

ALLOCATION ISSUES

- 1 A number of general issues were raised in submissions that relate to allocation or allowance under the total allowable catch (TAC), although many of the issues flow through into the individual fishstock proposals. The submissions primarily focussed on the advantages and disadvantages of proportional changes to the allocations provided to each fishing sector and reallocation of the TAC (i.e. non-proportional changes) between fishing sectors. The issue of compensation was raised by industry in relation to non-proportional changes to the allocations. Submissions discussed these matters extensively.

Allocation of the TAC

Submissions

- 2 **The New Zealand Seafood Industry Council (SeaFIC)** submit that non-proportional changes:
 - a) Create the perverse economic incentives identified in Yeabsley's (1996) analysis;
 - b) Increase the risks to the sustainable management of the affected stocks;
 - c) Contravene the Crown's obligations under the Deed of Settlement by providing preference to the recreational sector over the commercial; and
 - d) Reduce consumer surplus, with subsequent adverse effects on New Zealand consumers of the affected fish species (in addition to the adverse effects on commercial fishers, processors and related industries already identified in the IPP).
- 3 SeaFIC further submit that the policy and advice on reallocation of the TAC between sectors is the single most concerning issue arising from the IPP. The IPP proposes options that reallocate the TAC for GMU 1 and SNA 8 in a manner that gives preference to non-commercial fishing and also proposes non-proportional TAC reductions in FLA 1 and SPO 1. They claim the IPP completely fails to identify the range and significance of the implications of a decision to reallocate catch between sectors. SeaFIC believes that options that result in a preferential reallocation of catch undermine the fundamental basis of the QMS and sustainable management. SeaFIC recommends that if preferential allocation options are retained in the FAP, the Minister must be informed of the risks to sustainability and economic efficiency, and of the significant Crown liability for compensation.
- 4 **The Northern Inshore Fisheries Management Company** (Northern Inshore) endorse the submission made by SeaFIC on the generic policy concerns on reallocation. Northern Inshore also support the recommendation by SeaFIC that all options for non-proportional TAC reductions (i.e. reductions involving reallocation between sectors) be deleted in the final advice provided to the Minister for the reasons outlined by SeaFIC.

- 5 **Te Ohu Kai Moana** (Te Ohu) considers that any reductions to the TAC and hence the total allowable commercial catches (TACCs) must firstly be based on demonstrated sustainability grounds. Beyond that, reductions must be made on a proportional basis between the commercial and recreational sectors that must both share and demonstrate responsibility for the management of New Zealand’s fisheries. Therefore where there is shown to be a sustainability concern with particular fishstock and a TAC reduction is necessary, serious consideration must be given to bag limit reductions so that recreational catch limits can be effectively constrained.
- 6 Te Ohu submits that MFish seems to have made no *bona fide* efforts to present proposals to constrain recreational fishing through the lowering of bag limits or setting of minimum legal size for the Kaipara harbour and Kahawai stocks. Te Ohu cites the judgement in the SNA 8 Court of Appeal case, including “...*the Minister must act reasonably to seek to stop the saving resulting from TACC reductions being lost to recreational fishing*”.
- 7 Te Ohu are concerned that no such measures have been proposed in the IPPs to address this apparent inequity, which has the effect of reallocating shares between sectors. In addition Te Ohu refer to their submission on the introduction of Kingfish into the QMS on 1 October 2003. In that submission Te Ohu discussed in detail their concerns regarding the consequences of attempting to reallocate shares between sectors using the “utility approach” with the end result being an erosion of the rights secured and guaranteed under the Fisheries Settlement. The IPP describes the “utility approach” which fails to address the inequity of reallocating sector shares from the commercial to the recreational sector. This approach has the effect of devaluing the ITQ contained in the fisheries settlement without compensation.
- 8 **Pagrus Auratus Company Ltd** (Pagrus Auratus) support the views of SeaFIC that do not endorse the utility-based approach to allocation. They support the view of SeaFIC that MFish does not have credible information on which to base an assessment of the relative value of changes for any fishstock to the recreational and the commercial sectors and that the numbers provided are biased and misleading.
- 9 Pagrus Auratus recommend that all references to utility based approach to utilisation be removed from the final advice to the Minister or if they are retained the Minister must be informed of the consequences and risks to economic efficiency and Crown liability for compensation arising from preferential allocation.
- 10 Te Ohu disagrees with and objects to any attempt to reallocate TAC shares between sectors or within sectors (including using the utility approach or a non-proportional strategy) in a way that erodes the value of the Fisheries Settlement with Iwi/Maori.
- 11 Te Ohu also reminds MFish and the Minister that as the problem of competition for limited resources approaches they must balance the Treaty obligations when operating the Articles of the Treaty of Waitangi.
- 12 **Aotearoa Fisheries Limited** (AFL) agrees with SeaFIC and Te Ohu that the IPP demonstrates a clear agenda to reallocate sector shares, which will undermine the QMS and the Maori Fisheries Settlement. AFL also notes that there is a failure to confront full rights based definition, management requirements and operational disciplines for the non-commercial sectors.

- 13 **Egmont Seafoods Ltd, Taranaki Commercial Fishermen’s Assn and Taranaki fishers** state that in relation to SNA 8, to reduce or restrain the commercial catch without accurate assessment or management of the recreational catch is not consistent with good fisheries management. **NZ Federation of Commercial Fisherman** placed a submission in support of the Taranaki Commercial Fishermen’s Assn, which states that at no time should the commercial sector be required to endure reductions to TACCs in the face of confirmed uncertainty about recreational catch.
- 14 **The Kaipara Harbour Sustainable Fisheries Management Study Group** submit that they are unaware of any existing policy basis for giving recreational fishers a proportionally smaller share of the fishery. More particularly, they can recall the CEO of MFish, during consultation on the Customary Fisheries Regulations, promising iwi that their customary take would always be provided for under the Treaty of Waitangi (Fisheries Claims) Settlement Act.
- 15 **Sanford Limited** (Sanford) oppose any non-proportional approach where preference is given to the recreational sector based on their use and value of the resource, especially where the TACC is reduced from the current level. **Snapper 8 Company Ltd** (SNA 8 Co) also strongly opposes any management use of non-proportional reductions as outlined in the SNA 8 IPP. Sanford and SNA8 Co believe any non-proportional reduction amounts to reallocation from the commercial to recreational sectors and raises the issue of compensation for lost property rights.
- 16 **Paua Industry Council Ltd** (PIC) submits the Minister’s “new policy idea” which involves reallocation of property rights from commercial to recreational, clearly undermines the quota management system, will prove most detrimental to the government’s growth and innovation strategy and must be abandoned. If government simply bring in a “new policy idea” to transfer fish stocks from the commercial to the recreational sector, all the incentives to manage fish stocks on a sustainable basis vanish.
- 17 PIC rejects the precedents in the Kahawai IPP as highly dangerous and undermining to both the QMS and the Government’s growth and innovation strategy. It is critical that the rights based framework underpinning the QMS is completed in respect to recreational and customary fishing. This must include mechanisms to constrain non-commercial catch to that allowed for in the TAC.
- 18 PIC states that any attempted reallocation of stocks from the commercial sector to the recreational sector will likely expose the Minister to significant fiscal risk.
- 19 AFL submit that even where the IPPs appear to adopt the principle of ‘shared pain shared gain’, they are clearly a sham because there is no proposal to effectively constrain non-commercial catch through reduced bag limits, seasons, gear restrictions, customary permit reductions etc. Without these actions, the initial effect of a TACC cut is a reduced relative share to commercial fishers. If the stock size increases subsequently, there is a strong likelihood that the rate of any such increase would be suppressed by an expansion of absolute non-commercial catch. It is an indictment on the quality of the IPPs that such obvious issues are not identified, let alone analysed.
- 20 AFL endorses the need to improve the collection of customary and recreational data. However, AFL observes that, without the effective application of the shared pain

shared gain approach, an incentive exists for non-commercial fishers to report catch strategically. If the only result of reporting increased non-commercial catch is to reduce the TACC, the incentive exists to overstate non-commercial removals.

21 **option4** state that for proportional allocations to have any chance of working between commercial and non-commercial fishers it is essential that:

- a) Consultation with non-commercial fishers is undertaken on whether the proportional allocation model is acceptable;
- b) Initial proportions are fairly achieved and set with possibility of judicial review;
- c) Reliable scientific information is available on which to base initial allocations;
- d) Stakeholders have an equal opportunity to catch their allocation;
- e) The stakeholders can to be constrained to their proportion;
- f) All stakeholders share pain or gain equally and simultaneously;
- g) Cheating is detectable and avoidable;
- h) All stakeholders have equally strong rights;
- i) All stakeholders are similarly resourced;
- j) There is a way of altering the proportions when they are poorly set; and
- k) There is a way of increasing the non-commercial proportion if the number of non-commercial fishers increases, or decreasing it if less people go fishing.

22 option4 believes MFish, in trying to impose a proportional system, fails to address any of the above issues and as a result there are no benefits to non-commercial fishers of a proportional system. Option4 reject completely all proportional options in the 2005 IPPS for the following reasons:

- a) The initial allocations were set on the basis of a scientifically determined TACC for each fishery divided by the total commercial catch history for that fishery. The non-commercial sector was not given a proportion at this time. Non-commercial fishers were assured by Fisheries Minister of the time, Colin Moyle that, "*Government's position is clear, where a species of fish is not sufficiently abundant to support both commercial and non-commercial fishing, preference will be given to non-commercial fishing*".
- b) Almost immediately the commercial quota was issued, many commercial fishers sought to have their individual allocations increased by lodging appeals through the Quota Appeals Authority (QAA). Many were successful and MFish allowed these new quotas to be cumulative above the existing TACC thus unfairly inflating the commercial share of those fisheries.
- c) Many of the species left out of the quota system were fished hard because there were no catch limits, quota lease costs and the prospect of these stocks being introduced to the quota system encouraged fishers to maximise their catch history. Kahawai, kingfish and many of the reef species were fished down as a result.

- d) In some key shared fisheries the additional commercial catch issued by the QAA has prevented or slowed any rebuild and this has clearly impacted adversely on all non-commercial fishers. This has unfairly reduced the non-commercial “proportion” of those fisheries through reducing the biomass and suppressing non-commercial catches.
- e) Deemed values have caused TACCs to be consistently exceeded in some fisheries. Thousands of tonnes of inshore fish have been harvested unsustainably through deeming. In addition, the illegal practice of dumping unwanted fish called highgrading has been widespread and commercial fishers dumping catch above quotas has unfairly reduced the non-commercial proportion of those fisheries through reducing the biomass and suppressing non-commercial catches. Proportional allocation may also increase wastage because non-commercial fishers subsidise the risks for commercial fishers. If poor commercial fishing practices cause the stock to decline commercial fishers are assured that they do not bear the full cost of their activities.
- f) The reality of the “at or above MSY” policy is that we are actually managing many of our fisheries below MSY. There is a demonstrable reallocation from non-commercial fishers to commercial fishers during the fishing down and overfishing phase, and again when catches are reduced “proportionately” to rebuild the fishery.
- g) Fishery decisions that reduce catches are made when a fishery has been overfished and the biomass has fallen below MSY. Because non-commercial catch is largely driven by the abundance of a fish stock, non-commercial catches, individually and as a sector, decline as the biomass declines.
- h) The ability of the commercial sector to catch their proportion is largely unaffected by the health of the fishery, they simply apply more effort or more efficient methods to maintain their catches and “proportion” in a declining fishery. They are thus only penalised once when decisions to cut catches are made.
- i) When we are allocated our “share” it is usually based on our current catch in a depleted fishery. Consequently, under the current proposals we are allocated the minimum possible amount as an initial proportion. Then MFish make recommendations on how to further constrain non-commercial catch through imposing lower bag limits or increased size limits.
- j) It is unrealistic to expect non-commercial fishers to accept this system after being allocated their “initial share” based on known underestimates of catch compiled while the fishery is at, or near, its lowest stock levels.
- k) A major flaw in the MFish proposals is that those who have depleted fisheries or wasted the resource are treated no differently than those who have conserved. Non-commercial fishers have a record of being able to implement successful voluntary conservation initiatives. For example, a voluntary arrangement gave thousands of kingfish a second chance as non-commercial fishers fished to huge size limits and self-imposed lower bag limits. When kingfish were introduced into the QMS it was done proportionately with the proportions set at current catch levels at the time. This means that no extra allowance for fish conserved by non-commercial fishers was made in the allocation process. The result was a lower allocation of kingfish for

non-commercial fishers than would have been the case had those fish been landed instead of released.

- l) Non-commercial catch is going to increase as depleted fisheries rebuild. However, there is no acknowledgement in the IPP that non-commercial catches have been reduced as the fisheries have declined. This information is crucial if proportions of fisheries are to be allocated fairly.
 - m) Proportional allocation of fisheries between commercial and non-commercial fishers is a policy construct of MFish, which will placate commercial fishers and avoid compensation issues. When publicly consulted through the “*Soundings*” document proportional allocation of fisheries was overwhelmingly rejected by 98% of the record 60 000 individuals who submitted to the process. The current proportional system can only be about protecting the Crown from compensation where fisheries have been misallocated between sectors, mismanaged or both. Giving consideration to possible compensation claims from commercial fishing interests will always tend to create biased advice from MFish unless all aggrieved parties have similar access to compensation.
- 23 option4 state that in allowing for non-commercial "interests" the Minister should evaluate the true nature and scope of those interests and allow for them in a way that provides for those interests (i.e. taking into account the history of the fishery, and criteria which measure the quality of the recreational fishing experience e.g. CPUE or fish size). It needs to be expressly recognised that non-commercial fishing in New Zealand is as much about putting food on the table as it is about "recreation". Ongoing mismanagement of our inshore shared fisheries has come at a high social, cultural and economic cost for Maori.
- 24 **The New Zealand Big Game Fishing Council** is in agreement with option4’s submission on proportional allocation.
- 25 **Marlborough Recreational Fishers’ Association** states it is wrong for the Minister/MFish to allocate “proportionally” between the commercial and non-commercial sectors which erodes recreational fishing rights. Commercial fishing must be conservative and cautious to avoid the repeated “boom and bust” scenario of the last 50 years with various species.
- 26 **The Council of Outdoor Recreation Associations of New Zealand Inc** submits that proportional reductions will erode the public’s rights and unfairly apportion the pain of cutback to recreationalists. Former Fisheries Minister Colin Moyle gave an assurance in the late 1980s that recreational rights came before commercial rights in fisheries management.

MFish response

Current situation

- 27 A summary of the key aspects of the current legal and policy framework applicable to the allocation of the TAC is as follows:
- a) The Minister has the legal discretion to adjust the proportion of the TAC allocated to the commercial and non-commercial sectors, whether or not this is part of a process of adjusting the TAC for sustainability reasons.
 - b) The allocation of the TAC requires consideration of the competing demands on the resource. In essence these are decisions about how to optimise use of the resource; that is, what distribution of resource use will generate the greatest net benefit for society. In these decisions you are required to consider all interests. There is no specific guidance in the Act as to the specific factors that must be taken into account.
 - c) When adjusting TAC/TACCs for sustainability reasons alone, the default policy at present is a proportional approach as this does not change the relative positions of the sectors and provides some certainty to stakeholders.
 - d) Where “reallocation” is undertaken, there is currently a legal risk that stakeholders would initiate litigation, claiming that the decision adversely affects their interests and that they should be compensated for the impacts.
 - e) The most clearly established economic interests are the quota rights of the commercial sector, and the most likely scenario for a test case is where the industry share of the TAC has been reduced in favour of an increase in the recreational share.
 - f) Case law on the subject of reallocation and compensation is limited. It is not clear in what circumstances the Courts will consider a reallocation has occurred and when liability for compensation arises. A claim for compensation may succeed in an extreme case, where reallocation clearly results in a major impact on established interests. However, what threshold of impact on existing interests might be held by the Courts to require compensation, and how historical and contemporary circumstances and the reasons for the particular action might affect that threshold or the rate of compensation due, is likely to vary from case to case.
- 28 Set out below in more detail are particular aspects of the current framework which are relevant to your decision on allocation of the TAC.

Discretion to allocate TAC

- 29 When adjusting catch allowances for one or more sectors, outcomes can be characterised as either “proportional” or “reallocative”. Proportional allocation is best described as a system of “shared pain, shared gain”. Where a decline in a fishery is to be addressed by a reduction in the TAC, the share of the TAC allocated to all sectors is reduced in the same proportion. An increase in the TAC would be implemented by a proportional increase in each sector’s allocation. The notion of a “reallocation” is the converse situation where the relative ratio of catch allocated to the respective fishing sectors is changed either as part of, or independent of, a TAC change.

- 30 You have discretion to determine how to allocate the TAC for each stock on a case-by-case basis, on each occasion you reconsider allocation of the TAC for that stock. The Act is silent as to the manner in which a TAC is to be allocated. The Act simply states that the Minister is required to allow for customary and recreational interests, and all other mortality to the stock caused by fishing, when setting or varying the TACC. There is no clear statement in the Act to indicate that Parliament's preference or intention that the TAC be allocated in accordance with any particular approach.
- 31 Case law on allocation is limited – the leading case is commonly known as *SNA I* which was considered in the High Court and subject of appeal to the Court of Appeal. A second case of importance is *Roach*. In *SNA I* the Court of Appeal stated that there is no implicit preference in the Act in favour of proportionality. The imprecision of the recreational catch precludes strict proportionality (p 18). In *SNA I* (High Court) it was noted that a conscious transfer of catch between interests is a legitimate activity within the context of the Act (p 122). A decision that impacts adversely on holders of ITQ which advantaged—deliberately or incidentally—non-commercial interests, does not in itself imply an improper purpose: “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”. (p 89)
- 32 The Court of Appeal in *SNA I* found 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 (pp 18–19). 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 (p 17). “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.” (p 18)
- 33 In *Roach*, the High Court considered that where there are competing demands exceeding an available resource it could perhaps be said the Minister can “allow for” use by dispensing a lesser allotment than complete satisfaction, creating not a full priority but some degree of shared pain. In *SNA I* the High Court concluded in the recreational interest is to be construed as meaning to “allow for in whole or part” (p 150). Proportionality is one means of allowing/providing for competing demands for use of the resource.
- 34 Accordingly, the Fisheries Act gives you discretion to determine the nature and extent of any priority between recreational and commercial interests on a case-by-case basis. The Fisheries Act assigns no priority between commercial and recreational interests. 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.
- 35 In submissions industry suggests that your discretion is subject to some requirement to negotiate with industry, in the absence of mandated recreational bodies, in situations where a reallocation occurs. MFish rejects any notion that your discretion to re-allocate is subject to negotiation with commercial rights holders. The Act

requires that you consult on proposals to set or vary a TACC. Moreover, the Crown is not the 'rights holder' by proxy for the recreational sector. It is not appropriate that the Crown act as an advocate for the recreational sector in the course of some negotiation process.

Situations where reallocation occurs

- 36 There is no clear statement in the Act as to what constitutes a reallocation of the TAC or the implications or consequences that flow from such a decision. The Court of Appeal in the SNA 1 that it could 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.*" (p17–18).
- 37 The inference is that a reallocation occurs where changes are made to the ratio of catch allocated between commercial, recreational and customary fishers. The notion of a ratio implies a legitimate expectation of a particular proportion of the TAC being allocated to each fishing sector.
- 38 The following situations could be considered by the Courts as constituting a re-allocation of catch:
- a) TAC set for the first time and changes made to ratio of catch allocated to commercial, recreational, and customary fishers;
 - b) TAC maintained but changes made to catch allocated to commercial, customary, and recreational sectors;
 - c) TAC increased or decreased and non-proportional changes to the ratio of catch allocated to the fishing sectors; and
 - d) TAC and allocations made but failure to constrain sector to allocation where information suggests that the catch of the sector is likely to exceed the quantum allocated to that sector.
- 39 The first situation arises at the point of introduction of a stock into the QMS or on the setting of a TAC and/or allowances (other than the TACC) for stocks introduced into the QMS prior to enactment of the 1996 Act. Prior to QMS introduction, no explicit allowances have been set and therefore no clear ratio exists between the fishing sectors. There is not a strong case that the setting of allocations that differ from current catch of each sector equates to a reallocation of catch.
- 40 In the case of existing QMS stocks, no formal allowances, other than the TACC, may have been set. However, an allowance for non-commercial catch may have been set or there may be estimates of recreational catch. If a decision is made to provide an allowance that differs from the catch information or current allowance then it could be argued that a change in the ratio results.
- 41 The second situation involves a decision to redistribute the existing TAC in different proportions to the existing allocations. This may occur as a result of an assessment of competing demands for a resource.
- 42 The third scenario involves a preferential change to the relative ratio of the TAC allocated to a sector either when the TAC decreases or increases. The quantum of

catch allocated to a particular sector may not be altered, but the relative ratio between sectors change as a result.

- 43 The final scenario arises where allocations have been set. In such cases there is a need to ensure that allocation is not exceeded. Measures may be required to constrain a sector to the allocation provided. The failure to constrain may result in the allocation and the TAC being exceeded. By default a reallocation occurs as in practice the catch ratios change. Where information suggests there is a risk of an allocation being exceeded then appropriate measures should be adopted to constrain catch. In the case of commercial fishers, deemed values and overfishing thresholds are used. In the case of recreational and customary fishers, the information on catch and the measures adopted are not as precise. Catch is not allocated to the individual fisher or reported by them. A bag limit is the primary means of constraining recreational catch.
- 44 The risk of an allowance being exceeded does not arise in all situations. In a depleted fishery (i.e. the stock is below Bmsy) it may be reasonable to assume that current recreational and customary catch is below the current allowance. The lack of abundance will impact on the quantum of catch taken. As the biomass of a stock increases, it is logical to assume that catch rates will improve. While there is a need to ensure that the rebuild of the stock is not undermined by the allocation being exceeded, in the short term there may be no need to constrain recreational or customary catch.
- 45 MFish does not consider that the following situations necessarily constitute an alteration of catch ratio of the recreational, commercial, and customary sectors:
- a) Changes to the allowance for other sources of mortality. In some instances, due to particular fishing practices, changes in the allowance for other sources of mortality may be attributable to one or more fishing sectors.
 - b) Catch estimates are corrected. In the case of recreational fishers new information may come to light that suggests previous estimates of recreational catch was incorrect. There is a need to make a distinction between a genuine error in the methodology of the survey and updated information that indicates recreational catch levels have changed.
 - c) Catch history is amended through a statutory process. The catch history review process does result in additional catch (sometimes of significant quantity) being allocated to commercial fishers. The ratio initially determined between commercial, recreational and customary fishers is altered.
- 46 MFish notes that there is no case law directly on the point in respect of all the scenarios outlined above. As a result, there is some uncertainty about the nature of any legal risk associated with decisions to vary the ratio of catch between sectors.

General factors relevant to reallocation

- 47 The Act does not explicitly address the basis upon which different competing claims for use in excess of the available resource are to be determined. MFish considers that the Minister's objective in allocating the TAC among sectors should be to distribute the use of the resource so that the highest possible net social benefit is achieved. The

objective of “maximising the value New Zealanders obtain through the sustainable use of fisheries resources” is the overall goal of MFish. In order to maximise value, a decision to either maintain existing proportions of the TAC allocated to each sector or to change the proportions may be considered appropriate in the particular case.

48 The appropriate allocation of a TAC is a matter for your assessment bearing in mind all relevant considerations on each occasion you revisit the issue. Factors relevant to the exercise of your discretion include:

- a) Population trends;
- b) Assessment of relative value of resource to respective sectors (including popularity and importance of the resource, economically, socially, and culturally);
- c) Current fishing practices (including overfishing, voluntary shelving or closures by a stakeholder);
- d) Initiatives undertaken to develop or enhance the resource; and
- e) Social, cultural and economic impact of allocative decisions.

49 Population trends are reflected in the level of recreational fishing undertaken, both on a national and regional basis (*SNA 1* (Court of Appeal, p 18)). The growth of urban centres, in particular Auckland, has 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.

50 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 financial value but may also include the aesthetic value and non-market value. For example, while snapper is a medium to high value commercial 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. MFish notes that it is difficult to quantify the relative value of a resource to each sector.

51 Overfishing of a TAC may result in the need for a subsequent reduction of that TAC. 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. In order to attribute overfishing impacts, there needs to be good information about the extent of catch. This is available in the commercial fishery, but less so for non-commercial fisheries.

52 Stakeholders may elect to exercise their fishing rights in a manner that 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. Ideally, stakeholders should receive the benefit of the actions that they take to conserve the resource without that benefit being

captured by another group. At the moment it is not practical to account for such initiatives in the allocation process with any degree of precision.

- 53 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 downstream economic activity. The Court of Appeal in *SNA I* 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 that you considered relevant to your decision and those factors that 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 see that all other reasonable possibilities were analysed and that the decision adopted was the preferable option.
- 54 A cost benefit analysis is used to assess whether the net benefits of a proposal are positive or negative and the magnitude of that benefit. However, in many instances the information necessary for a detailed cost benefit analysis to be undertaken is not available. 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.
- 55 Industry submissions suggest that non-proportional changes to the allocations of the sectors will reduce consumer surplus and pose risks to economic efficiency. Consumers of the resource are not solely those who purchase fish. An increase in the recreational and customary allowances will provide for consumption by these sectors, and would generally be justified on the basis that the value of that consumption is greater than that generated through the commercial utilisation of the same catch. The notion of economic efficiency does not apply only to commercial fishers. An allocative decision that optimises use of a resource is by definition economically efficient.
- 56 Industry did acknowledge in their submissions that the level of economic analysis in the IPP had improved and offered suggestions in this regard. MFish is building capacity in the area of economic analysis. A significant impediment to undertaking more detailed cost-benefit analysis is the lack of readily available information.
- 57 Social impacts may include the affect of decisions on individuals and communities. There is no restriction on the nature of the social factors that you may take into account. 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.

Deed of settlement

- 58 Inter-sectoral allocation raises issues about the underlying principles of the current fisheries management framework. An issue raised in submissions is the impact of allocation decisions on the Crown's fisheries Treaty settlement with Maori.

- 59 Te Ohu disagrees with and objects to any attempt to reallocate TAC shares between sectors or within sectors in a way that erodes the value of the Fisheries Settlement with Iwi/Maori. AFL agrees with SeaFIC and Te Ohu that the IPP demonstrates a clear agenda to reallocate sector shares, which will undermine the Maori Fisheries Settlement.
- 60 MFish recognise that the intent and implications of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is a valid consideration when you are considering decisions about allocation of a resource. You are obliged to act in a manner consistent with the Settlement Act. Although s 5(b) of the 1996 Act refers only to acting in a manner consistent with the Settlement Act, and does not refer directly to Treaty of Waitangi principles, the Settlement Act did not extinguish the duty to act in accordance with the principles.
- 61 To give effect to the obligations arising from the Treaty, the Crown:
- a) Acknowledges it has an obligation to act in an informed manner when it forms policy or acts in a way that affects Maori interests;
 - b) Acknowledges that it has a duty of active protection in relation to Maori rights and interests guaranteed pursuant to Article II of the Treaty subject to the Settlement Act;
 - c) Recognises that the Crown and Maori both have an obligation to act in good faith, fairly, reasonably and honourably towards the other; and
 - d) Recognises that central to the Treaty relationship and implementation of Treaty principles in respect of the rights of tangata whenua is a common understanding that tangata whenua will have an important role in the development of policies and processes that affect their interests and rights.
- 62 The Settlement Act addresses both commercial and customary interests in fisheries resources, and Article 3 of the Treaty guarantees Maori rights as citizens including rights to recreational fishing. Under the settlement Maori decided to settle their claims to the commercial fishery in return for access to the QMS. The nature of the commercial settlement was the subject of extensive discussion in the SNA 1 case, both in the High Court and Court of Appeal decisions. The Court of Appeal stated that Maori became holders of quota along with all other holders. Their rights are no more or less than those of non-Maori quota holders (p 20). Maori cannot claim to be entitled under the Settlement Act to some of additional threshold or onus before their quota is reduced (p 21).
- 63 The capacity for a reduction has always been inherent in the quota system. The Court of Appeal held that:
- “The idea that the settlement is any less just, honourable and durable should Maori quota be reduced, is unpersuasive. An asset which Maori obtained under the settlement had within it the capacity for diminution. If that capacity was lawfully realised, there cannot be any complaint on the basis that the settlement has been broken or has not proven durable. A reduction in TACC, which is otherwise lawful, cannot be viewed as a decision by the Minister inconsistent with the Settlement Act.”

- 64 A decision to re-allocate the TAC or to not effect a proportional change to commercial and recreational interests is a lawful decision under the 1996 Act. The Court of Appeal explicitly rejected a contention that there was legitimate expectation by Maori that if there were a reduction in the TACC it would be applied proportionately to the commercial and recreational allowances.

Problems with current situation

- 65 The current legislative framework provides you with discretion to reconsider the relevant information on each occasion you revisit the allocation of the TAC for a stock. While that provides you ample flexibility to take into account new information and not be bound by previous decisions, there are number of problems inherent in the current framework:
- a) Uncertainty for the Crown in making decisions as to what liability for compensation may be incurred (potential reluctance to make changes to address allocation issues between sectors);
 - b) Uncertainty for the commercial sector over potential changes to the TACC for other than sustainability reasons, and what compensation if any might be made (potential affects on investment environment and costs of litigation);
 - c) Concern on the part of recreational fishers that they will be locked into existing allowances for recreational take due to the compensation issue, when they consider allowances for some species to be inequitable due to historical fishing patterns;
 - d) The Crown is required to act as the arbiter between competing interests and make decisions often without the information to accurately quantify the relative value of a resource to each sector. Decisions are seen by stakeholders to be subjective and are therefore contentious;
 - e) Each sector has a different set of rights, with no common currency in relation to those rights other than fish. The respective interests are not aligned, and there is often limited collective incentive to conserve fisheries resources; and
 - f) the perception by each sector that their rights are being eroded by the actions of the other sectors. This results in the “gaming” of the process as sectors lobby to increase their relative share of resource and seek to re-litigate past actions and to attach blame for the decline of the stock.

MFish position on allocation

- 66 MFish favours the adoption of a proportional policy as a default approach when adjusting the TAC. A proportional policy simply reflects that there is no case for reallocating catch. Where there is no particular reason for making a reallocation, the expectation that a required TAC adjustment would be dealt with proportionally provides a consistent approach for stakeholders.
- 67 MFish considers that the default situation should not include instances where the recreational and customary allowance represents a very small component of the overall catch. In such instances, strict proportional adjustment to the allowances is not necessarily warranted. This approach simply reflects that it is not possible to manage with that degree of precision when catch levels are small. MFish

acknowledges, however, that the cumulative effect of incremental changes over time on the QMS does need to be considered.

- 68 A proportional system provides a degree of certainty to stakeholders about how increases and decreases to the TAC will be addressed. It enables commercial fishers to plan and invest with a greater degree of confidence. It supports the fundamentals of the QMS and the value of the quota property right.
- 69 The QMS is recognised as the principal management tool for most of New Zealand's important fishstocks. The creation of an individual property right is designed to engender behaviours that lead to improved management of the resource and efficient fishing practices. Decisions that adversely impact on that right, or a perception by fishers that such decisions do erode the value of the right, have the potential to undermine long-term incentives to manage sustainably. The right can be eroded both through incremental changes over time or one-off decisions, including significant reallocation of catch between sectors. Caution is therefore required that decisions do not undermine the general intent underlying a property right system. Nonetheless, MFish recognises that the QMS framework is not the only factor relevant to your considerations on allocation of a TAC.
- 70 A default proportional approach is not intended to fetter your discretion to explicitly recognise the competing demands on a resource. Consideration of individual circumstances may lead you to decide to depart from a proportional approach where you consider it reasonable to do so. The implications of decisions with major impact would need to be considered and the rationale for the decision made transparent.
- 71 MFish agrees with both industry and recreational submissions that the current situation relating to allocation of the TAC demands attention and improvement. This matter is linked strongly to the issue of recreational management as noted in submissions, which is something that has proved a difficult area in which to make progress. MFish supports the development of an allocation system that delivers greater certainty to all stakeholders and reduces conflict over allocative decisions. However, development of a satisfactory allocation policy and its implementation will require time and resources from MFish and stakeholders, and commitment from Government.

Liability for Compensation

Submissions

- 72 **SeaFIC** submits that the IPP significantly understates the Crown's liability for compensation. Legal advice obtained by SeaFIC concludes that, in the absence of an express prohibition on compensation for reallocation, the industry would have a good arguable case at common law for compensation for the market value of a substantial reallocation of TAC to the non-commercial sector as they claim is proposed in several of the IPP options for SNA 8.
- 73 SeaFIC submits that, it is a well-established principle that a statute should not be interpreted to remove property rights without compensation unless the intention to do so is expressed in clear and unambiguous terms. International case law cited by

SeaFIC suggests that this principle amounts to a common law right to, or presumption for, compensation for expropriation of property which may be ousted only by express statutory provision. SeaFIC's legal advisors suggests that a common law right to compensation unless ousted by express statutory provision is an approach that is capable of being followed in the New Zealand Courts.

- 74 SeaFIC's analysis of the SNA 8 section concludes that the economic analysis in the IPP significantly underestimates and misrepresents potential losses to the commercial sector arising from reallocation and reveals the need for very substantial compensation following re-estimation of economic loss.
- 75 **Northern Inshore** submit that if reallocation is considered to be desirable by the Minister then to minimise the undermining of incentives associated with quota ownership the mechanism of compensation is available to the Crown for affected commercial rights holders. Northern Inshore refer to the case for compensation presented in the SeaFIC submission.
- 76 **Sanford** and the **SNA 8 Co** submit that should the Minister make a non-proportional reduction decision they will expect compensation for the removal of their property rights. They believe that a non-proportional reduction would result in the expropriation of their property, including: the loss of their property rights by having quota removed, a transferring of these property rights to the Crown, and the absence of a clear legislative requirement not to compensate within the FA96.
- 77 **Sanford** and the **Snapper 8 Company Ltd** note that no protection is provided against a compensation claim under s 308 of the FA96 apart from the circumstance of initial introduction of species into the QMS. They go on to say that any compensation claim would still need to be made out to the satisfaction of the Courts if legal action ensued.
- 78 **option4** state that MFish has consistently tried to force proportional allocation on non-commercial fishers as a way of "capping the recreational catch" and "avoiding compensation issues for the Crown".
- 79 **option4** submit that MFish has no option but to give preference to commercial fishing interests in advice to Ministers regarding the management of shared fisheries. They contend that this preference stems from the exposure to compensation from commercial fishing interests, which is always a possibility when making allocation decision in shared fisheries and only commercial fishes can claim compensation. The avoidance of the possibility of claims for compensation leads to pandering to commercial fishing interests.
- 80 **option4** submit that since non-commercial fishers cannot sue for compensation, little consideration needs be given to their interests. Giving consideration to possible compensation claims from commercial fishing interests will always tend to create biased advice from MFish unless all aggrieved parties have similar access to compensation.

MFish response

- 81 The Fisheries Act provides specific protection for the Crown from claims for compensation in specific circumstances. Section 308(2)(a) provides that nothing

authorised by any provision of the Act that contains measures to ensure sustainability (including the varying of any TACC as a direct consequence of a variation in the corresponding TAC) shall be regarded as making the Crown liable to pay compensation or damages to any person.

82 This does not necessarily mean that compensation is payable in alternative circumstances. Hence, where a decision is purely a reallocation of entitlements, then the possibility of compensation is not excluded by s 308. In light of these circumstances, an assessment is provided of the risk of:

- a) Legal proceedings being issued by industry in support of claims for compensation for reallocation of catch;
- b) Potential for judgments in favour of industry; and
- c) Potential fiscal liability to the Crown in light of judgments in favour of industry.

83 MFish assesses the risk of legal proceedings being issued by industry as high, subject to the nature of your decisions about allocation. Industry submissions have stated a case in favour of compensation and may elect to test their case in legal proceedings. The magnitude of the allocation decisions in SNA 8 may provide a useful test case for industry. However, it is equally plausible that industry may simply chose to injunct your decisions prior to entering into force on 1 October.

84 As to the likely outcome of any legal proceedings, there is no case law in New Zealand directly on point. Comments made by the Courts in *SNA 1* referred to the need to consider the nature of the property right. However, there was no explicit discussion of the circumstances in which liability for compensation would arise. The case of *Sanford South Island v Moyle* dealt with the imposition of a regulation in 1988 closing an area to provide annual return of salmon to rivers to spawn. While not directly related to the issue of allocation, the Court noted the apparent unfairness of commercial fishers facing possible losses without legal rights to compensation under the legislation. The Court commented that this seemed “against the spirit of the QMS scheme and its intended commercial certainties” (p 11). Industry submissions refer to Canadian case law on the issue of compensation for impacts on the value of commercial fishing rights. It is unclear whether the Courts in New Zealand would apply this decision.

85 MFish notes that in areas both Parliament and the Courts in New Zealand have recognised that where a right in the nature of property is compulsorily taken by the state it ought to be compensated for. In some instances this is explicitly recognised in statute, such as the Public Works Act.

86 If a Court found that a reallocation had the effect of reducing the value of the property right held by fishers, and that compensation was warranted, then the level of compensation awarded is likely to be the equivalent to the value of the rights taken. Where a TAC is being reduced for reasons of sustainability, compensation may be warranted only for that portion of the reduction applied to the commercial sector that would have (under a proportional scenario) been applied to another sector. Therefore, the Crown would not be open to a claim for the value of the whole reduction in a non-proportional scenario.

- 87 As a tradeable right, quota value represents the net present value of the expected future stream of benefits from the use of the resource. Calculation of that value might be obtained from the market price or through a tender process. MFish has provided you with the quota value (using available quota trade data) of the reallocated catch each of the options in the IPP, although this does not necessarily represent the value of the asset loss. MFish notes that a number of possible methodologies to valuing the right are possible, and arguable in any legal proceedings.
- 88 If a Court found that a reallocation had the effect of reducing the value of the property right held by fishers, then the level of compensation awarded is likely to be the equivalent to the value of the rights taken – i.e. the quota value (using available quota trade data) of the reallocated catch. Where a TAC is being reduced for reasons of sustainability, compensation may be warranted only for that portion of the reduction applied to the commercial sector that would have (under a proportional scenario) been applied to another sector. Therefore, the Crown would not be open to a claim for the value of the whole reduction in a non-proportional scenario.
- 89 As a tradeable right, the quota value represents the net present value of the expected future stream of benefits from the use of the resource. Calculation of that value might be obtained from the market price or through a tender process. MFish notes that a number of possible methodologies to valuing the right are possible, and arguable in any legal proceedings. MFish can offer only an indicative figure of the potential level of compensation that might be payable for each of the options in the IPP, should the Courts find that compensation is due.