgment under appeal, above n 4.

> [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*. …
>
> [117] … 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 level should be determined at the time of setting the TAC.
>
> ….
>
> [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.

[105] Although Fisheries Inshore's notice of appeal signalled a challenge to the Judge's findings on the second cause of action, no specific submissions were made in relation to it. In oral argument Mr Scott accepted that, in setting the TAC, the Minister had to be satisfied with the probability that the rebuild would be achieved but did not accept that the Minister was required to identify a specific level of probability. As a result, the appeal against the findings on the third cause of action necessarily proceeds on the basis that the probability of achieving the rebuild target was a relevant consideration.

[106] The third cause of action asserted that there was a default probability standard of 70 per cent that was a mandatory consideration. Because the Fisheries Act makes no mention of a specific standard of probability, Forest & Bird's case depended on establishing both that a default standard existed and that it was an implied mandatory consideration.

[107] Forest & Bird pleaded that:

> 37. In making the 2019 TAC decisions, the Minister … failed to take into account a relevant consideration, concerning the [HSS] and Operational Guidelines.
>
> …
>
> <u>Particulars — failure to take into account relevant consideration</u>
>
> g. The Minister set a combined TAC with a 50% probability of achieving the target within the rebuild timeframe.

h. The [HSS] provides that where a stock is below the "soft limit" it should be rebuilt to at least the target level in a timeframe between T_{min} and $2*T_{min}$ with an acceptable probability.

i. The Operational Guidelines specify that 70% is the minimum standard for the acceptable probability of rebuild for a stock that is below the "soft limit" because 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) and that in such instances it is necessary to rebuild both the biomass and the age composition.

j. The Minister failed to have regard to the minimum standard of "acceptable probability" of 70% for rebuilding depleted stocks, and the reasons for that higher probability.

[108] The Judge described this cause of action as follows:[71]

> [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.
>
> …
>
> [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.
>
> …
>
> [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*. …

[109] The Judge's reference to the obligation to use the best available information is a reference to s 10(a) of the Fisheries Act, which provides:

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[71] Emphasis added.

> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:
>
> (a) decisions should be based on the best available information:

[110] The Judge concluded that, although there was no reference to the HSS in the Act and s 13 did not refer to the assessment of probability as part of the process of setting a TAC, the HSS was the "best available information" for the purposes of s 10(a) in relation to acceptable probability levels and other matters relevant to the interpretation of s 13.[72] The Judge went on to find that the Minister had not considered the HSS guidance in relation to probability when making the 2019 decision and therefore failed to take into account a mandatory consideration.[73]

[111] Fisheries Inshore contends that Forest & Bird's pleading did not, in fact, assert that the HSS specified 70 per cent as the default probability for rebuild — only that the Operational Guidelines contained a default probability standard. Nor had it pleaded that the HSS was the "best available information" about probability for the purposes of s 10(a). Therefore, the Judge erred in even considering whether the HSS was "the best available information" and the appeal had to be limited to whether the Operational Guidelines were an implied mandatory consideration.

[112] Ms Gepp, for Forest & Bird, says that Forest & Bird simply pleaded that the Minister was to have regard to the minimum probability of 70 per cent and the reasons for it; the HSS and Operational Guidelines were merely particulars. Ms Gepp also submitted that, although Forest & Bird did not assert that the Minister had failed in a duty under s 10(a), the Judge was entitled to refer to s 10(a) and to consider whether the HSS was the "best available information" when considering whether it was an implied mandatory consideration. Forest & Bird therefore frames the second issue on appeal as whether the HSS specifies an acceptable probability of 70 per cent and, if so, whether the HSS and/or the Operational Guidelines are implied mandatory considerations.

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72 At [148] and [152]–[153].
73 At [167]–[168].

[113] As set out earlier, paragraph 37 of the statement of claim identifies the relevant consideration as arising under both the HSS and Operational Guidelines. However, particular (h) refers only to the HSS requirement for a rebuild plan with "an acceptable probability" of reaching its target. Read alone, it would not convey a requirement for a probability of 70 per cent arising under the HSS. Particular (i) refers only to the Operational Guidelines as containing the 70 per cent standard of acceptable probability. Read alone it asserts that the probability standard appears only in the Operational Guidelines. However, particular (j) simply refers to the minimum standard of acceptable probability of 70 per cent, without reference to either the HSS or the Operational Guidelines. Read either alone or as the culmination of the preceding particulars, it asserts that under either or both of the HSS and the Operational Guidelines the acceptable probability standard is 70 per cent.

[114] In our view it is therefore appropriate to frame the second issue broadly, as proposed by Forest & Bird, so that the question of whether there was an implied mandatory consideration is directed at both the HSS and the Operational Guidelines. We therefore address Issue 2 as follows:

(a) Does the HSS specify a default probability standard for rebuild of 70 per cent (and reasons for that default probability) that is relevant to rebuilding plans for stocks below the "soft limit"?

(b) If yes, was the 70 per cent default probability contained in the HSS an implied mandatory consideration in setting the TACs for East Coast tarakihi in 2019?

(c) Was the 70 per cent probability of rebuild and the reasons for that probability specified as the default probability in the Operational Guidelines an implied mandatory relevant consideration in setting the TACs for East Coast tarakihi in 2019?

[115] We note that it was common ground between the parties that the Minister did not consider the probability of 70 per cent when making his decision.

Does the HSS specify 70 per cent as the default probability for a rebuild plan?

[116] The relevant section of the HSS is that addressing the "Core Elements" of the HSS. These are the core elements described earlier and include the soft limit that triggers a requirement for a formal, time-constrained rebuilding plan. This section of the HSS begins with a stated objective, to which we return later. It then provides "Specifications" relating to each of the core elements. In relation to the soft limit, it relevantly states:[74]

> > The default soft limit is ½ B_{MSY} or 20% B_0, whichever is higher.
>
> > The soft limit will be considered to have been breached when the probability that stock biomass is below the soft limit is greater than 50%.
>
> > Stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a time frame 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[75] …

And by way of footnote to the fourth specification:

> > 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%.

[117] For completeness, the Operational Guidelines state:[76]

> > For both limits [soft 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.
>
> > …

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74 HSS, above n 5, at 7–8 (footnotes omitted). For convenience, we refer to these as the first–fourth specifications.

75 Despite the fourth specification identifying a probability standard of "at least … 70%", reference throughout the case was simply to a standard of 70 per cent. We therefore refer only to 70 per cent as the probability standard relied on.

76 Operational Guidelines, above n 5, at 10 and 12.

> 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.

[118] Mr Scott argued that only the third specification of the HSS applies to the rebuilding plan and it leaves the question of acceptable probability for determination by the Minister. He says that the fourth specification does not apply to the rebuild plan and is to be read separately and as relating to the state of the fish stock at the end of the rebuild.

[119] Ms Gepp argued that it would be illogical to treat the 70 per cent probability standard in the fourth specification as applying only at the end of a rebuild because the position at the end of the rebuild is affected by the trajectory chosen at the start of the rebuild. In other words, the requirement that a stock be "rebuilt … with an acceptable probability" cannot be separated from the requirement that a stock "will be considered to have been fully rebuilt" when there is a 70 per cent probability that the target has been achieved. This is because the probability of the rebuild at the outset is directly relevant to achieving the target within the period that has been determined as appropriate to the stock. Mr Scott rejected this argument. His response was that because things could change over the course of the rebuild plan (for example, as a result of the IRP), it was possible that the desired probability would be reached sooner even if it started with a lower probability target.

[120] In discerning the meaning of the third and fourth specifications, we see the starting point as the HSS' stated objective, which is:[77]

> … *to provide a consistent and transparent framework for setting fishery and stock targets and limits* and associated fisheries management measures, so that there is a high probability of achieving targets, a very low probability of breaching limits, and acceptable probabilities of rebuilding stocks that nevertheless become depleted, in a timely manner. *The [HSS] specifies appropriate probabilities that will achieve each of these outcomes*.

[121] The last sentence indicates an intention that the HSS would specify the appropriate probability for rebuilding depleted stocks in relation to setting fishery

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[77] HSS, above n 5, at 7 (emphasis added).

stock targets and limits. While the fourth specification could be read as Mr Scott contends, that construction would mean — contrary to the stated objective — that the acceptable probability of rebuild plans is not specified in the HSS. It would also mean that the fourth specification would do no more than provide a means of measuring success at the end of the target period. Because of the length of rebuild periods, this would not assist, either significantly or at all, in providing a framework for setting fisheries targets and limits to achieve the stated outcomes.

[122] Although our reasoning is slightly different, we agree with Ms Gepp's submission that the effect of the third and fourth specifications cannot be separated. In our view the more natural construction, and one that would fulfil the stated objective of the HSS, is to read them conjunctively. The third specification makes it clear that the rebuild plan comprises not only a target level and requisite time frame but also an acceptable probability of achieving those goals. The acceptable probability is essential because the target level and time frame are not absolutes — they are measured by reference to the probability of their being achieved. It is unlikely this central factor would not be specified in the HSS, given that the stated objective is to do exactly that. We therefore see the fourth specification as supplementing or explaining the third specification.

[123] This construction would reflect the format of the first and second specifications, which are clearly intended to be read together. It would also be consistent with the explanatory footnote, which is directed towards how the target can be reached — a prospective view rather than a hindsight assessment. We do not accept Mr Scott's argument that the fourth specification can be explained by the possibility of something happening during the rebuild period that results in the target being reached earlier than anticipated. The effect of the footnote is explicitly against that approach.

[124] We conclude that the HSS does specify a default minimum acceptable probability standard for a rebuild plan of 70 per cent.

Is the default probability standard of 70 per cent in the HSS an implied mandatory consideration?

[125] Issue 2 is directed towards whether the default probability of 70 per cent in the HSS and the reasons for it are also mandatory considerations. As noted, the Judge had held (in relation to the second cause of action) that the probability of achieving the rebuild target is a mandatory consideration in setting the TAC.[78]

[126] The Judge began her analysis of this issue by considering whether the HSS was the "best available information" under s 10 before going on to determine that the HSS was an implied mandatory relevant consideration under s 13:[79]

> [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.

After reviewing the evidence given on behalf of Fisheries Inshore she said:

> [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.

The Judge then made a finding 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".[80]

[127] This last finding was followed by a statement of the law and a fuller explanation of the Judge's reasons, which we discuss later.

[128] Mr Scott submitted that the Judge erred in even considering the question of whether the HSS was the "best available information" under s 10 and that, in any event, the HSS was not "information" much less "the best available information" for the purposes of s 10(a). He also submitted that the Judge had applied the wrong test

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78 Judgment under appeal, above n 4, at [127(a)].

79 Footnote omitted. It is common ground that the words "and it is 'the best available information' in terms of s 10 of the Act" was the Judge's finding rather than the evidence of Dr Mace.

80 At [153].

for determining an implied mandatory relevant consideration and that, on the correct test, the HSS was not an implied mandatory relevant consideration.

Was the Judge entitled to consider whether the HSS was "the best available information" for the purposes of s 10(a)?

[129] As Miller J observed in *Antons Trawling Co Ltd v Minister of Fisheries*, a TAC-setting decision should begin by identifying the best available information.[81] It follows that if information satisfying that description is available, which relates to an aspect of the decision required to be made under s 13(2)(b), then that information is necessarily a relevant consideration.

[130] However, Mr Scott argued that the Judge erred in considering this issue because Forest & Bird had not pleaded that the 70 per cent probability standard was the "best available information", nor that the Minister had made an error of law in failing to take this into account as a breach of the information principles in s 10, and nor had its evidence treated the HSS and Operational Guidelines as such. Mr Scott submitted that, correctly characterised, Forest & Bird's case was that the HSS and Operational Guidelines set out policy and the Government's view of best practice rather than being "information" in terms of s 10.

[131] Forest & Bird could have pleaded that the HSS represented the best available information and was therefore an implied mandatory consideration. However, it simply pleaded that the minimum standard of probability in the HSS was a relevant consideration that the Minister failed to take into account. Doing so had the effect of a short-cut, directing the enquiry towards the ultimate answer rather than the route by which the necessary implication would be drawn. However, we do not see any error by the Judge in considering the question of implication by reference to s 10(a). The HSS was advanced in the evidence as a statement of best practice. Addressing that evidence would lead, inevitably, to s 10(a) because of the obvious proposition that a statement of best practice would arguably also represent the best available information.

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[81] *Antons Trawling Co Ltd v Minister of Fisheries* HC Wellington CIV-2007-485-2199, 22 February 2008 at [61].

Did the Judge err in finding that the HSS was "the best available information"?

[132] The HSS describes itself in the following way:[82]

> 2. The [HSS] is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fishstocks in New Zealand's [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. …
>
> 3. The metrics specified in the [HSS] are to be treated as defaults: i.e. they should be applied in most situations. Where proposed management options depart from the [HSS], they must be justified in terms of the particular circumstances that warrant such departure.

[133] The Judge held that the HSS did represent best practice in relation to probability and was therefore the best available information.[83] Mr Scott submitted that this finding was an error because the HSS was not "information", much less "the best available information" for the purposes of s 10(a). We do not accept these submissions.

[134] "Information" is defined in s 2(1) of the Fisheries Act as including:

> (a) scientific, customary Māori, social, or economic information; and
>
> (b) any analysis of any such information

[135] The "best available information" is also defined in s 2(1), as "the best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".

[136] Mr Scott relied on the dictionary definition of information as "facts provided or learned about something or someone".[84] He submitted that the HSS (and the Operational Guidelines) are statements of policy and practice which are used in light of information that is obtained. They are not, themselves, "information" in terms of s 10. In our view, the meaning of "information" in the Fisheries Act is not so narrow. In ordinary parlance, information is a word of wide import. For example, other

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82 HSS, above n 5.
83 Judgment under appeal, above n 4, at [156].
84 Mr Scott cited the Oxford English Dictionary for this definition but it is unclear which edition.

dictionary definitions include "[k]nowledge communicated concerning some particular fact, subject or event, …".[85] In the context of the Fisheries Act the word is clearly intended to have a similarly wide import. It is not tenable to argue that a statement of best practice and the reasons for it are not information for the purposes of s 10(a).

[137] We see no significance in the fact that Forest & Bird's witnesses referred to the HSS as a statement of best practice rather than the "best available information". Whether the HSS represented best practice was a question of fact for the Judge to determine on the basis of the expert evidence. Whether it was the best available information was a question of law and, self-evidently, not a matter on which any expert witness could properly express a view.

[138] We turn to Mr Scott's submission that the HSS did not represent best practice. This submission rested on the evidence of Fisheries Inshore's Executive Chair, Mr Lawson, who said:

> 37 The HSS is therefore a policy document of the Ministry's seeking to provide guidance to the Minister on how to approach the biological considerations and uncertainties relevant to TAC setting under section 13. It also sets default criteria and is not intended to apply if there is better fisheries specific information that can be used.
>
> 38 While the seafood industry understands and agrees with the objectives of the HSS, it has never adopted this policy document. It is useful to have default criteria to be used where good information about a fishery is not available. However, it was prepared over ten years prior to the decision at issue in these proceedings and was supposed to be updated over five years ago. As such, Fisheries Inshore has maintained throughout the consultation process 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.
>
> 39 We accept however that it was ultimately a question for the Minister to determine whether he considered it appropriate to use the default standard contained in the HSS or to use the more fisheries specific information which Fisheries Inshore asked him to take into account.

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[85] *Oxford English Dictionary* (online ed, Oxford University Press, updated to December 2022), definition of "information".

[139] Mr Scott submitted that the Judge had failed to take account of Mr Lawson's evidence in finding that the HSS represented best practice and the best available information. That submission is not supportable. The Judge specifically referred to Mr Lawson's evidence.[86] She said, however, that it was not clear from his evidence how the tarakihi stock assessment would provide a basis for departing from the HSS guidance on probability levels.[87] This was a reasonable conclusion to reach. Mr Scott did not suggest any basis on which the Judge might have drawn a different conclusion from Mr Lawson's evidence.

[140] The Judge had before her the evidence of two experts that the HSS still represented best practice, notwithstanding its age. Dr Mace, who was involved in developing the HSS, said that when it was published in 2008 it represented best international practice. She acknowledged that it had not been revised since then but explained that this was partly because it still largely represents international best practice. Ms Goddard, a marine consultant and advocate, also said that the HSS still represented best practice. There was no evidence to the contrary.

[141] Mr Scott criticised the Judge for saying that Fisheries Inshore had not provided better information when the question whether the HSS was the best available information was not an issue in the case. For the reasons already discussed, we do not accept that submission. Whether the HSS represented current best practice was plainly in issue on the evidence. Whether it was the best available information for the purposes of s 10(a) was a question of law that arose from that evidence. In any event, we read the Judge's comments as simply identifying the information available to her, not as imposing any evidential burden on Fisheries Inshore.

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86 Judgment under appeal, above n 4, at [149]–[150].
87 At [151].

Did the Judge err in finding that the HSS was an implied mandatory consideration?

[142] The Judge referred to the recognised test,[88] as it was discussed by this Court in *CREEDNZ Inc v Governor-General*:[89]

> … It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* … "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". More recently in *Secretary of State for Education and Science v Tameside Borough Council* … Lord Diplock put it as regards the statutory powers of a Minister that "… it is for a court of law to determine whether it has been established that in reaching his decision … he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered …"
>
> 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. …

[143] The Judge went on immediately to cite from McGechan J's decision in *Taiaroa v Minister of Justice*.[90] Under consideration in that case was a pleading that McGechan J described as one of "'mistake of fact', albeit coupled with associated invocation of resulting 'irrelevant considerations'".[91] His Honour observed:[92]

> Essentially, 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 - in a sense that Parliament must have intended it to be taken into account - the decision may be invalidated. Two points, however, require emphasis. First, the fact "must be an established one or 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

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88 Judgment under appeal, above n 4, at [153].

89 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 182–183 (citations omitted).

90 Judgment under appeal, above n 4, at [154], citing *Taiaroa v Minister of Justice* HC Wellington CP99/94, 4 October 1994 at 34.

91 At 42.

92 At 42 (citations omitted). This passage was cited in Judgment under appeal, above n 4, at [155].

> "actually or constructively within the knowledge of the Minister or the Ministry", …

[144] The Judge made the following findings:[93]

> [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.

[145] Mr Scott submitted that, having correctly identified the relevant test as stated in *CREEDNZ*, the Judge failed to apply that test and instead, wrongly, applied the test in *Taiaroa*, which was directed towards mistake of fact. Even leaving that aspect aside, Mr Scott argued that, in any event, application of the *CREEDNZ* test would not have resulted in the HSS being treated as a mandatory consideration.

[146] We do not accept that the Judge applied the wrong test. It is evident that the Judge treated the statements in *Taiaroa* as assisting in determining whether the HSS was the best available information. We see no error in that. We accept however (and Ms Gepp acknowledged), that the Judge reasoned directly from the fact of the HSS being the best available information to the conclusion that it was a mandatory consideration. There was no explicit explanation for the implication that the HSS was a factor the Minister was required to consider. Nevertheless, we do not accept Mr Scott's submission that there was no basis for that implication.

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[93] Judgment under appeal, above n 4.

[147] Whether the HSS was, impliedly, to be taken into account in making the decision did not depend on the HSS being specifically in Parliament's contemplation. Section 10(a) required the Minister to base decisions on the best available information, implying that Parliament intended for whatever information is the best available information at the time a decision is made to be taken into account. Therefore, the Judge was right to proceed on the basis that if the HSS was the best available information when the 2019 decision was made, it was required to be taken into account.

[148] Mr Scott submitted that it was significant that the HSS was not developed until some 12 years after the introduction of the Fisheries Act, and that no reference to it was included when s 13 was amended in 2008.[94] For the reason just given, we do not see these points as helpful. Prior to the HSS being introduced in 2008 other material would have been the best available information. It would have been that information which was required to be taken into account and in the future other, different, material may be the best available information. Parliament cannot have intended there to be legislative changes whenever recognised scientific best practice changes.

[149] We therefore conclude that the Judge did not err in her conclusion that the HSS was a relevant consideration that ought to have been taken into account. As Ms Gepp acknowledged, this did not mean that the Minister was bound to apply the 70 per cent probability; the HSS specifications are stated only to be default positions. But it should have been considered and, as acknowledged by all the parties, it was not.

[150] Given this conclusion, we find it unnecessary to go on to consider the Operational Guidelines as a relevant consideration.

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[94] The Fisheries Act 1996 Amendment Act 2008, s 4(1), introduced s 13(2A), which addressed the situation arising in *Antons Trawling*, above n 81, where the level of stock required to produce the maximum sustainable yield could not reliably be estimated using the best available information.

Conclusions and result

[151] The effect of our conclusions on Issue 1 can be summarised as:

(a) When setting the TAC under s 13, the Minister is required to determine the "period appropriate to the stock" by reference solely to the scientific factors specified in s 13(2)(b)(ii), and separately from the way and rate of rebuild. It is, however, not necessary for the Minister to decide on the "period appropriate to the stock" before determining the "way in which and rate at which" the stock is moved towards MSY, though doing so is likely to be more practical.

(b) In deciding the "period appropriate to the stock" under s 13(2)(b)(ii), the Minister is not entitled to take social, cultural or economic factors into account. Those factors are relevant only to the way and rate of the rebuild.

(c) The IRP was an irrelevant consideration in identifying the "period appropriate to the stock" under s 13(2)(b)(ii).

[152] On Issue 2, we have concluded that the HSS does specify a default probability standard for rebuild of 70 per cent and this standard, and the reasons for it, were implied mandatory considerations in setting the 2019 TAC.

[153] Therefore:

(a) The appeal is dismissed.

(b) The cross-appeal is dismissed.

[154] As to costs, Fisheries Inshore, Te Ohu and the Minister must pay Forest & Bird costs for a standard appeal on a band A basis, with second counsel certified, and usual disbursements.

GODDARD J

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Introduction

[155] The purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability.[95] It sets out various mechanisms for pursuing that goal. Under pt 3 of the Act, the Minister of Fisheries may set "sustainability measures" for fisheries stocks. For a fisheries stock that is subject to the quota

[95] Fisheries Act, s 8(1).

management regime provided for in the Act, one sustainability measure that must be determined by the Minister from time to time is the TAC for that stock.[96]

[156] Tarakihi is a quota management stock. It is a valuable stock commercially, and is important to customary and recreational fishers. In 2018, and again in 2019, the Minister made decisions setting the TAC for the East Coast tarakihi stock.[97]

[157] The TAC for a stock is set with a view to managing the stock at, or moving it towards, a level that can produce the MSY. Assessments of the East Coast tarakihi stock in 2018 and 2019 confirmed that the stock was significantly below that level. So the Minister was required to make a decision under s 13(2)(b) of the Act setting a TAC that would enable the stock to be restored to, or above, that level. In 2018, and again in 2019, the Minister reduced the TAC for East Coast tarakihi with a view to enabling the stock to recover.

[158] Forest & Bird considered that the TAC reductions determined by the Minister were insufficient to enable the stock to recover within an appropriate timeframe, with an appropriate level of confidence. Forest & Bird brought judicial review proceedings challenging the decision made by the Minister under s 13(2) of the Act in 2019 in relation to East Coast tarakihi (the 2019 decision). Before the High Court that challenge succeeded on a number of grounds.[98]

[159] An industry body, Fisheries Inshore appeals from that judgment. Te Ohu supports the appeal. The Minister does not seek to uphold his original decision, but filed a cross-appeal concerning the interpretation of s 13(2)(b). The Minister's interpretation argument is not strictly speaking a cross-appeal, as the Minister does not contend for a different outcome from that reached in the High Court.[99] But it was described in that way before us, and I am content to use that label in this judgment.

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96 Section 13.

97 The East Coast tarakihi stock represents the majority of the tarakihi catch in New Zealand. It comprises all or part of the quota management areas known as TAR 1, TAR 2, TAR 3 and TAR 7 which are found along the East Coast of New Zealand and the eastern part of the Cook Strait.

98 Judgment under appeal, above n 4.

99 See *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [16] and [25]; and *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2013] NZSC 35, [2013] 2 NZLR 397 at [2]–[7].

[160] Courtney J has concluded that the appeal should be dismissed. I take a different view. I do not consider that the Minister's 2019 decision was inconsistent with the statutory scheme in any material respect that would justify setting it aside.

[161] My conclusion reflects a different understanding of the requirements that the Act prescribes for decisions by the Minister under s 13(2)(b). I am not persuaded that the Minister failed to consider any of the matters that he was required to consider in order to make a lawful decision consistent with the statutory scheme, or that he took into account any irrelevant considerations.

[162] The Act provides for decisions about TACs to be made by a Minister because decisions about the timeframe over which a depleted stock will be restored to a level consistent with MSY involve difficult trade-offs between the longer-term economic and environmental benefits from a swift recovery of stock levels, and the shorter term social, cultural and economic impact of large reductions in the TAC for a stock. These trade-offs are quintessentially political decisions, to be made after considering the best available scientific information about the stock and the views of the communities and stakeholders whom the Minister is required to consult. There is abundant room for reasonable disagreement about such decisions. The criticisms of the 2019 decision advanced by Forest & Bird go to whether the Minister struck the right balance: a matter for which he is politically accountable. They do not in my view call into question the lawfulness of that decision.

[163] The reasons for my conclusions are set out below. I agree with, and adopt with gratitude, Courtney J's summary of the background to the proceedings, the reasoning of the High Court, and the parties' submissions. I focus on what the Act requires of the Minister when setting a TAC under s 13(2)(b), and on the respects in which it was claimed that he failed to comply with those requirements.

Issues on appeal

[164] I begin by summarising, for ease of reference, the two issues identified by the parties to the appeal.

[165] The first issue is whether the High Court erred in finding that when varying the TAC under s 13(2) to rebuild the East Coast stock, the Minister:

(a) Must first assess the period of rebuild appropriate to the stock by reference only to the biological characteristics of the stock and any environmental conditions affecting the stock and without considering whether the period could be lengthened due to the social, cultural, and economic impact of catch reductions referred to in s 13(3).[100]

(b) Must then separately consider the way in which and rate at which the stock is moved to a level that can produce MSY as a distinct step (without considering the period of the rebuild), and that the social, cultural, and economic factors referred to in s 13(3) are only relevant to this second step.[101]

(c) Was not permitted to consider the IRP when determining the appropriate period under s 13(2)(b)(ii), as it was an irrelevant consideration under that subparagraph.[102]

[166] The second issue concerns the Minister's approach to the probability of rebuild within a given period, and whether the Minister is required to expressly consider whether to adopt or depart from a "default" probability of rebuild of 70 per cent. As explained in more detail below, the High Court found that a minimum probability of rebuild of 50 per cent is implicit in s 13(2)(b).[103] That finding was not challenged before us. But the High Court also found that the Minister was required to expressly consider whether or not to adopt a probability of rebuild of 70 per cent on the basis that this higher probability is contemplated by the HSS and Operational Guidelines adopted by the Ministry, and this "best practice" guideline is a mandatory relevant consideration for the Minister.[104]

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100 Judgment under appeal, above n 4, at [109].
101 At [109].
102 At [193] and [200].
103 At [127].
104 At [152]–[157].

[167] The issue has two components:

(a) Does the HSS specify a 70 per cent default probability of rebuild (and reasons for that default probability) that is relevant to rebuilding plans relating to stocks below the "soft limit" identified in the HSS?

(b) Was the 70 per cent probability of rebuild and the reasons for that probability specified as the default probability in the Operational Guidelines (and, if the answer to (a) is yes, the HSS) a mandatory relevant consideration when the Minister decided to set the TACs for East Coast tarakihi in 2019?

Fisheries Act: relevant provisions

[168] As already mentioned, the purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability. Those terms are defined as follows:[105]

> **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.

[169] Sustainability is concerned with utilisation over time: properly understood, the two concepts are complementary and are not in tension.[106] But high levels of utilisation in the short term will generally be inconsistent with sustainable utilisation of the resource over the longer term. The tension that the Act seeks to address is between unsustainably high levels of short-term utilisation of a resource and a longer term (sustainable) approach to utilisation of that resource.

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105 Fisheries Act, s 8(2).

106 The definition of "utilisation" refers to conserving fisheries resources. But "conserving" is defined in s 2(1) to mean "the maintenance or restoration of fisheries resources *for their future use*" (emphasis added): so this concept is also focused on the use of the relevant resources.

[170] Section 9 sets out environmental principles that the Minister (and others exercising powers under the Act) must take into account:

> **9 Environmental principles**
>
> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall 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:
>
> (c) habitat of particular significance for fisheries management should be protected.

[171] There was no claim that the Minister failed to take into account relevant environmental principles when he made the 2019 decision.

[172] Section 10 sets out information principles that must be taken into account by the Minister and other decision-makers:

> **10 Information principles**
>
> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall 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:
>
> (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.

[173] "Information" is defined to include:[107]

> (a) scientific, customary Māori, social, or economic information; and
>
> (b) any analysis of any such information

[174] "Best available information" is defined as the "best information that, in the particular circumstances, is available without unreasonable cost, effort, or time".[108]

[175] I return to s 10 when I discuss the second issue below at [260]–[284]. For now, I simply note that s 10 requires the stated principles to be taken into account. The principles are high-level principles about the approach to decision-making under the Act, which recognise that in this domain the available information about fisheries resources and social and economic factors is almost invariably incomplete and uncertain. Section 10 requires decision-makers to adopt an approach which pays appropriate attention to the incompleteness and uncertainty of information relating to fisheries.

[176] Part 3 of the Act is concerned with sustainability measures. Section 11 sets out in some detail the matters that the Minister must take into account when setting or varying 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

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107 Fisheries Act, s 2(1) definition of "information".
108 Section 2(1) definition of "best available information".

(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; 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.

(6) A notice under subsection (4)(b)(i) is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).

[177] The matters that the Minister is expressly required to have regard to include specified planning documents prepared under the Act and under other statutes. The list does not include the HSS or the Operational Guidelines: those documents are not contemplated by, or referred to in, the Act. As discussed below, in circumstances where Parliament has expressly identified a range of relevant planning documents that must be taken into account some caution is required before finding that other planning documents are mandatory relevant considerations that Parliament must have intended the Minister to consider as a pre-condition to making a lawful decision. Imposing such a requirement implicitly, despite omitting it from the detailed list in s 11, would be a surprising and unhelpful approach to framing legislation which a court should be slow to attribute to the legislature.

[178] Section 12 provides for broad consultation in relation to decisions on sustainability measures:

12 Consultation

(1) Before doing anything under any of sections 11(1), 11(4), 11A(1), 13(1), 13(4), 13(7) , 14(1), 14(3), 14(6), 14B(1), 15(1), and 15(2) or recommending the making of an Order in Council under section 13(9) or section 14(8) or section 14A(1), the Minister shall—

(a) consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Māori, environmental, commercial, and recreational interests; and

(b) provide for the input and participation of tangata whenua having—

(i) a non-commercial interest in the stock concerned; or

(ii) an interest in the effects of fishing on the aquatic environment in the area concerned—

and have particular regard to kaitiakitanga.

(2) After setting or varying any sustainability measure, or after approving, amending, or revoking any fisheries plan, the Minister shall, as soon as practicable, give to the parties consulted in accordance with subsection (1) reasons in writing for his or her decision.

(3) This section does not apply in respect of emergency measures under section 16.

[179] Section 13, which is at the heart of this appeal, provides for decisions by the Minister setting or varying the TAC for each quota management stock:

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).

…

[180] The concept of "maximum sustainable yield" referred to in s 13 requires some elaboration. The term is defined as meaning, in relation to any stock, "the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock".[109]

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109 Section 2(1) definition of "maximum sustainable yield".

[181] The biomass of a stock is a measure of the size of a stock in units of weight.[110] The biomass that can produce MSY is referred to as B_{MSY}. Maintaining a stock at B_{MSY} requires the stock to be managed at or around the level giving the fastest population growth rate (where fish are abundant, and food resources are plentiful).

[182] The long-term relationship between biomass and yield is shown in the following diagram:[111]

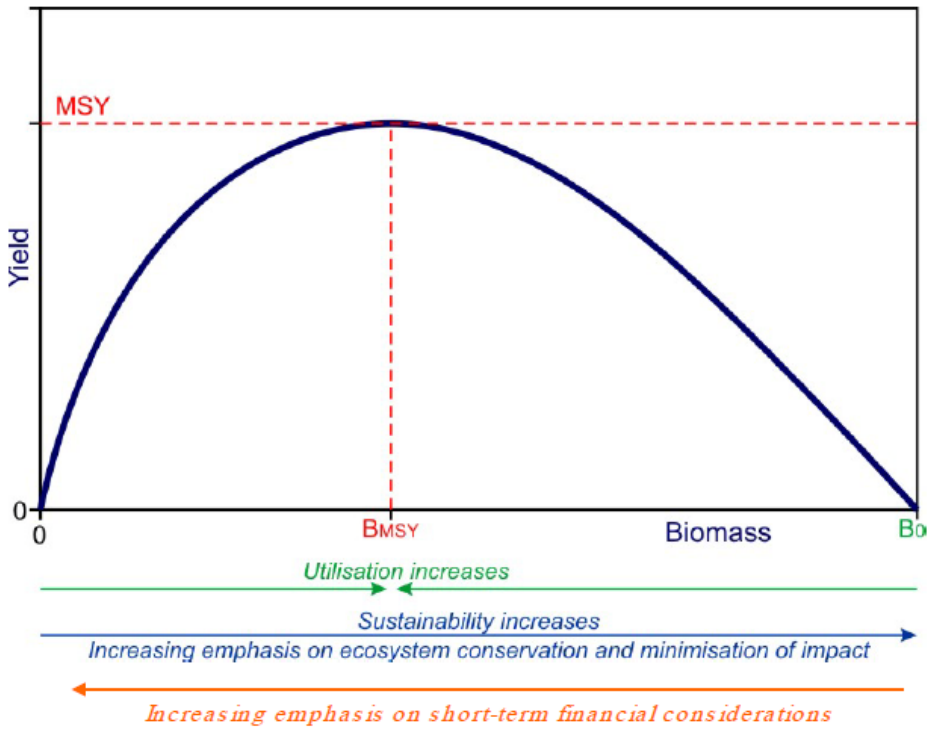

Figure 1. The long-term average (equilibrium) implications of providing for utilisation while ensuring sustainability in an MSY context. Arrows underneath the figure show that utilisation and sustainability considerations act in the same direction when biomass is below B_{MSY}, but in opposite directions when it is above.

[183] A stock can be managed sustainably at levels above or below B_{MSY}. But management of a stock around B_{MSY} is optimal from a sustainability perspective

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110 Biomass can be expressed in several different ways. In particular, it may refer to the spawning biomass, which is the total weight of sexually mature fish in a stock that spawn in a given year; or the recruited biomass (also known as the exploitable or vulnerable biomass), which is the portion of a stock's biomass that is available to the fishery (that is, those fish above legal size limits). In the case of East Coast tarakihi, biomass reference points are usually expressed in terms of spawning biomass.

111 The diagram is taken from the Operational Guidelines, above n 5, at 2.

as it maximises the long-term utilisation of the resource, and ensures intergenerational equity. There are significant longer-term benefits from rebuilding a depleted stock to B_{MSY}. But pursuing these longer-term benefits by reducing fishing in order to rebuild the stock can have appreciable social, cultural and economic costs in the shorter term associated with a loss of revenue for fishing businesses during the rebuild period, including the potential for business closures, and reduced opportunities for customary and recreational fishing.

[184] The Minister's decisions proceeded on the basis that B_{MSY} for tarakihi is 40 per cent of the "virgin" or unfished biomass (B_0) for that stock. That estimate of B_{MSY} was not in issue in the present proceedings.

The HSS and the Operational Guidelines

The HSS

[185] In October 2008 the Ministry of Fisheries issued the HSS. The HSS is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fish stocks under the QMS, to be used by the Ministry when providing advice to the Minister in relation to the setting of TACs. The way in which the Ministry envisaged the HSS is explained in the following paragraphs taken from the introduction:

> 2. The Harvest Strategy Standard is a policy statement of best practice in relation to the setting of fishery and stock targets and limits for fishstocks 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 Harvest Strategy Standard outlines the Ministry's approach to relevant sections of the Fisheries Act 1996 ("the Act"), and, as such, will form a core input to the Ministry's advice to the Minister of Fisheries ("the Minister") on the management of fisheries, particularly the setting of TACs under sections 13 and 14.
>
> 3. 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.
>
> 4. The Harvest Strategy Standard needs to be interpreted by reference to the Glossary of Terms (Appendix I) and the footnotes, both of which provide explanation and elaboration of the statements made in the text, and are integral

> parts of the Harvest Strategy Standard. It is also essential to refer to the companion document entitled "Operational Guidelines for New Zealand's Harvest Strategy Standard", which incorporates both technical and implementation guidelines. The sections on technical guidelines provide suggested methods for calculating or approximating the biological reference points specified in the Harvest Strategy Standard, a more detailed basis and justification for the metrics specified in the Harvest Strategy Standard, and elaboration on how the Harvest Strategy Standard should be implemented. The sections on implementation guidelines specify the respective roles and responsibilities of fisheries managers, scientists and stakeholders in giving effect to the Harvest Strategy Standard.
>
> 5. The Harvest Strategy Standard itself specifies only a small number of standards *per se,* with most of the technical, interpretation and implementation aspects set out in the Operational Guidelines. It is intended that the core standards will not change substantively in the short term, but should be subject to review in a period not exceeding five years, based on the evolution of fisheries plans and fisheries management strategies in New Zealand, and the evolution of international best practice. However, the Operational Guidelines will continually evolve as new data, analyses and insights become available.
>
> 6. In recognition of the differences in the nature and purpose of the Harvest Strategy Standard and the associated Operational Guidelines, the Harvest Strategy Standard has been approved by the Minister of Fisheries, while the Operational Guidelines will be periodically revised and approved by the Ministry's Chief Executive based on advice from the Chief Scientist and the National Manager Fisheries Operations. The Chief Scientist will develop revisions to the technical sections of the Operational Guidelines in collaboration with stakeholders in periodic meetings of the Stock Assessment Methods Working Group.

[186] The HSS was approved by the Minister. But as already mentioned, it is not a statutory planning document contemplated by the Act. Parts 1 to 3 of the Act were in force for some 12 years before the HSS was issued. Section 11(2) has been updated to refer to other materials on a number of occasions, but no reference to the HSS has been added.

[187] The HSS describes its relationship to the relevant provisions of the Act in the following way:[112]

> The Harvest Strategy Standard is a technical standard *to be used by the Ministry of Fisheries* ("the Ministry") when applying the legal provisions of the Fisheries Act 1996 ("the Act") *for the purpose of providing advice to the Minister of Fisheries* ("the Minister") related to the setting of TACs, and managing fisheries in accordance with the Minister's decisions. *It does not have legal force.* Rather, it is a statement of how the Ministry intends to give effect to the obligations in the Act in the context of the practical requirements

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[112] HSS, above n 5, at 22 (emphasis added).

> of managing fisheries. Sections 8, 10, 13, 14, 14A and 14B of the Act are of particular importance in this regard.

[188] The HSS is discussed in more detail below. For now, I note that it is expressed to be intended as guidance for the Ministry in preparing advice for the Minister. It was not issued as guidance for the Minister when making decisions under the Act. Nor was it issued as guidance to the public on how the Minister would approach decisions under the Act. It was not intended to have any legal force.

[189] The HSS expressly recognises that it is not the only relevant input when setting TACs:[113]

> However, the Harvest Strategy Standard is not the only input into the setting of TACs. The Harvest Strategy Standard is concerned with the application of best practice in relation to the setting of fishery and stock targets and limits, but it is focussed on single species biological considerations and related uncertainties, and includes only limited consideration of economic, social, cultural or ecosystem issues. Although it will form a core basis for the Ministry's advice to the Minister, other considerations such as environmental principles (section 9) and economic, social, and cultural factors also play a role in the advice to, and decisions by, the Minister.

[190] The HSS has three core elements:[114]

(a) a specified target about which a fishery or stock should fluctuate;

(b) a soft limit that triggers a requirement for a formal, time-constrained rebuilding plan; and

(c) a hard limit below which fisheries should be considered for closure.

[191] The HSS explains that quota management stocks such as East Coast tarakihi are 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.[115]

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113 At 3.
114 At 7.
115 At 7.

[192] The HSS identifies a default soft limit that triggers a requirement for a rebuilding plan of ½ B_{MSY} or 20 per cent B_0, whichever is higher.[116] The HSS provides the following guidance in relation to the soft limit, and rebuilding plans:[117]

> …
>
> > The soft limit will be considered to have been breached when the probability that stock biomass is below the soft limit is greater than 50%.
>
> > Stocks that have fallen below the soft limit should be rebuilt back to at least the target level in a time frame 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[118] *and* there is at least a 50% probability that the stock is above the soft limit.
>
> …

[193] The second issue on appeal relates in part to the interpretation of the last of these bullet points, and the associated footnote. The Judge considered that this bullet point addresses the probability that a rebuilding plan will achieve its target by the end of the relevant timeframe.[119] Fisheries Inshore says it is concerned with assessment of whether the target has been met following a period of rebuilding. This issue is discussed at [260]–[284] below.

[194] The HSS identifies a default hard limit at which fisheries will be considered for closure of ¼ B_{MSY} or 10 per cent B_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. Fisheries that have been closed as a result of breaching the hard limit will not be re-opened until it can be demonstrated that there is at least a 70 per cent probability that the stock has rebuilt to or above the level of the soft limit. The HSS explains that use of a probability level greater than 50 per cent

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116 At 7.

117 At 8 (footnote omitted).

118 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%.

119 Judgment under appeal, above n 4, at [157].

ensures that closed fisheries are not re-opened too soon, as this could quickly lead to the need for reconsideration of closure.[120]

[195] The HSS briefly explains how it is intended to assist in decision-making under s 13(2)(b) as follows:[121]

> The Harvest Strategy Standard assists in decision-making under this section by providing that depleted stocks should be rebuilt back to a target based on MSY-compatible reference points or better, and ensuring that the specified rate of rebuilding takes due account of relevant biological and environmental factors. In section 13(3), it is also stated that when deciding on the way and rate at which a stock is rebuilt ... "the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant". The Harvest Strategy Standard allows rebuilding plans to take these factors into account by enabling the adoption of targets "better than" MSY-compatible reference points, and permitting flexible rebuilding timeframes.

[196] It is clear from this paragraph of the HSS that it was prepared on the understanding that flexible rebuilding timeframes are permitted in order to take into account social, cultural and economic factors. I return to this below.

Operational Guidelines

[197] The HSS was issued with a companion document entitled "Operational Guidelines for New Zealand's Harvest Strategy Standard", incorporating technical and implementation guidelines. The HSS records that it specifies only a small number of standards, with most of the technical, interpretation and implementation aspects set out in the Operational Guidelines.[122] It was envisaged that the Operational Guidelines would be periodically revised and approved by the Ministry's Chief Executive based on advice from the Chief Scientist and the National Manager Fisheries Operations.[123] The Operational Guidelines expressly note that they do not have the same status as the HSS.[124]

[198] The Operational Guidelines set out detailed technical guidelines for use with the HSS. They include guidelines for recommended default proxies for B_{MSY} as a

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120 HSS, above n 5, at 9.
121 At 23 (footnote omitted).
122 At 1.
123 At 2.
124 Operational Guidelines, above n 5, at 1.

percentage of B_0. For tarakihi, which is a low productivity stock, the default proxy for B_{MSY} is 40 per cent of B_0.[125] As noted above, this was the estimate of B_{MSY} used by the Minister when making the 2019 decision.

[199] The Operational Guidelines note that fish populations fluctuate in size even in the absence of fishing.[126] Even if an MSY-compatible harvest strategy were to be implemented exactly, biomass would continually fluctuate. B_{MSY} is the average level around which the biomass is expected to fluctuate when a stock is fished on the basis of an MSY-compatible harvest strategy.[127]

[200] The Operational Guidelines explain the philosophy that underpins setting soft and hard limits, noting that they should be set well above extinction thresholds. Limits should be set at levels from which the stock is likely to recover in reasonable time.[128]

[201] The Operational Guidelines note that for both soft and hard limits, the ultimate goal is to ensure full rebuilding of the stock to the biomass target with an acceptable probability. The guidance provided by the Operational Guidelines is that this acceptable probability is 70 per cent. The reason given 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 (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 of the stock.[129]

[202] The Operational Guidelines provide detailed guidance on rebuilding plans. They explain the concept of a rebuilding plan as follows:[130]

> 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.

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125 At 8.
126 At 8.
127 At 8–9.
128 At 9–10.
129 At 10.
130 At 11.

[203] I note in passing that this description of the content of a rebuilding plan makes no reference to the rate of rebuild. As I explain below, that is because rate of rebuild is implicit in the expected timeframe for the rebuild: they are two sides of the same coin, not separate matters that can be determined independently of each other.

[204] The Operational Guidelines also discuss in some detail the setting of timeframes for rebuilding stocks. The paragraphs that are relevant to Forest & Bird's argument that the Minister failed to have regard to default rules concerning probability of rebuild read as follows:[131]

> The setting of timeframes for rebuilding stocks needs to take into account the interdependence of stocks, the biological characteristics of the stock, any environmental conditions affecting the stock and the economic, social and cultural factors relevant to fisheries on the stock in question. Another relevant issue is the comprehensiveness and reliability of the available information on these factors and on stock status.
>
> The Act requires that relevant economic, social and cultural factors be taken into account in deciding upon the way and rate at which a stock is rebuilt to the target level. In the case of stocks with significant allocations to more than one sector (greater than about 20% of the TAC), there may be considerable disagreement about timeframes for rebuilding. Where a stock is virtually exclusively allocated to one sector, the timeframe selected may be more reflective of the interests of that particular sector.
>
> The Harvest Strategy Standard specifies that where the probability that a stock is at or below the soft limit is greater than 50%, the stock should be rebuilt to the target within a time period between T_{min} and $2*T_{min}$ (where T_{min} is the theoretical number of years required to rebuild a stock to the target with zero fishing mortality).
>
> Mathematical projection models will generally need to be developed to estimate T_{min} and to compare and contrast alternative rebuilding strategies. These will usually be probabilistic models that incorporate uncertainty in the projections. 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. A stock will not be declared to be rebuilt, and therefore absolved from further rebuilding, until it can be determined that there is at least a 70% probability that the target has been achieved. This means that if the initial rebuilding plan is underachieved/overachieved, it may need to be revised prior to the termination of the timeframe initially set. This may result in a more restrictive, or more lenient, rebuilding plan as time progresses.

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131 At 11–12.

> T_{min} reflects the extent to which a stock has fallen below the target, the biological characteristics of the stock that limit the rate of rebuild, and the prevailing environmental conditions that also limit the rate of rebuilding. Allowing a rebuilding period up to twice T_{min} allows for some element of socio-economic considerations when complete closure of a fishery could create undue hardships for various fishing sectors and/or when the stock is an unavoidable bycatch of another fishery. The probability of rebuild should be increased where the information is highly uncertain or where multiple sectors have significant interests in the fishery.

[205] This passage expressly recognises that allowing a rebuilding period greater than T_{min} is intended to allow socio-economic considerations to be taken into account. I return to this below.

[206] In this passage, and at other points, the Operational Guidelines clearly provide that where a soft limit for a stock has been breached, a rebuilding plan should be adopted that has a 70 per cent probability of achieving its target stock level at the end of the timeframe for the plan.[132]

What is the Minister required to do when determining TAC under s 13(2)(b)?

Setting the provision in context

[207] It was common ground before us that at the time the 2019 decision was made, it was open to the Minister to vary the TAC that had been set for East Coast tarakihi in 2018, pursuant to s 13(4) of the Act. It was also common ground that the estimated level of the East Coast tarakihi stock was significantly below B_{MSY}. Indeed it was below the soft limit specified in the HSS, with the result that the Ministry could be expected to recommend to the Minister that he adopt a formal, time-constrained rebuilding plan.

[208] Although s 13(4) simply provides for the Minister to "have regard to" the matters specified in s 13(2), I do not read that as permitting the Minister to depart from the decision-making approach required by s 13(2) when making a decision under s 13(4). A decision on varying the TAC must be made in the same manner as an initial decision to set the TAC under s 13(1) and (2). But I pause to note that s 13(4) provides for the Minister to have regard to the matters specified in subsection (3) — that is,

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132 See for example at 28.

social, cultural and economic factors — when considering a variation. I return to this below.

[209] The Minister was expressly required by the Act to make his decision taking into account the environmental principles specified in s 9, and the information principles specified in s 10. The Minister was required to have regard to the provisions of the planning documents specified in s 11(2) and (2A). Before varying the TAC under s 13(4) the Minister was required to undertake consultation, and provide for input and participation of tangata whenua, as prescribed in s 12.

[210] In light of those principles, and the consultation required by the Act, the Minister was then required to set a TAC that:[133]

> (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

[211] The estimated level of the East Coast tarakihi stock in 2019 was just that: an estimate, based on research and scientific analysis. Projections of the way in which the stock would change over time as a result of reductions in TAC were also estimates, generated using a model for the stock. Such estimates are uncertain, and inevitably that uncertainty increases over time. Section 10 of the Act required the Minister to take all of these uncertainties into account in making his decision.

[212] From a practical perspective, the Minister could approach a decision about whether and how to vary the TAC in a number of ways. One approach would be to identify a range of possible TAC reductions — for example, 10 per cent or 30 per cent or 50 per cent — and model the likely results of such reductions over time. For each potential TAC reduction, modelling would provide information about the period within which the stock would be likely to be restored to B_{MSY}, and the probability

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133 Fisheries Act, s 13(2).

attached to that estimate. For example, Fisheries New Zealand advised the Minister that a TAC reduction of 35 per cent would have a 50 per cent probability of achieving the target of B_{MSY} within 11 years. The Minister could then make a choice between different TAC reductions in light of the predicted consequences of those reductions.

[213] Alternatively, the Minister could identify a period within which he sought to achieve the target of restoring the stock to B_{MSY}, and the desired level of probability of achieving that result within that timeframe. The TAC reduction required to achieve that outcome could then be estimated using the model. The shorter the timeframe, and the higher the desired level of probability of achieving B_{MSY} within that timeframe, the greater the reduction in TAC would need to be.

[214] As these examples of potential approaches to making the decision illustrate, decisions about the rate at which a stock will be restored are linked as a matter of logic and science to decisions about the timeframe within which that outcome will be achieved. They are two sides of the same coin. It is not possible to determine the period within which restoration to B_{MSY} is to be achieved without also considering the way in which and rate at which the stock will be altered over that period, and the probability of achieving the desired result at the end of that period.

[215] These examples of potential approaches also highlight the nature of the trade-offs that the Minister must consider in making the TAC decision. If the Minister wishes to achieve the earliest possible rebuild, with the highest degree of confidence, the Minister can close the fishery by setting the TAC at zero.[134] In the absence of fishing, the stock will recover as fast as possible having regard to its biological characteristics and relevant environmental conditions. (This is the period described as T_{min} in the HSS.)[135] However setting the TAC to zero would have significant social, cultural and economic consequences. For a major fishery such as East Coast tarakihi, the impact on the fishing industry and the people it employs is likely to be significant. The Minister's task is to determine whether those shorter-term (but potentially significant) impacts should be mitigated by permitting some fishing: that is, by setting an above-zero TAC. The higher the TAC, the slower the rate of recovery and the

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134 Fisheries Act, s 13(5) expressly confirms that the Minister may set or vary any TAC at, or to, zero.
135 HSS, above n 5, at 8, n 7.

longer the period over which the recovery can be expected to take place. As the TAC set by the Minister increases, the timeframe for recovery stretches out.

[216] The same point can be made another way. Section 13(2)(b) and (4) require the Minister to make a single decision: what the new TAC should be. That single decision determines the period and rate of rebuild. These are not independent matters, that can be determined separately. They are inextricably interlinked consequences of a single decision. It is logically impossible to consider any given factor when determining the rate of rebuild, but not when determining the period of rebuild, as these cannot be determined separately from each other. I return to this below.

[217] The statutory scheme requires the Minister to set a TAC under s 13(2)(b) that enables the level of the stock to be restored to B_{MSY} over time. The Judge held that the Minister was required to identify a probability level for the rebuilding of the stock at the time of setting the TAC.[136] That is plainly right: it is required by the language of s 13(2)(b) ("will result") and the information principles which require uncertainty to be taken into account. The Judge went on to find that the Minister's 2019 decision adopted an approach with an approximately 50 per cent probability of achievement, and that it was not an error of law to adopt a TAC that had modelled a 50 per cent probability of achieving the target.[137] The finding that it was not an error of law to proceed on the basis of a 50 per cent probability of achieving the target of B_{MSY} was also in my view plainly right, having regard to the language of s 13(2)(b). It would be inconsistent with the statutory scheme to adopt a TAC that had a less than 50 per cent prospect of enabling recovery of the stock to B_{MSY}. Conversely, there is nothing in the statute itself to indicate that a probability greater than 50 per cent of recovery within an appropriate period is required.

[218] It was not suggested before us that the Minister's 2019 decision failed to meet the requirement in s 13(2)(b)(i): that is, that it would enable the level of the East Coast tarakihi stock to be altered in a way and at a rate that would result in the stock being restored to or above B_{MSY}, having regard to the interdependence of stocks. As Courtney J records at [41] of her judgment, the final advice paper prepared by

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136 Judgment under appeal, above n 4, at [127(a)].
137 At [127(b)–(c)].

Fisheries New Zealand set out four options, including the option ultimately chosen by the Minister of a TAC reduction of 10 per cent combined with the measures in the IRP. Modelling of a TAC reduction of 10 per cent indicated a 50 per cent probability that B_{MSY} would be achieved in 25 years, and that it would take more than 30 years to reach that target with a 70 per cent probability.

[219] The concern that underpins Forest & Bird's challenge to the 2019 decision is that a TAC reduction of 10 per cent is expected to take a long time to achieve the target of B_{MSY}, even with a 50 per cent probability. Forest & Bird consider that the Minister should have decided on a greater TAC reduction, in order to achieve the target earlier and with a greater degree of confidence.

[220] A judicial review challenge founded on that concern confronts the obvious hurdle that the Act does not specify a maximum period within which the stock must be restored to B_{MSY}, and does not specify a level of confidence with which that target must be achieved other than the implied requirement of at least a 50 per cent probability, as noted above.[138] That is why Forest & Bird's challenge to the 2019 decision could only be framed as a claim that the Minister failed to have regard to mandatory relevant considerations, or took into account irrelevant considerations, at specific points in the decision-making process.

Restoring the stock to B_{MSY} "within a period appropriate to the stock"

[221] The first issue raised by Forest & Bird's challenge focuses on the phrase "within a period appropriate to the stock" in s 13(2)(b)(ii). Forest & Bird say (and the Judge agreed) that the Minister was required to assess the period of rebuild appropriate to East Coast tarakihi under s 13(2)(b)(ii) of the Act before applying social, cultural and economic factors to the determination of way and rate of rebuild.[139]

[222] It became apparent in the course of argument that the parties understood the reference to "a period appropriate to the stock" in s 13(2)(b)(ii) in two different senses. The submissions of the parties other than Forest & Bird took this as a reference to the

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138 Some fisheries regulatory regimes in other jurisdictions do set a maximum time for rebuilding a stock, but that is not the position under the Act.

139 Judgment under appeal, above n 4, at [109].

period within which the rebuild was expected to occur as a result of the Minister's decision. So for example if the Minister decided on a TAC reduction of 35 per cent, which was expected to rebuild the stock to B_{MSY} within 25 years, the "period" referred to would be that 25-year period. The enquiry would then be whether that 25-year rebuild period was appropriate to the stock.

[223] The submissions of Forest & Bird, on the other hand, took this as a reference to a maximum period of rebuild appropriate to the stock. The period within which the Minister's decision would result in a rebuild, which would turn on the level of TAC set by the Minister, could then be any period equal to or less than (and thus, "within") that stock-appropriate maximum period.

[224] The evidence of Ms Katrina Goddard, a marine conservation advocate employed by Forest & Bird at the time the proceedings were commenced, emphasised that the HSS contemplates that if the soft limit has been breached, the stock should be rebuilt to B_{MSY} in a timeframe between T_{min} and $2*T_{min}$ with an acceptable probability.[140] Her evidence proceeded on the basis that the appropriate period for the relevant stock for the purpose of s 13(2)(b)(ii) was $2*T_{min}$ (which, in the case of tarakihi, would be 10 years).

[225] On Forest & Bird's approach, the Minister should have begun his analysis under s 13(2)(b) by identifying the maximum period appropriate to the stock. He should then have determined a TAC that would achieve a rebuild within (that is, in a timeframe up to, but potentially less than) this maximum period. In determining the maximum period for a rebuild as a preliminary step, the Minister should have regard *only* to the biological characteristics of the stock and any environmental conditions affecting the stock. The social and economic factors referred to in s 13(3) could not be taken into account in determining the maximum period appropriate to the stock. They would come into play only in the second stage.

[226] One difficulty with the two-stage approach contended for by Forest & Bird is that this is not how s 13(2)(b) is structured. If the Minister was required to begin by

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[140] See HSS, above n 5, at 8, set out above at [192].

determining a maximum rebuild period, having regard only to the biological characteristics of the stock and any environmental conditions affecting the stock, one would expect the Act to provide for this determination to be made as a preliminary step before a decision was made about the TAC. A subsequent provision would then require that the TAC be set to enable a rebuild within that maximum period. It would be surprising and unhelpful legislative design to locate in subpara (ii) a preliminary step which needed to be carried out before addressing the matters referred to in subpara (i).

[227] It would also be surprising and unhelpful to provide for a mandatory preliminary step in a subparagraph which forms part of a single sentence in the broader paragraph, which can only be understood by referring to the objective set out in the structurally prior (but, Forest & Bird say, procedurally subsequent) subparagraph. The division of para (b) into a chapeau and two subparagraphs appears to have been motivated by readability considerations, rather than by a structural distinction between two separate decisions (with the first decision set out, unhelpfully, after the second). Subparagraph (ii) cannot be read in isolation, as Courtney J accepts at [64]. The purpose for which a rebuild period must be determined is found in subpara (i), so the purpose of the alteration within the period referred to in subpara (ii) can only be understood by reading the two subparagraphs together. To this I would add that the biological characteristics of the stock and environmental conditions affecting the stock are also plainly relevant considerations when determining the way in which and rate at which the level of the stock will be altered: although these considerations are referred to in subpara (ii), they are equally relevant to the matters referred to in subpara (i). The inference that the entire paragraph must be read as a whole, describing a composite requirement for the TAC to be set by the Minister, is in my view compelling.

[228] Another difficulty with Forest & Bird's approach is that subpara (ii) specifies matters to which the Minister must have regard when determining the period appropriate to the stock. On an orthodox approach to statutory interpretation it would be an error of law for the Minister to fail to consider these matters. But equally, an orthodox reading of a provision expressed in this way is that other relevant matters

may be taken into account: if Parliament required the Minister to consider *only* those matters, one would expect the provision to say so.

[229] The reference in s 13(2)(b)(ii) to "*a* period appropriate to the stock" (emphasis added), rather than "*the* period appropriate to the stock" also tends to suggest that the legislation does not envisage a single (maximum) period appropriate to the stock, but rather a period that is one of many possible periods that would be appropriate to the stock.

[230] A reading of s 13(2)(b) as a coherent textual whole, in light of its place in the statutory scheme and its purpose, leads in my view to the conclusion that:

(a) The period referred to in subpara (ii) is the period of expected rebuild that would result from the Minister's TAC decision, not a maximum period within which the (potentially shorter) expected rebuild period must fall.

(b) That period must be appropriate to the stock: so the Minister needs to identify the expected rebuild period associated with a proposed TAC and consider whether that period is appropriate to the stock.

(c) In considering whether the rebuild period is appropriate to the stock, the Minister must have regard to the biological characteristics of the stock and relevant environmental considerations.

(d) However these are not the only matters that may be taken into account in determining what the rebuild period should be.

[231] I agree with Courtney J that in s 13(2)(b)(ii) the words "having regard to" do not indicate factors that the Minister may or may not treat as influential in the decision. I agree that the Minister is required to consider and act on those factors.[141] But these are not, and cannot be, the only matters that the Minister is permitted to take into account when determining the rebuild period, as I explain below.

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141 Above at [68].

[232] If the "period appropriate to the stock" referred to in s 13(2)(b)(ii) is a reference to the period within which the rebuild is expected to occur, which may be more than T_{min} in order to mitigate adjustment costs, it is immediately apparent that that period cannot be set by reference only to the biological characteristics of the stock and environmental conditions affecting that stock. As counsel for Fisheries Inshore and the Minister both emphasised, the only reason a rebuild period would exceed T_{min} is to take into account the social, cultural and economic factors referred to in subs (3). It would be a logical impossibility for the rate of rebuild to be determined by reference to those factors, but not the expected period of rebuild, since as explained above these are two sides of the same coin which flow inexorably (and inseparably) from the determination of the TAC.

[233] Some further support for this reading is provided by s 13(3). The direction to the Minister in s 13(3) to have regard to social, cultural and economic factors applies when considering the way in which and rate at which a stock is moved towards B_{MSY} *under subs (2)(b)*. That makes sense if there is a single indivisible determination of way, rate and associated period under subs (2)(b). If the Act required a separate determination of way, rate and rebuild period under subpara (i) one might have expected the reference to be to subs (2)(b)(i) alone.

[234] Further support for this reading is also provided by s 13(4), which as noted above requires the Minister's decision varying a TAC to be made having regard to the matters specified in subs (3). That requirement is framed on the basis that the social, economic and cultural factors referred to in subs (3) are relevant when the Minister makes a decision on TAC, and thus on rebuild period and rebuild rate.

[235] The High Court Judge was concerned that perpetually maintaining a stock below B_{MSY} would be permissible if s 13(2)(b)(ii) was qualified by economic considerations.[142] But this concern is misplaced. The TAC set by the Minister must be expected to enable the stock to rebuild to B_{MSY} with a probability of at least 50 per cent, within a period appropriate to the stock. The rebuild period can be

142 Judgment under appeal, above n 4, at [92].

extended beyond T_{min} to mitigate transition costs. But rebuild must be more likely than not: maintenance of the stock below B_{MSY} is not permitted.

[236] Courtney J suggests that the reference in the HSS and the scientific evidence to an acceptable rebuild period between T_{min} and $2*T_{min}$ indicates that "scientific opinion makes some allowance for general social, cultural and economic factors in assessing what an appropriate period is".[143] I have difficulty following this proposition: it seems to me that what this indicates is that the HSS and the scientists who gave evidence all recognise that socio-economic factors are relevant to determining any rebuild period other than T_{min}. If a decision about the rebuild period is made disregarding socio-economic factors, there can never be a reason to choose a period greater than T_{min}. Courtney J goes on to say that this:[144]

> … does not mean that, in selecting the appropriate period under s 13(2)(b)(ii), the Minister is free to make further allowance for social, cultural and economic factors specific to the case at hand under s 13(3). Those factors are properly limited to assessing the way and rate of the rebuild.

The two related difficulties with this proposition are:

(a) As already explained, the way and rate of the rebuild are not separate from the period of rebuild. To decide one is to decide the other. To decide the TAC is to decide both.

(b) The Minister can select a TAC that results in a rebuild period greater than T_{min} only if the Minister takes into account social, economic and cultural factors, and decides how much weight to give those factors. The more weight, the greater the departure from T_{min}. The less weight, the less the departure from T_{min}. But if these factors are not in the mix, then the period chosen must necessarily be T_{min}, not $1.5*T_{min}$ or $2*T_{min}$ or $5*T_{min}$. And if those factors are in the mix, then the Judge was wrong to say they are irrelevant considerations when it comes to determining an appropriate rebuild period.

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143 Above at [92], and see also the discussion at [87]–[91].
144 Above at [92].

[237] The legislative history does not in my view provide any real assistance on this issue. The amendments made to s 13(2) in 1998, discussed by Courtney J above at [26], ensure that environmental factors are taken into account when considering the period of rebuild. It is perhaps worth noting that the explanatory note to the Fisheries (Remedial Issues) Amendment Bill 1997 stated that the reference to environmental factors was being moved from subpara (i) to subpara (ii) because "the effects of changing environmental factors could well be relevant in considering the rate at which a stock size will change".[145] That is, the note proceeds on the basis that subpara (ii) is concerned with the rate of change, which it is, if subpara (ii) is referring to the expected rebuild period, and the rate of change and period of change are recognised as two sides of the same coin. The explanatory note would make little sense if Parliament understood s 13(2)(b) in the manner contended for by Forest & Bird, as concerned only with a maximum period for rebuild and not with the rate of change that will result from the Minister's decision on TAC.

[238] I agree with Courtney J that the authorities we were referred to in relation to s 13 are of little assistance in resolving the specific issues raised by this appeal.

[239] In summary, it seems to me that both the text and the purpose of s 13(2)(b) indicate that where a stock is below B_{MSY}, the Minister must set a TAC that is expected to result in the level of the stock being restored to B_{MSY}. The Minster needs to consider the way in which and rate at which the stock will be expected to move towards B_{MSY}, and the period within which it is expected that that target will be achieved. (For any given TAC, these can be modelled — with both rate and period being (inextricably linked) outputs of the model.) A minimum probability of 50 per cent of achieving the target of B_{MSY} is required. The period of rebuild associated with the chosen TAC level must be appropriate to the stock, having regard to its biological characteristics and relevant environmental conditions. The rate and timeframe/period of rebuild associated with the chosen TAC must also take into account relevant social, cultural and economic factors. Those factors may lead to a rebuild period greater than T_{min}.

[240] It follows that I consider that the High Court erred in finding that the Minister:

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[145] Fisheries (Remedial Issues) Amendment Bill 1997 (97-1) (explanatory note) at ii.

(a) Must first assess the period of rebuild appropriate to the stock by reference only to its biological characteristics and any relevant environmental conditions, and without considering whether the period could be lengthened due to social, cultural and economic effects of catch reductions referred to in s 13(3).[146]

(b) Must then separately consider the way in which and rate at which the stock is moved to B_{MSY}, with social, cultural and economic factors relevant only to this second step.[147]

(c) Was not permitted to consider the IRP when determining the appropriate period referred to in s 13(2)(b)(ii).[148]

[241] In light of this analysis, I turn to whether the Minister erred in his approach to the TAC decision.

Did the Minister err in his approach to the "period appropriate to the stock"?

Decision paper prepared by Fisheries New Zealand

[242] Fisheries New Zealand prepared a lengthy decision document for the Minister, which recorded that it was accompanied by full submissions on all of the proposals. The paper set out the statutory framework for the decisions to be made in relation to various fisheries, including the East Coast tarakihi stock. It set out an overview of the HSS, including the guidance the HSS provides that 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". In the section of the decision paper concerning East Coast tarakihi, Fisheries New Zealand advised the Minister that:

> 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

146 Judgment under appeal, above n 4, at [109].
147 At [109].
148 At [193] and [200].

> minimum timeframe), with a 50% probability. T_{min} for tarakihi has been determined to be 5 years for a target of 40% SB_0, …

[243] The paper noted that under current catch limits (that is, after the 2018 TAC decision) the stock was projected to reach B_{MSY} in 35 years with a 50 per cent probability.

[244] The paper outlined the four options summarised in Courtney J's judgment above at [41]. In relation to each option, the rebuild rate and timeframe were identified. In relation to the chosen option, the paper explained the rebuild rate and timeframe as follows:

> The Industry Rebuild Plan proposes that the management actions outlined in the plan will accelerate the rate of rebuild and have committed to a maximum 20 year rebuild timeframe.
>
> Fisheries New Zealand notes there is uncertainty as to whether the Industry Rebuild Plan will deliver an accelerated rate of rebuild.
>
> In the absence of any additional management actions and solely taking into account catch, the rebuild timeframe would be 25 years ($5*T_{min}$) or 19 years ($4.75*T_{min}$) for a target of 40% SB_0 or 35% SB_0 respectively.

[245] The paper went on to outline the social and economic impacts of reductions in the TAC for tarakihi.

[246] The paper summarised the submissions received on the proposal to vary the TAC for East Coast tarakihi. It recorded that some submitters supported a faster rebuild because the stock was below the soft limit and had been there for a long time. Some submitters, including Forest & Bird, preferred larger catch reductions to ensure a rebuild timeframe of 10 years "which aligns with the [HSS]". Fisheries New Zealand noted that options 1 and 2, which provided for rebuild timeframes of 11 and 12 years respectively, were considered by Fisheries New Zealand to be broadly consistent with the HSS "while noting that it is a guideline, to which you are not bound".

[247] The paper then analysed the factors that the Minister was required to take into account under the Act. Reference was made to the biological characteristics of the stock and relevant environmental conditions. The paper noted, again, that projections suggested a 50 per cent probability of rebuilding to B_{MSY} within five years in the

absence of fishing. A 50 per cent probability of reaching that target was considered acceptable, "due to the natural variation caused by fluctuations in recruitment and environmental conditions". The paper expressly recorded that options 3 and 4 were outside the guidelines in the HSS in relation to the period for rebuild. Fisheries New Zealand said:

> 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.

[248] Fisheries New Zealand's preferred options were either option 2 or option 4. If the Minister considered it a priority to rebuild the stock as quickly as possible, in a timeframe that most closely corresponded to the HSS, Fisheries New Zealand recommended option 2. Alternatively, if the Minster considered that minimising socio-economic impacts on fishers, their families and regional communities was an important factor to have regard to, then Fisheries New Zealand recommended option 4. Fisheries New Zealand expressly addressed this departure from the HSS as follows:

> While the Harvest Strategy Standard is considered international best practice, and has rarely been deviated from in the past, the guidance outlined in it is only part of what is required to be considered when making your decision. You are required to consider many factors, as mentioned above, and you may consider it is warranted to deviate from the Harvest Strategy Standard in this instance.

[249] Fisheries New Zealand's advice to the Minister did not consider what a maximum acceptable rebuild period would be that was appropriate to this stock. But as explained above, I do not consider that this was required.

[250] The advice paper clearly addressed the rebuild periods that would be associated with each of the four options. In relation to the selected option, option 4, it was

recorded that the rebuild period would be between 4 and $5*T_{min}$. It was expressly identified that this was outside the period of $2*T_{min}$ recommended in the HSS. The reasons for departing from the HSS were also explicitly identified.

The Minister's evidence

[251] The Minister swore an affidavit setting out the background to the decisions he made about the East Coast tarakihi TAC in 2018 and 2019. He explained that in light of the 2017 stock assessment carried out for East Coast tarakihi, which estimated stock was 17 per cent of B_0, it was necessary for him to reduce the TAC to enable the stock to move towards (or above) the level that could produce B_{MSY} (which was taken to be 40 per cent of B_0). He then considered the way in which and rate at which he should seek to move East Coast tarakihi towards that level.

[252] The Minister said that he understood that science advice suggested the East Coast tarakihi stock would rebuild over a minimum five-year period in the absence of fishing. He recognised that there was uncertainty in this assessment. He was aware the HSS suggested, as a guide, that a fishery should be rebuilt in up to twice this timeframe. A range of options for the rebuild period was consulted on with stakeholders, from 10 to 20 years. There were clear trade-offs between these rates. "The shorter the rebuild time, the quicker the benefits of a rebuilt stock are available to all users, but the larger the short-term socio-economic impact."

[253] The Minister explained that he favoured a rebuild timeframe of 10 years. Fisheries New Zealand's advice was that a 55 per cent reduction in commercial catch for East Coast tarakihi was required to provide a 50 per cent probability of rebuild within 10 years. The Minister says he was conscious that this was not a particularly high probability. However, to rebuild with higher certainty would require even larger reductions. The Minister considered a 50 per cent probability to be reasonable given the status of the stock, the size of the rebuild required, and the socio-economic impact associated with achieving a rebuild with greater certainty.

[254] In 2018, the Minister decided on a phased approach to implement catch reductions. In the first year, from 1 October 2018, he decided to reduce the TAC by

approximately 20 per cent. The Minister recognised that this reduction would not rebuild the stock at his preferred rate without significant further measures. But it would begin the rebuild process, and provide the industry with a short period to adjust their operations. The Minister considered that in the absence of any additional measures, a further 35 per cent reduction in TACC would most likely be required in 2019/2020.

[255] The Minister went on to say that in making the 2019 decision, he carefully considered the advice from Fisheries New Zealand, the views of submitters, the best available scientific information and assessments of economic impacts, while also taking into account any uncertainty in the information presented.

[256] In relation to the rebuild period, the Minister said:[149]

> 46. The science advice indicated the further TAC and TACC reductions in 2019 (alone) would have a 50% probability of rebuilding East Coast tarakihi within 25 years. However, in addition to the TAC and TACC cuts the Industry Rebuild Plan commits to a maximum rebuild timeframe of 20 years. Although this is a longer time period than I favoured in 2018, and a departure from the HSS, I concluded that by working in partnership with key industry participants, and acknowledging the innovative measures the government had either introduced, or was seeking to introduce, this time frame was likely to be a 'worst case scenario'. I also concluded that a genuine 'mood for change' had occurred within the industry and the vast majority of participants sought to proactively adopt, and in many cases, fast-track, technologies and fishing practices that would, in my mind at least, ensure continuity of employment and fishery rebuild.

[257] It is clear from the Minister's affidavit that he was alive to the HSS recommendation that a rebuild occur within $2*T_{min}$, but considered that a longer rebuild timeframe was appropriate in this case. In determining the rebuild timeframe, he had regard to all relevant factors: the biological characteristics of the stock, environmental conditions, and social, cultural and economic factors.

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149 Footnotes omitted.

Did the Minister give adequate consideration to whether the rebuild would occur within a timeframe appropriate to the stock?

[258] The Minister did not separately address what a maximum rebuild period appropriate to the tarakihi stock would be. But for the reasons I have explained above, I do not consider that it was necessary for the Minister to do so. The Act does not require a two-stage analysis of this kind.

[259] The decision paper did not expressly address, as a distinct inquiry, whether a rebuild period of 25 years is a period "appropriate to the stock". The Minister does not say he separately turned his mind to that issue. It would have been preferable for Fisheries New Zealand to provide explicit advice on this point, and for the Minister to expressly consider it. But I do not consider that was essential, provided the question was implicitly addressed. Here, it was sufficient that the Minister turned his mind to the rebuild period, and formed the view that it was an appropriate period after considering all relevant factors including the biological characteristics of the stock and relevant environmental considerations, and the relationship between the rebuild period and T_{min}. He was expressly advised that a rebuild period of 25 years would be inconsistent with the guidance in the HSS. That implicit consideration of the appropriateness of the rebuild period to the stock was in my view sufficient to comply with the statutory scheme.

Issue 2: Did the Minister err by failing to take into account provisions of the HSS or the Operational Guidelines relating to a 70 per cent probability of rebuild?

Were the HSS or Operational Guidelines mandatory relevant considerations?

[260] That leaves the question of whether the Minister's decision was nonetheless unlawful and liable to be set aside because the HSS and/or the Operational Guidelines provided guidance that an acceptable probability of rebuild was 70 per cent, and this guidance was a mandatory relevant consideration.

[261] One might think this was not a promising argument for a number of overlapping reasons.

[262] First, as already mentioned, neither the HSS nor the accompanying Operational Guidelines is a planning document contemplated by the Act. They were issued by the Ministry to provide greater clarity and transparency in relation to the advice to be provided by the Ministry to the Minister. As already mentioned, s 11 of the Act sets out in some detail the planning documents that the Minister must take into account. The argument that the Minister was required to consider the HSS and/or the Operational Guidelines faces the significant hurdle that these non-statutory documents are not among those specified in s 11.

[263] Second, the HSS is not addressed to the Minister. It is a statement of the standards that the Ministry is expected to meet in preparing its advice. It seems ambitious to argue that the Minister was required to take into account a document that was not addressed to him, or intended to be used by him in making decisions.

[264] Third, the HSS expressly states that it is not intended to have any legal force.

[265] Fourth, for more than a decade the Act operated without any HSS or Operational Guidelines of this kind. They were not a necessary pre-condition of valid decision-making by the Minister before they were issued, and did not acquire that status upon being issued in 2008.

[266] Against that backdrop, it seems difficult to conclude that the legislature must have intended to require the Minister to take the HSS and/or Operational Guidelines into account when making decisions under s 13.

[267] I repeat, for ease of reference, the passage from *CREEDNZ Inc v Governor-General* set out in the judgment of Courtney J above at [142]:[150]

> It is a familiar principle, commonly accompanied by citation of a passage in the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* … "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". More recently in *Secretary of State for Education and Science v Tameside Borough Council* … Lord Diplock put it as regards the statutory powers of a Minister that "…it is for a court of law to determine whether it has been established that in reaching

[150] *CREEDNZ Inc v Governor-General*, above n 89, at 182–183 (citations omitted).

> his decision … he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered …"
>
> 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.

[268] Plainly the HSS contains a great deal of information that can properly be taken into account by the Minister. Fisheries New Zealand's advice paper made frequent reference to the HSS. The Minister also confirmed, in his affidavit, that he took into account various aspects of the HSS. But the Act does not expressly require the Minister to have regard to the HSS and Operational Guidelines. Nor in my view can it be implied into the Act that, as a matter of legal obligation, the Minister was required to have regard to an (informal) planning document of this kind.

[269] I accept Mr Scott's submission that the Judge appears to have run together the test in *CREEDNZ* and the test — addressed to the quite different issue of mistake of fact — set out in the High Court decision in *Taiaroa v Minister of Justice*.[151]

Were the HSS or Operational Guidelines "best information" for the purpose of s 10?

[270] I would therefore have little difficulty in dismissing this argument as initially pleaded by Forest & Bird. However it is necessary to go on to consider the way in which this argument was reframed by the Judge by reference to s 10 of the Act, which requires the Minister and other decision-makers to take into account four specified information principles, including the principle that decisions should be based on the best available information. The Judge held that the HSS represented best practice in relation to probability of rebuild, and was therefore "best available information".

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151 *Taiaroa v Minister of Justice*, above n 90, at 34.

The Judge considered that the Minister was thus required by s 10(a) to take this guidance on best practice into account.[152]

[271] Putting to one side the procedural issues raised by this reframing, which was not foreshadowed in Forest & Bird's pleading, there are in my view compelling reasons not to accept this line of reasoning.

[272] First, and most fundamentally, there is an important difference between information — the evidence on the basis of which a regulatory decision is made — and guidance on best practice in making a regulatory decision. The HSS falls into the second of these categories. As it records, it is a "policy statement of best practice in relation to the setting of fishery and stock targets and limits for fishstocks". It provides "guidance as to how fisheries law will be applied in practice". The HSS is concerned with the law and its implementation. It is not a source of factual information or evidence on which to base a particular decision.

[273] The requirement to base decisions on the best available information required the Minister to seek out the best scientific and other information, and the best analysis of that information (including modelling), that was available without unreasonable cost, effort or time.[153] The Minister was then required to make a decision under s 13 having regard to that information. The Act does not require the Minister (or any other decision-maker) to adopt best practice in making regulatory decisions under the Act, or to inquire into and have regard to best practice in regulatory decision-making. From a public law perspective, the Minister was required to refrain from making a decision that was irrational or unreasonable. That is a very different threshold from requiring the decision to be consistent with best practice regulatory decision-making, or requiring the decision-maker to consider guidance on best practice regulatory decision-making. Neither the Act nor established principles of public law can justify imposing such a requirement on the Minister.

[274] This distinction is especially clear in the present context. The guidance in question concerns the level of confidence with which decisions should be made.

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152 Judgment under appeal, above n 4, at [152].
153 Fisheries Act, s 10.

Should the Minister apply the (implicit statutory) confidence requirement of a 50 per cent probability, or should the Minister make decisions on the basis that the prescribed target in the statute should be achieved with 70 per cent probability? This goes to the heart of *how* the Minister makes the s 13(2)(b) decision. It has nothing to do with the information on which that decision is based.

[275] Reading s 10 broadly to encompass guidance on how to make regulatory decisions, and the level of confidence required when making such decisions, would in my view be a significant and unwarranted extension of the scope of judicial review.

[276] Second, as the High Court rightly held, it is implicit in s 13(2)(b) that the chosen TAC must ensure a rebuild to B_{MSY} with at least a 50 per cent probability.[154] It seems odd to suggest that the Minister was required by s 10 to consider adopting a probability of rebuild that differed from the probability implicit in s 13.

[277] Third, the Minister received advice on, and expressly turned his mind to, the probability with which a rebuild would be achieved as a result of his decision. He was conscious that a 50 per cent probability of rebuild within a given period was not especially high, as he expressly noted in the context of his 2018 decision. But he considered it was an appropriate approach to adopt, for the reasons which he gave. I do not understand what express consideration of the recommendation in the HSS that a 70 per cent probability be adopted would have added to this analysis. It could hardly be suggested that the Minister was not aware that he could adopt a higher probability of rebuild, and that this would result in a higher TAC reduction for any desired period of rebuild or, conversely, a longer expected period of rebuild for any given TAC reduction.

[278] The Judge was right to find that the Minister was required by implication to consider the probability of rebuild associated with a proposed TAC reduction.[155] He did so. Suggesting he was specifically obliged to consider a 70 per cent default probability adds nothing material to this, and intrudes further than can be justified into the fine detail of how the Minister goes about making a decision under s 13(2).

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154 See Judgment under appeal, above n 4, at [116]–[126].
155 At [116]–[118].

Did the HSS provide for rebuilding plans to be based on 70 per cent probability of success?

[279] In these circumstances, it is not strictly speaking necessary to consider whether the HSS provides for rebuilding plans to be determined by reference to a 70 per cent probability of achieving the relevant target of B_{MSY}. But for the sake of completeness, I record that in my view it does not. As I read the HSS, it addresses two quite distinct issues:

(a) the probability with which a rebuilding plan must be expected to achieve its target; and

(b) the identification of the point in time at which a stock has been rebuilt to the relevant target.

[280] The bullet point relied on by Forest & Bird to support its argument that the HSS requires a 70 per cent probability of rebuild is more naturally understood as setting out a test to be applied when the question that is being asked is the second of these: whether the stock *has been* fully rebuilt. That is, the question is whether the target has been achieved as a result of action taken pursuant to a rebuilding plan, with the result that the plan can be discontinued. That reading is confirmed by the footnote which explains that a probability level greater than 50 per cent ensures that rebuilding plans are not abandoned too soon: the focus is on whether rebuilding is complete and the rebuilding plan can be abandoned.[156]

[281] That reading of the bullet points in the HSS relating to breach of soft limits is confirmed by the discussion of hard limits that follows. The corresponding bullet point relating to hard limits provides guidance that fisheries that have been closed as a result of breaching the hard limit should not be re-opened until it can be demonstrated that there is at least a 70 per cent probability that the stock has rebuilt to or above the level of the soft limit.[157] A corresponding footnote records that use of a probability

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156 HSS, above n 5, at 8, n 8.
157 At 9.

level greater than 50 per cent ensures that closed fisheries are not re-opened too soon, as this could quickly lead to the need for reconsideration of closure.[158]

[282] I therefore do not consider that the HSS specifies the probability of rebuilding the stock to a 70 per cent target level at the end of the timeframe: it does not go beyond referring to an "appropriate probability".

[283] The Operational Guidelines do refer to a probability of 70 per cent as the minimum standard for a rebuilding plan, as set out above at [204] and [206]. But as with the HSS, that guidance on regulatory decision-making (and on how fisheries law will be applied in practice) is not "information". Thus it is not a mandatory relevant consideration for the Minister via s 10 of the Act.

Conclusion on Issue 2

[284] In summary, I am firmly of the view that the Minister's decision under s 13(2) is not liable to be set aside on the ground that the Minister failed to consider any "best practice" policy guidance on regulatory decision-making found in the HSS or the Operational Guidelines.

Conclusion and practical consequences

[285] I have concluded that the Judge was wrong to find that the Minister had failed to comply with the requirements of the Act when he made the 2019 decision. I would therefore allow the appeal.

[286] The approach I have adopted to the interpretation of s 13(2)(b) is broadly consistent with, but not identical to, the approach contended for by the Minister in his cross-appeal. But as already mentioned, the Minister's argument was not properly speaking a cross-appeal because the Minister was not contending for a different outcome from that arrived at in the High Court. In those circumstances I doubt it is strictly necessary to determine the cross-appeal. But out of an abundance of caution, I would dismiss the cross-appeal on the basis that the correct approach to decision-making under s 13(2) is as set out earlier in this judgment.

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158 At 9, n 12.

[287] The High Court did not determine the fifth cause of action in Forest & Bird's statement of claim alleging that the Minister's decision was unreasonable, because on the Judge's approach it was unnecessary to do so. Ultimately, it was common ground before us that even if the appeal was successful, it was not necessary to refer the proceeding back to the High Court to determine that cause of action as the Minister's 2019 decision has been overtaken by subsequent events. We were advised by counsel that the Minister made a decision in September 2022 resetting the TAC and TACC for East Coast tarakihi. In those circumstances no useful purpose would be served by the High Court hearing and determining a challenge to the 2019 decision on unreasonableness grounds.

[288] The majority have reached a different view on the interpretation of the Act, and in particular s 13(2)(b). What is I think quite clear from reading the judgments of this Court is that s 13(2)(b) is not happily framed: there are difficulties with both its structure and its language which together leave ample room for different (reasonable) understandings of how the provision is intended to operate. That is unfortunate to say the least, given the practical significance of the TAC regime. Moreover it seems to me that the approach preferred by the majority is likely to be difficult for the Minister and officials to apply in practice. There is abundant scope for further litigation about decisions made under s 13(2)(b), and for the uncertainty, delay and cost associated with such litigation, for so long as the provision remains in its current unsatisfactory form. I encourage those responsible for the legislation to review it sooner rather than later, with a view to reframing s 13(2)(b) so that it clearly identifies the decisions to be made by the Minister, the order in which relevant matters are to be addressed, and the factors to be taken into account at each step in the decision-making process.

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