

Allocation of TAC Between Stakeholders

Introduction

- 1 The Fisheries Act requires that a TAC is set in respect of each QMA for each stock subject to the QMS and that certain interests are to be allowed for when setting the TACC. The TAC constitutes primarily a composite of the respective stakeholder sector groups' catch allocation, plus other fishing mortality related to the exercise of the catch entitlement, in a particular fishery. For non-commercial interests, namely recreational and customary, that interest is specified as an allowance. The commercial entitlement is specified in the form of a TACC. The process by which the allowance for non-commercial interests in the fishery is apportioned or the allowance is made is undertaken in conjunction with the setting of the TACC.
- 2 However, a clear statement on the extent of the respective allowance for each stakeholding interest or the priority to be accorded to those interests is absent from the Fisheries Act. However, a number of statutory provisions indicate the nature of a stakeholder's right and the manner in which it can be modified¹. To date, a series of court judgments have provided further legal guidance as to the nature of your statutory obligation as Minister, but only in a fragmented and skeletal sense.
- 3 Principles applicable to the allocation of the TAC between stakeholders are an operational requirement under the Fisheries Act. The object of this portion of the Statutory Consideration and Consultation section of the FAP is to:
 - a) identify those interests to be allowed for when allocating the TAC;
 - b) provide guidance on the allowance for non-commercial fishers;
 - c) determine how the allocation for each interest is quantified when there is an absence of precise informational; and
 - d) identify those factors you are to take into account when making an allocative decision.

Legislative Obligations

- 4 Section 21 states that when setting or varying any TACC you are to have any regard to the TAC for that stock and allow for:

¹ Provisions which indicate the manner in which stakeholder's rights can be modified include:
Commercial: s 28B(5) Fisheries Act 1986, legislation required to subdivide QMA; s 25B Fisheries Act 1996, alteration of QMAs without agreement of quota owners; Part VII Dispute Resolution, s 123(3), determination of a dispute may not significantly affect the fishing activities of any current fishing interest; s 311, closure of area to commercial fishing for a stock or prohibit a method of commercial fishing; s 12(1), Minister to consult prior to undertaking actions under certain provisions of Part III; s 21(2) Minister to consult prior to setting or varying a TACC; s 13(3), Minister to have regard to social, cultural, and economic factors as considered relevant; s 8 "utilisation" is directed to enabling people to provide for their social, economic, and cultural well-being.
Māori customary non-commercial interests: s 5(b), Act to be interpreted consistent with provisions of Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Part IX Taiapure-Local Fisheries and Customary Fishing; s 12(1) & (2); s 13(3); s 21(2); s 8.
Recreational interests: s 311; s 123(3); s 12(1); s 21(2); s13(3); s 8.

“(a) *The following non-commercial fishing interests in that stock, namely—*

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

(ii) Recreational interests; and

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

- 5 The 1996 Act itemises the relevant non-commercial fishing interests to be provided for. In addition, the issue of fishing related mortality to the stock in question is a factor to be allowed for when setting or varying the TACC. The 1996 Act specifies no priority or quantitative measure when allowing for the non-commercial interests in the fishery or TACC. No reference is made to the foreign allowable catch in s 21. A separate determination is required as to what portion of the TACC is to be made available for foreign fishing vessels (see paragraph 154 for discussion of this issue).

Guidance for Allocation

- 6 The Fisheries Act stipulates a process by which the TAC for any one stock is to be allocated. No explicit statutory mechanism provides guidance as to the apportionment of the TAC between sector groups either in terms of a quantitative measure or prioritisation of allocation. MFish considers that a number of provisions in the Fisheries Act provide some guidance on allocation of the TAC between the respective interests to be allowed for. A quantitative measure of the proportional allocation is an integral element of the prioritisation process. Equally the quantitative measure is determined in part by the utilisation of the stock.
- 7 From an operational perspective, you are required to consider the following factors in allocating the TAC under the Fisheries Act:
- a) Mortality to the stock caused by fishing (s 21(1)(b));
 - b) Māori customary non-commercial fishing interests (s 21(1)(a)(i));
 - c) Recreational fishing interests (s 21(1)(a)(ii)); and
 - d) Commercial fishing interests (s 20).
- 8 It is noted the Act is prescriptive in terms of those interests, which are to be recognised in the allocation of the TAC. This is indicative of the fact that the TAC is designed to provide for extractive use of fisheries resources.

Mortality to the Stock Caused by Fishing

- 9 MFish considers that all other mortality to a stock caused by fishing should logically be assigned priority when allocating the TAC under the Fisheries Act. Illegal catch (underreporting, poaching, and discards), incidental gear mortality, scientific research, and bycatch may be considered a source of “*all other mortality to that stock caused by fishing*”. Such mortality other than within a specific allowance for a stock is considered a fundamental element, which determines the TAC available for apportionment between competing interests. The priority attributed to this factor acknowledges that such removals may be an unavoidable component of the utilisation of the resource. However, appropriate action may be possible to reduce or mitigate the level of fishing related mortality. Consideration of the impact of different gear and

fishing methods may be relevant to the implementation of measures designed to address fishing related mortality.

- 10 In some instances MFish is able to assess the level of mortality attributable to a particular source. Where information is available that attributes such mortality to the activities of a particular sector then it is deemed equitable that the level of mortality is subtracted from the share of the TAC apportioned to the party responsible.

Māori Customary Catch

- 11 The obligations contained in s10 of the Settlement Act impact on allocation decisions made under the Fisheries Act 1996, for example, the setting of the customary allowance under s 1 and the making of regulations that allocate access to a fishery between different sector groups. In particular, the setting of the customary allowance under s 21 of the Act should account for the extent of customary non-commercial take as authorised by kaitiaki under the customary regulations. Generally the allowance is set retrospectively, on the basis of information about customary removals during the previous fishing year. However the Minister could set a different allowance as long as he or she was satisfied that customary take would be unlikely to exceed the allowance during the coming year.
- 12 Taken to its extreme, should the entire TAC of a particular fishery be taken for non-commercial customary use then the Minister would be obliged to ban recreational fishing and set a TACC of zero tonnes, as is currently the case with the toheroa fishery (keeping in mind that the unregulated nature of the recreational sector means it is difficult to apply any limited form of recreational harvest for toheroa without potentially damaging the resource). In such circumstances customary use would be constrained by the need to ensure sustainability of the resource. There may be compensation issues to consider, should a wholesale reduction in the TACC be required in order to provide for the full extent of customary non-commercial use.
- 13 In practice, the quantity of removals authorised by kaitiaki is dictated not only by the needs of the tangata whenua, but also the availability of fish in their area. The availability of fish is influenced by the total level of removals by all sector groups, including commercial and recreational fishers, and by environmental factors.
- 14 Part IX of the Fisheries Act 1996 contains customary fisheries management tools including provisions that are designed to increase the availability of fish for customary food gathering purposes. While application of these tools (taiapure, mātaitai, s 186 regs, s 186A closures and method restrictions) may result in increased levels of customary harvest, the rights and interests of the commercial and recreational fishing sectors must be taken into account. For example, a mātaitai reserve cannot be declared if the establishment of the reserve will prevent commercial fishers from catching their quota entitlement within the wider Quota Management Area.

- 15 Under the current management framework, the setting of the customary allowance by the Minister is a reactive measure in that the allowance *reflects* the level of customary harvest, rather than *directs* it. In the future, there may be benefits for all extractive users of fisheries (commercial, recreational and customary) in moving to a proportional share arrangement for the allocation of shares to the TAC. Any move to proportional shares to a fishery would need to be agreed to by tangata whenua and kaitiaki, taking into account the status of Māori non-commercial fishing rights as provided for by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
- 16 In providing for the Māori customary non-commercial allowance in respect of any stock, you are required to take into account any mātaimai reserve and any area closure or any fishing method restriction or prohibition in the relevant QMA created pursuant to ss 186, 186A, and 186B, respectively (s 21(4) of the 1996 Act). Mataimai and closed areas provide for customary interests in a spatial context.

Recreational Interests

- 17 A claim may be sustained under common law principles that every person has a right to be able to fish for recreational purposes. To the extent that any common law right still exists, that right is not accorded any constitutional protection. The right to fish in New Zealand for recreational purposes is subject to legislative and regulatory controls.
- 18 The Fisheries Act is directed at both commercial and non-commercial fishing. The Fisheries Act affords no legal priority to recreational interests in terms of allocation of TAC for a stock. The Act requires that you allow for recreational interests prior to determining the TACC. The Act imposes an order within the allocative process, but does not in itself imply that that the recreational allowance assumes any greater priority than the TACC.
- 19 In *Roach v Minister of Fisheries* (HC, Wellington CP715/91, 12/10/92) without determining the issue of whether it was strictly correct to conclude that recreational fishers are accorded a priority under the Act, McGechan J stated that to allow for non-commercial fishing interests, arguably does not necessarily mean that the allowance must fully satisfy estimated non-commercial requirements.
- 20 Where there are competing demands, which will exceed the availability of a resource it could be said that you can allow for recreational use by dispensing less than complete satisfaction, thereby also allowing for commercial users. His Honour concluded that in doing so the Minister created for recreational users “*not full priority but some degree of shared pain*” (p 16). Justice McGechan subsequently concluded in *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97) that the requirement to “*allow for*” the

recreational interest is to be construed as meaning to “allow for in whole or part” (page 150).²

- 21 The Fisheries Act does afford you discretion to determine the nature and extent of any priority between recreational and commercial interests on a case by case basis. In respect of making an allowance for non-commercial interests, McGechan J held in *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97) that a TACC could be reduced to serve legitimate conservation purposes or to advantage—deliberately or incidentally—non-commercial fishing interests. His Honour held that:

“It is not outside or against the purposes of the Act to allow a preference to non-commercials to the disadvantage in fact of commercials and their valued ITQ rights, even to the extent of the industry’s worst case of a decision designed solely to give recreationalists greater satisfaction. Both are within the Act.”
(page 89).

- 22 This point was also addressed in the Court of Appeal decision where the issue of whether the Act contained an implication of proportionality between commercial and non-commercial sectors (*New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (CA82/97, 22/7/97, judgment of the Court delivered by Tipping J). In this judgment the Court of Appeal held that:

“We can see no reason why either as his primary purpose or as a consequence of some other purpose the Minister should not be able to vary the ratio between commercial and recreational interests.” (pages 17–18) and

“If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation to carefully weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group.” (page 18)

- 23 The Court held that there was no implied duty for you to fix or vary the recreational allowance at any particular proportion of the TACC or the TAC. The appropriate allocation is a matter for your assessment bearing in mind all relevant considerations on each occasion you revisit the issue (pages 18–19).
- 24 Justice McGechan, in the context of the date of the decision, held that the Minister did not have an obligation to impose effective controls to constrain catch within any allowance. However, it should be noted that McGechan J

² MFish considers that the notion of “shared pain” or to “allow for in part” does not apply to the customary allowance given the express requirement to interpret the Fisheries Act in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the need to recognise the obligations derived from the Treaty itself (see discussion at “Treaty of Waitangi (Fisheries Claims) Settlement Act 1992” at paragraphs xx to xx above).

came to this conclusion at a time when you did not have an obligation to set a TAC for every stock. It is MFish's view that, when a TAC is set, you have an obligation to consider controls to constrain recreational fishing within that allowance. Ancillary management measures (eg, daily bag limits, minimum legal sizes) will need to be considered to ensure they are consistent with the TAC/TACC/allowance decision.

- 25 A reduction of the recreational allowance for the purposes of ensuring sustainability (ie, consequential to a reduction on the TAC) is not liable to compensation. A reallocation of the recreational allowance to customary or commercial interests, on a case by case basis, may result in compensation to recreational interests for any consequential reduction in the recreational allowance.
- 26 It is noted that in providing for this allowance in respect of any stock you are required to take into account any area in a QMA closed to commercial fishing (s 21(5) of the 1996 Act). Closed areas are of particular relevance when you are considering a reduction in the recreational catch or a reallocation of the recreational allowance to customary or commercial interests.

Total Allowable Commercial Catch

- 27 The TACC creates a property right for individuals who hold individual transferable quota in a QMS stock. That property right is not absolute in that it is expressly subservient to the exercise of your powers as Minister under the Act. A decision you make which impacts adversely on ITQ owners that advantaged — deliberately or incidentally — non-commercial interests, does not in itself imply an improper purpose (*New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97, McGechan J) at page 89). It is an inherent element of the QMS that the TACC can be reduced, with a consequential reduction in quota. In considering a reduction of the TACC, you must weigh the economic impact of your proposed course of action on individual quota holders and on the QMS generally (*New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (Court of Appeal, CA82/97, 22/7/97, judgment of the Court delivered by Tipping J, at page 16). (For a discussion of the economic considerations to be taken in account, see heading “Factors Determining Allocation”).
- 28 There is no direct proportionality between the ratio of commercial/recreational catch in any increase or decrease in the TAC. The Court of Appeal in *New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (CA82/97, 22/7/97) held that it was within the powers of the Minister to vary the ratio between the commercial and recreational interests once the initial allocation had been made. The Court discounted any requirement that once the ratio had been fixed there could be no change to the ratio except upon an increase in biomass (page 17). No implied obligation to attain proportionality between commercial and recreational catch arises from the legislation.

- 29 The imprecision of the recreational catch precludes strict proportionality (page 18). Justice McGechan in *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97) noted that a conscious transfer of catch between interests is a legitimate activity within the context of the Act (page 122).
- 30 A reduction of TACC for the purposes of ensuring sustainability (ie, consequential to a reduction on the TAC) is not liable to compensation. A reallocation between commercial and non-commercial interests, on a case by case basis, may lead to consideration of compensation to commercial interests for any consequential reduction in TACC.

Foreign Allowable Catch

- 31 A determination is required as to the portion of the TACC (or total catch limit, if any, set for a non-QMS stock) that is to be made available as the foreign allowable catch. For most QMS stocks the Crown's available ACE for a stock will be the foreign allowable catch. The Crown's holding of ACE is first to be made available to domestic fishers. For non-QMS stocks the domestic harvesting capacity is first to be taken into account when setting a foreign allowable catch.

Calculation of Stakeholder Interest

- 32 The primary method by which the extent of an interest in a fishstock is proposed to be assessed is by a measure of the existing utilisation of a fishstock by each sector group. The TAC is a measure of the sustainable level of utilisation of a stock. The sum total of the TACC and the remaining allowances must not exceed the TAC. As an absolute measure the TACC or an allowance for either the recreational or Māori customary non-commercial catch may be set at zero or 100% of the TAC for any one stock; within that range the TAC may be apportioned between the separate interests according to an appropriate ratio for that stock.
- 33 The manner of calculation of that interest may vary depending upon the level of information available. In terms of the commercial fishing sector, reported catch for existing QMS species plus any information on all other mortality to a stock caused by fishing are considered to be an accurate record of commercial utilisation of the fishstock. Information detailing the extent of catch levels for sectors other than commercial fishing interests and the extent of all other sources of fishing related mortality may not be equally comprehensive, rather than relying on precise data certain assumptions regarding the extent of utilisation is made.
- 34 MFish considers that in the absence of precise information it is appropriate to use the best information available. This approach is consistent with the information principles specified in s 10 of the Fisheries Act 1996. The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of the 1996 Act — this includes apportioning the TAC between sector groups and all other sources of fishing related mortality. Further, MFish notes that in the absence of precise information you have the discretion to determine a

“best estimate” of that catch when determining an allowance (*Roach v Minister of Fisheries* (HC, Wellington CP715/91, 12/10/92, McGechan J) at page 15).

- 35 It is noted that information presented to the fishery assessment plenary may not in every instance be accepted by that body. For stock assessment purposes, MFish considers that it is appropriate to use only that information accepted by the fishery assessment plenary. Information used for stock assessment purposes is subject to rigorous scientific scrutiny. MFish considers that the best information available to determine the extent of existing utilisation of a fishstock by each sector group is relevant for stock assessment purposes. The calculation of stakeholder interest in a fishstock is also relevant for the purposes for management decisions as to the allocation of the TAC between sector groups. It is noted that allocative decisions are a separate process from undertaking a stock assessment of the status of that stock.

Commercial Catch

- 36 **Current QMS fishstocks:** Reporting systems under the Fisheries Act ensure that the commercial catch levels for fishstocks managed under the QMS are accurately monitored. A record of current catch levels and monitoring of this catch, however, should not be taken as implying that an assessment of the status of the stock is available.
- 37 **New QMS fishstocks:** In respect of new species introduced into the QMS, there is usually less information on the status of the stock relative to B_{MSY} or on the current or predicted trend in the biomass level at the estimated level of current total removals.
- 38 Information is available detailing historical commercial catch for non-QMS species. This may be inaccurate, due to mis-reporting or no legal requirement to report. The discarding of a non-QMS species is not an offence. In general TACCs are set at levels based on reported landings in the absence of alternative stock assessment information. In utilising catch histories, in accordance with the information principles, a cautious approach to the setting of TACCs is to be exercised.
- 39 In setting a TACC for each new QMS fishstock, it is appropriate to apply separate criteria to stable and developing fisheries. MFish considers a fishery to be developing where a significant increase in recent catch has been recorded. Where this has occurred the average total landings, available from the plenary report, over the last three completed fishing years have been used as a basis for determining the TACC. A fishery is considered to be stable when reported catches have remained relatively constant over an extended period of time (ie, in excess of three years). In respect of stable or fluctuating fishstocks, the TACC has been determined using the average total landings over the total period of time for which catch landings are available from the plenary report (ie, 1982–83 to 1996–97). As a general rule, information relating to total landings reported in the plenary report have been used in the first instance. Where information is not available for the most recent fishing

years in the plenary report, information from MFish databases has been extracted.

Recreational Catch

- 40 The level of recreational catch for a fishstock may not be known. In such instances an estimate of the recreational take is made on the best available information. In instances where information relating to the level of catch from surveys is available this information is to be used as a means of determining current catch levels and used when providing for an allowance. Where information relating to catch is available for the species in a separate QMA, this would be relevant in estimating an amount when providing for an allowance for recreational interests for a fishstock. Where estimates are not available but there is known to be recreational catch of a minimal nature it is considered appropriate to provide for a nominal allowance. For some species and stocks, in particular deepwater species, there may be no or negligible recreational catch. In this instance a zero allowance is to be set.
- 41 The recreational interest in each fishery as a matter of law is to be taken into account allocating the TAC between those interests specified in s21 of the Act. MFish, however, does not consider that a recreational allowance, nominal or otherwise, should be set for all fishstocks. Information of historical catch in a fishery is one factor to be considered but a previous lack of participation is not in itself determinative of the allocation to be provided for. The recreational allowance is to be considered in the context of an assessment of the nature of the fishery. This necessitates practical reasons of significance to the fishery concerned for not allocating access to that fishery, such as the suitability of the fishery for recreational purposes (ie, the depth of the species and the methods available to recreational fishers). Based on the facts relating to a fishery to date, it may be determined that no allocation is necessary.
- 42 It is noted that a previous lack of participation in a fishery does not create a presumption against providing for an allocation in the future. However, MFish does not interpret s21 of the 1996 Act as requiring that you make a nominal allowance for every fishstock to allow for the possible future development of a recreational fishery. Existing allowances may be subject to review based upon any new information available to take into account any subsequent or increased participation in a fishery.

Customary Māori Catch

- 43 The level of customary catch for a fishstock may not be known. In such instances an estimate of take is made on the best available information. In the future there will be information relating to the level of catch from customary fishing authorisations. Increased use of the customary regulations throughout the country will result in the information regarding customary catch being more complete and accurate. Where information relating to catch is available for the species in a separate QMA it is appropriate to take that information into account when providing for customary Māori interests for that fishstock. For some species and stocks, in particular deepwater species, there may not be any Māori customary catch. In this instance a zero allowance would be provided.

- 44 The consultation process for the sustainability measures round involves sending copies of all proposals to about 80 iwi and hapū throughout New Zealand. Where they have provided any information of the extent on customary Māori take, this has been used. Other rationale could be considered on a cases by case basis including:
- a) where a species is known to be of importance to Māori, but no information is available, an allowance similar to the known recreational catch is recommended;
 - b) where a species is not of particular importance to Māori, but it is thought there may be some take, 50% of the recreational catch estimate is recommended (rounded to the nearest tonne); and
 - c) where it is considered unlikely that there is or has been any customary Māori catch in a particular fishstock then a zero allowance is recommended.
- 45 The customary Māori interest in each fishery as a matter of law is to be taken into account allocating the TAC between those interests specified in s 21 of the Act. MFish, however, does not consider that a customary allowance, nominal or otherwise, should be set for all fishstocks. Information of historical catch in a fishery is one factor to be considered but a previous lack of participation is not in itself determinative of the allocation to be provided for. The customary allowance is to be considered in the context of an assessment of the nature of the fishery (ie, the depth of the species and the methods available to customary fishers). Based on the facts relating to a fishery to date, it may be determined that no allocation is necessary.
- 46 It is noted that a previous lack of participation in a fishery does not create a presumption against providing for an allocation in the future. In respect of customary take it is acknowledged that there is no restriction as to the type of fisheries for which kiatiaki may grant access to. Accordingly it is possible that vessels will be granted permits to undertake legitimate customary fishing activities in deepwater fisheries. However, MFish does not interpret s 21 of the 1996 Act as requiring that you make a nominal allowance for every fishstock to allow for the possible future development of a customary fishery. Existing allowances may be subject to review based upon any new information available to take into account any subsequent or increased participation in a fishery.
- 47 MFish notes that the implementation of customary regulations under s 186 will provide better information, via the issuing of permits, as to the level of customary take. The Māori customary non-commercial allowance is a combination of the catch levels reported under the permit system, catch within mātaimai reserves, plus all other mortality to a stock attributed to Māori customary non-commercial interests. That allowance will generally be allowed for on a retrospective basis, meaning that if customary harvest levels exceeded the allowance for any given fishing year, then the allowance would need to be raised the following fishing year to accommodate the increased customary fishing activity.

- 48 Further, it is noted that while the customary allowance should reflect the extent of Māori non-commercial fishing extractions, the level of customary take may be low due to the localised depletion of the resource. Māori may well stop fishing a particular species altogether in order to ensure sustainability. If there is complete reliance on information from customary fishing authorisations then the allowance for customary fishing will not always reflect the customary requirements of the tangata whenua. There are a number of management tools designed to ensure that the use and management practices of Māori are provided for (mātaitai reserves, Taiapure, s 186A closures). These mechanisms could be used to improve availability over time. You should also take into account all available information relating to the availability of a particular species for customary purposes when making an allowance for Māori non-commercial customary fishing. In this process you could anticipate changes in customary take.

Other Sources of Fishing Related Mortality

- 49 Where a TAC is set for a stock, an allowance may be made for all mortality to a fishstock caused by fishing. As a general principle, all mortality to a fishstock caused by fishing, other than provided by the TACC or a non-commercial allowance, is to be attributed to the source of the mortality where relevant information is available. The practical effect of implementing this policy will require the setting of a total allowance for a stock for the particular fishing sector with the level of mortality then deducted from that allowance which will then represent the total available fishing allowance. It is noted that in some instances the modelling used to assess the status of a stock incorporates all other mortality caused by fishing.
- 50 MFish considers that it is not practical nor necessary to set a generic allowance for all stocks. All other mortality to a stock caused by fishing is typically species, method, gear, and potentially even vessel specific. For most species no allowance is made for unrecorded fishing mortality. Unrecorded mortality will not affect the estimate of the sustainable yield for a stock, if the level of mortality has remained relatively constant over time. It is accepted that the level of illegal catch and discards and underreporting may be subject to variation. If an “*index*” (the measure of assessing a stock) indicates a decline in the stock and the index has not incorporated unrecorded mortality, due to the unavailability of such information, generally this will indicate that the stock is more robust or productive than is currently being assessed on the basis of the available information.

Allocative Process

- 51 Section 21 of the Fisheries Act 1996 requires that allowance for certain interests (the allowance) is provided for when a TACC is set or varied. The legislation indicates that that allowance is to be provided for either when a TACC is initially set or on each occasion that the TACC is varied. The Act implies that an allocation is made only where the TACC is set or varied.
- 52 In practice the Act stipulates an allocative process which involves three distinct steps — the setting or varying of a TAC; the provision of an allowance for specified interests (referred to in the Act as the matters to be taken into account

when setting a TACC); and the setting or varying of a TACC. The three tools are interrelated but may operate independently of each other. The TAC may be varied without affecting the TACC. An allowance may be redistributed independently of the TAC or TACC. The exception is that the allowance must be taken into account when setting or varying the TACC. However, this does not imply that the allowance must be varied as a result of any variation of the TACC. It is noted that a stakeholder group may have no initial catch in a species. Where a catch of that species is subsequently developed then the issue of allocation of catch entitlement between sectors would need to be addressed in the TAC/TACC/allocative process.

- 53 The non-commercial interest in a fishery is a quantitative allowance, but by its very nature the quantification of that allowance is not as precise as the TACC. Monitoring of non-commercial interests occurs retrospectively through recreational surveys and liaison with tangata whenua. MFish notes that, increasingly in the future, information of Māori customary take will be provided through reporting mechanisms under customary regulations.

Factors Determining Allocation

- 54 The Fisheries Act does not expressly state the manner in which, or the factors to be taken into account, when you allow for non-commercial interests in a fishery and apportion the TAC between stakeholders. The allocation of the TAC is a matter for your assessment taking into account all relevant considerations.
- 55 A consideration of foremost importance is the unique nature of the Māori customary non-commercial interest in a fishery. The Fisheries Act 1996 and the customary fishing regulations made pursuant to the Act, do not provide for the Crown to place limitations on customary fishing, apart from ensuring the sustainability of a particular stock. The customary allowance is able to be capped only where the level of catch is likely to exceed the TAC. In determining the extent of customary take, you are required to provide for the input and participation of tangata whenua and is to have particular regard to kaitiakitanga (s 12(1)(b)).
- 56 Customary take is regulated through the authorisation system in the customary regulations which require that all customary fishing is to be undertaken in accordance with tikanga and the overall sustainability of the fishery. In contrast, where the TACC is reduced for sustainability/conservation purposes there is a direct relationship between managing recreational catch and reducing a TACC, and vice versa. Justice McGechan in *New Zealand Federation of Commercial Fishermen (Inc) & Ors v Minister of Fisheries & Ors* (HC, Wellington CP237/95, 24/4/97) stated:

“I am satisfied that when Parliament empowered the Minister to reduce the TACC for conservation purposes—not to improve recreational catch rate—it expected the Minister to take any concurrent steps necessary to minimise sabotage by recreational fishing. . . The significant point is that both law and common sense dictate that a Minister should not reduce the TACC for

conservation reasons unless able to take, and taking, reasonable steps to avoid the reduction being rendered futile through increased recreational fishing.” (page 102)

- 57 From a legal perspective there is no obligation to undertake a proportional reduction between recreational and commercial interests where the TAC or an individual stakeholder allocation is reduced for conservation/sustainability purposes. You are required to act reasonably to ensure that TAC reductions for conservation/sustainability purposes are not undermined by a failure to consider corresponding controls on recreational and commercial stakeholders.
- 58 Subject to this consideration, there is no legal requirement that a decrease or increase in the allocation of the recreational allocation is to result in a corresponding proportional adjustment of the TACC, and vice versa. MFish notes that the Fisheries Act assigns no priority between commercial and recreational interests. The Act is directed at both commercial and non-commercial fishing. Within that duality the Act permits the preference of one sector to the disadvantage of another; for example to provide for greater allowance for recreational interests in proportion to the commercial allocation.
- 59 In determining the allocation to be afforded to commercial and recreational interests in a stock you are is required to undertake a balancing exercise on a case by case basis. The Court of Appeal (in *New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors, 22/7/97, Tipping J*) addressed the issue of whether the Act contained an implication of proportionality between commercial and non-commercial sectors. The Court held that:

“We can see no reason why either as his primary purpose or as a consequence of some other purpose the Minister should not be able to vary the ratio between commercial and recreational interests.” And

“If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation to carefully weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group.”

- 60 In terms of those considerations you are to take into account, MFish notes that s 8 of the Fisheries Act 1996, in the context of utilisation of fisheries resources, refers explicitly to the Act enabling people to provide for their social, economic, and cultural wellbeing. Further, s 13(3) states that you are to have regard to such social, economic, and cultural factors as you consider relevant when considering the way and rate at which a stock is moved towards, or above, a level that can produce the MSY. It is implicit that in considering such

factors when setting or varying a TAC in accordance with s 13(3), such factors are also integral to the decision of apportioning allocation of a stock between stakeholders.

- 61 MFish considers that those factors which may be relevant to the exercise of your discretion, in addition to the principles specified in ss 5, 8, and 9 of the Act, include:
- a) population trends;
 - b) existing allocations (including popularity and importance of the resource);
 - c) current fishing practices (including overfishing, voluntary shelving, or closures by a stakeholder);
 - d) economic impact of allocative decisions; and
 - e) social and cultural impact of decisions.
- 62 Population trends are reflected in the level of recreational fishing undertaken, both on a national and regional context. The growth of urban centres, in particular Auckland, have a significant impact on particular fisheries. An allowance for the recreational interest and the corresponding management controls for a stock should take into account existing population distribution and growth. Hence where a greater recreational demand arises you are not precluded by any proportional rule from providing an increased allowance to the recreational entitlement subject to weighing all competing demands on the TAC (see *New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (CA82/97, 22/7/97) page 18).
- 63 Certain fisheries are considered to be of particular importance to fishers. In considering the extent of the recreational and Māori customary allowance it is appropriate to consider the nature of the species and the importance of the species to fishers. The value attributed to a resource is not limited solely to economic value but may also include the aesthetic value and non-market value. For example, while snapper is a medium to high value fish species, it is also an important recreational target species. Certain species may be valuable to particular sector groups, for example, charter boats, and may have significance for tourism by contributing to New Zealand's popularity as a tourist destination. The abundance of a species and the availability of particular size fish for a specific stakeholder group may be factors relevant to your decision.
- 64 Overfishing of a TAC may result in the subsequent reduction of that TAC. Reported overfishing by individual commercial fishers is subject to existing controls under the Fisheries Act. The consistent overfishing of the TACC or an allowance, which results in the reduction of the TAC, as a general principle, ought to be attributed to the stakeholder group responsible for the overfishing.

- 65 Stakeholders may elect to exercise their fishing rights in a manner, which results in their allocation in a fishery being undercaught. Voluntary closures and shelving of allocation may be undertaken as a means of improving the abundance of a species and the availability of certain sized fish. Such methods may improve recruitment. In the absence of explicit shares in a fishery, any subsequent increase in the TAC as a result of such methods would be available to all stakeholders. Stakeholders are not immune from any subsequent decrease in the TAC for sustainability purposes simply on the basis of the previous undercatch of their allowance.
- 66 The Act does explicitly recognise underfishing rights of commercial fishers. Where the person holding annual catch entitlement for a stock (not the owner of the ITQ) undercatches the extent of their entitlement, the person may carry forward the extent of the undercatch to the second fishing year up to a maximum of 10% of the total Annual Catch Entitlement (ACE) they held in the first fishing year. The carry forward of underfishing rights does not apply when the TACC is reduced in the second fishing year (s 67A(2)(b)).
- 67 A variation of the TAC and the manner in which the TAC is allocated may have significant social, cultural, and economic implications for stakeholders and consequential downstream economic activity. In *New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (CA82/97, 22/7/97) it was held that you had a clear obligation to move a stock towards MSY and when deciding upon the time frame and the ways to achieve that statutory objective you are to consider all relevant social, cultural and economic factors.
- 68 The Court of Appeal suggested that a careful cost-benefit analysis needs to be undertaken to support a particular decision to reduce the TACC and in respect of a reasonable range of options available to the Minister in moving a fishery toward MSY. The Court considered that it was prudent for you to expressly refer to the social, cultural, and economic factors which you considered relevant to your decision and those factors which were considered not to be relevant. Where a decision with major economic impact is considered necessary the rationale for that decision should be clearly transparent. Those affected ought to be able to establish that all other reasonable possibilities were analysed and that the decision adopted was the preferable option.
- 69 The economic factors referred to in s 13(3) need not be confined to matters directly affecting the fishing industry. Wider considerations affecting the national economic interest are capable of being regarded as relevant. MSY can be interpreted as being directed at the national interests as well as sectional interests (see *New Zealand Fishing Industry Association (Inc) and Ors v Minister of Fisheries and Ors* (CA82/97, 22/7/97) p 15).
- 70 In reducing a TACC you are advised to consider to carefully weight the economic impact of any such action on individual quota owners, those fishers dependent on obtaining annual catch entitlement and on the QMS generally. However, the reduction of the TACC is not rendered unlawful simply on the basis that the decision adversely impacts the property right inherent in the QMS. In the context of fisheries legislation, a property right constitutes a right

to harvest, which is subject to your statutory powers. Accordingly, MFish considers that financial security of a property right is a valid but not irrefutable consideration in the context of your TAC/allocative decisions.

- 71 The actual financial costs associated with allocative decisions are to be assessed according to the nature of the fishery. A decline in the commercial allocation may impact on quota and lease price, thus impacting on potential new entrants and existing quota holders and owners. The setting of a TAC and allocative decisions in a general context impact on economic investment in terms of upgrading of plant and fleet structure.
- 72 Downstream impacts may result as a consequence of allocative decisions made in respect of both recreational and commercial stakeholders. In addition to the commercial harvesting and processing sector a significant number of service industries are linked to the fishing industry, including charter operators, sale of fishing gear, repair, and transport related services. Decisions may also impact on particular communities where the fishing and fishing related services provide a significant contribution to a local economy.
- 73 The impact on individual fishers may be difficult to assess and will be dependent on a range of factors, including the extent of any reduction; the extent of existing quota holdings; the level of debt; the species mix of quota held; and the ability of individual fishers to adapt.
- 74 It is not entirely clear as to the nature and extent of any cost benefit analysis required to be undertaken in any given situation. A cost benefit analysis may be in the form of an analysis of the economic impact to stakeholders and fishing related sectors of the economy. Equally it could include the factoring of environmental and social costs and benefits. The Court of Appeal stated that when considering any reduction in the TACC you must carefully weigh the economic impact of that action. Later in the same judgment the Court referred to a cost-benefit analysis in the context of implementing a decision of major economic impact.
- 75 A cost benefit analysis is designed to act as a tool for deriving the most efficient and productive solution. In itself such an analysis is not intended to impose a barrier to implementing measures considered necessary for fisheries management purposes. In many instances MFish is not in possession of the information necessary for a detailed cost benefit analysis to be undertaken. Invariably it is the stakeholders concerned who hold the relevant information. MFish has requested that stakeholders provide relevant information in the course of their submissions to you on management proposals. MFish considers that in all instances it is impractical and unnecessarily burdensome for the Crown to undertake an exercise for all fisheries. MFish considers that a balance ought to be adopted between the magnitude of the impact of the proposed decision, the information currently available and information readily obtainable, and the requirement to provide an analysis of the economic implications of the proposed solution.
- 76 Social impacts may include the affect of decisions on individuals and communities. There is no restriction on the nature of the social factors, which

you may take into account. There is no explicit relationship in the Act between those classes of persons having an interest in a stock or the effects of fishing on the aquatic environment and the factors, which you may consider pursuant to s 13(3). The latter may be considered to be significantly wider in scope than the former. Non-extractive uses, social values and expectations, and political imperatives may therefore all constitute relevant considerations in the course of your decisions as to the setting of TACs and allocation of the TAC between fishing interests.

- 77 Reference to cultural factors in s 13(3) can be interpreted as encompassing both those provisions of the Act relating to the interests of Māori and tangata whenua but also cultural practices and values. The precise nature of those practices and values are to be determined by tangata whenua.