

SECTION 8:
PURPOSE OF THE FISHERIES ACT 1996

Summary

- 1 Section 8 is a statement of policy to guide people in exercising discretion when applying the Fisheries Act—it does not require any action, nor is it legally enforceable, in itself.
- 2 The purpose contains twin objectives, to reflect the fact that (in the Select Committee’s words) “... the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource”.
- 3 The Fisheries Act contains tools to manage fisheries resources in order to provide for extractive uses—providing specifically for non-extractive use is encompassed by other legislation.
- 4 The obligation to maintain the potential of fisheries resources to meet the reasonably foreseeable needs of future generations means ensuring that the renewability of the fisheries resource is maintained indefinitely, at a level that provides for continual utilisation.
- 5 In choosing between avoidance, remedy or mitigation as the appropriate response to potential adverse effects of fishing, the appropriate response may depend on the temporal relationship between the fishing activity and the response, or on the effectiveness of, or the comparative benefits and costs of, different responses.
- 6 There are links with many parts of the Act—compliance with specific sections of the Act, and with the principles set out in sections 5, 9 and 10, should ensure that the purpose of the Act is met.

Purpose of this Policy Definition

- 7 The purpose of this Policy Definition is to provide guidance, to any person acting pursuant to an empowering provision of the Act, to ensure that a decision requiring the exercise of discretion is consistent with the purpose of the Act. The policy put forward in this policy definition will need to be compared to other policy definitions, to ensure that a consistent policy framework exists for the implementation of the Act.

Background and scope of legislative provisions

8 Section 8 of the Fisheries Act states:

8. Purpose—(1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.

(2) In this Act –

“Ensuring sustainability” means—

(a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and

(b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment;

“Utilisation” means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

9 Section 8 outlines the purpose of the Fisheries Act. It is a statement of the aim of the Act and the anticipated/intended results arising from the exercise of powers under the Act. The purpose statement reinforces the management system provided for in the Act. Having a pre-eminent single substantive purpose in the Act may avoid a situation in which Ministers, officials and the Courts decide, in government policy statements and legal decisions, what the purpose might be.

10 The use of purpose statements is a modern legal drafting convention where the end, to which the legislation is intended to lead, is contained in a discrete section of the legislation. The purpose statement does not, of itself, require any action, or provide a framework for action. The framework for the management of fisheries is contained within the Act beyond the purpose statement. The purpose statement is not, by itself, a legally enforceable provision.

11 Two applications of a purpose statement have been identified:

- If a section of an Act is open to interpretation, the section should be construed in line with the purpose of the Act as a whole. This may prove rather problematic if the purpose statement is itself open to a variety of interpretations. Nonetheless, Courts frequently refer to statements of purpose.
- Whereas the long title of an Act sets out the direct purpose(s) of the legislation (eg, to reform and restate the law relating to fisheries resources), the purpose statement may convey the social, economic or other objective that Parliament was hoping to achieve. Courts may examine whether someone exercising a legislative discretion has done so in a way that is consistent with the purpose statement.

12 It is this second application that will be the more important in fisheries management. Several provisions of the Fisheries Act allow a certain amount of discretion, and acknowledge that the purpose of the Act is to be taken into account in exercising the discretion. Anyone exercising discretion should be guided by the objectives that Parliament aimed to achieve through the Act.

13 Interpretation of the purpose is likely to change and be redefined through time in accordance with changing knowledge and values. The overall intent of the Act as a whole will, however, remain the same.

Discretion

14 The development of policy implementation needs to be based on an understanding of the policy intent. Where the policy intent comes from a statement in legislation, MFish has to reach a view as to the intent of Parliament in passing the legislation. This view will have been at least partly formed during the policy development process.

15 New Zealand Courts have developed their own rules for interpreting legislation, to compensate for their remoteness from the policy development process. There is no guarantee that these rules will generate the true policy intent. Nevertheless, the Courts are able to impose their judgements on others, so discussion of the interpretation of policy statements should take heed of the rules for interpreting legislation.

16 The Interpretation Act 1999 states, at section 5, that:

The meaning of an enactment must be ascertained from its text and in the light of its purpose.

17 Courts will first try to ascertain meaning from the words themselves. If the meaning is not clear from the words, Courts may look for other guidance. As noted above, this may be provided by the purpose of the Act as a whole. If this provides no further guidance (as will be the case when it is the purpose statement itself that is being considered), other guidance may be required. In New Zealand it is accepted that the courts have a discretion to consider and use parliamentary history as an interpretative tool.¹

18 With reference to interpretation of the purpose statement in the Resource Management Act (RMA), in *New Zealand Rail Ltd v Marlborough District Council*² Justice Greig said:

This part of the Act expresses in ordinary words of wide meaning the overall purpose... It is not, I think, a part of the Act which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and its connotations, which I think is intended to allow the application of policy in a general and broad way.

19 This suggests taking a broad view in examining a purpose statement. In considering the meaning of the purpose statement in the Fisheries Act, we shall look at how the words have been interpreted, and what statements have been made by the Government and the Select Committee during the passage of the Bill.

¹ Burrows, *Statute Law in New Zealand* (1992 Butterworths) p134

² [1994] NZRMA 70, pp. 86

Legislative Intent

The wording of section 8(1)

20 Brookers commentary on s8 of the Act states that,

[section 8] appears to place utilisation of fisheries resources in balance with sustaining fisheries resources and environmental protection. However, in reality resource protection is favoured, and it must be ensured while providing for utilisation.

21 This statement gives no basis for the conclusions reached. Similarly, in the only Court judgement, we are aware of, to have considered this issue, Justice Laurenson³ noted:

I accept that utilisation is subject to the over-riding objective of sustainability without offering further comment or justification, except to note that the issue was irrelevant to the case in hand.

22 Section 8 states “The purpose of this Act is to provide for the utilisation of fisheries resources *while* ensuring sustainability...”. The word ‘while’ can be used in two different contexts:⁴

- “While” can be used as a co-ordinating conjunction where it means “and”. Use in this sense suggests an interpretation of utilisation being balanced with sustainability.
- “While” can be used as a sub-ordinating conjunction where it means “if and so long as”. This creates a stronger requirement to ensure sustainability, where utilisation can only occur where sustainability is ensured.

23 The RMA also uses the conjunction “while” in a similar context to the Fisheries Act. Litigation in relation to the interpretation of the purpose of the RMA shows a trend towards using ‘while’ as both a co-ordinating and sub-ordinating conjunction:

- Where the resource is close to extinction or there is some significant threat of environmental damage, “while” is taken to be a sub-ordinating conjunction. Therefore there is a requirement to ensure sustainability as defined in the Act.
- Where threat to the resource or the environment is less serious, “while” becomes a co-ordinating conjunction and a balancing approach between utilisation and sustainability is preferred.⁵

24 It has been suggested that such an interpretation of the use of “while” may not be appropriate to the Fisheries Act. The Act uses the words “while *ensuring* sustainability”. “Ensure”, in the Concise Oxford dictionary, means “make (person or thing) safe (against risks); make certain

³ CP 182/99

⁴ Richardson, Dr Ben. Verbal presentation to Seaviews Conference 14/2/98

⁵ Richardson in presentation to Seaviews. Willis noted that three Planning Tribunal (now Environment Court) decisions from Judge Kenderdine support the view that ‘while’ is a subordinating conjunction. They are Flockley Engineering W12/94, Plastic and Leather Goods W26/94, Shell Oil W8/94.

(...that); secure...”. Thus the purpose of the act could be stated as providing for the utilisation of fisheries resources while *making certain that* the use is sustainable; making future generations and the aquatic environment safe from the risks of utilisation.

25 However, it should be remembered that “ensuring sustainability” as a whole is defined in s8(2), so that the dictionary definition of “ensure” is not relevant. If one meets the obligations contained in s8(2), then one has ensured sustainability, and no further test is necessary.

26 In considering these views, we are led to a common sense conclusion. The fisheries resource is easily sustainable if no utilisation is ever allowed, but this will not meet the purpose of the Act. As utilisation is increased, there is likely to be a greater risk to sustainability. The requirement to ensure sustainability means that restrictions need to be placed on the resource utilisation—such a restriction may include preventing utilisation, but this should only be in the event of a serious threat, and hopefully a temporary measure. This does not mean that one arm of the purpose is more important than the other is. Rather, it means that the two arms operate in parallel, but not independently.

27 This interpretation can be made clearer from the words by considering the purpose as a problem statement. The first clause ‘provide for utilisation’ means, in New Zealand’s liberal democracy, to provide people with the opportunity to maximise their utility (as in the definition ‘provide for their social, economic and cultural well-being’) — it is the objective function that is to be optimised. The second clause ‘while ensuring sustainability’ is the constraint within which the optimal solution must be found.

Supporting statements

28 During the second reading of the Bill, the then Minister of Fisheries drew the House’s attention to:

...the religious bits. They set out the principles and purposes to enable people to provide for their social, economic and cultural well-being through fishing, while ensuring the sustainability of fisheries resources, and making it clear that management action should be taken to avoid, remedy, or mitigate any adverse effects of fishing on the aquatic environment.

29 In debate on Part II of the Act, the Minister stated:

It is important to understand that fisheries legislation is by nature a statute of use. The standard we are imposing is that anybody—and I am talking about all users—who takes a fish from the sea is required to do so in a way that ensures sustainability of the fisheries.

30 The Primary Production Select Committee⁶ stated, in relation to the purpose and principles, that the Fisheries Bill “introduces a clear statement of purpose for fisheries management by providing for the sustainable utilisation of New Zealand’s fisheries resources”. The Committee stated the purpose of the Act is intended to,

...facilitate the activity of fishing while having regard to the sustainability of harvests and mitigating the effects of fishing on the environment. Therefore, it deals with

⁶ Commentary on Fisheries Bill As Reported From The Primary Production Committee

fisheries resources that can be harvested and used sustainably either now or in the future.

31 The definition of utilisation contained in the purpose is intended to reflect the fact that “..the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource”.

32 These statements appear to support the conclusion drawn in the previous section. The last is a particularly good summary of the purpose. It should be noted that the attitude of the Courts, in having regard to statements contained in supporting documents, is far from clear⁷. They do, however, reflect the MFish understanding of the intent of Parliament.

Relevant policy Issues and proposed principles

33 The second part of section 8 contains the definitions of two terms: ‘ensuring sustainability’ and ‘utilisation’. While the two terms do appear in the first part of the section, they also appear elsewhere in the Act, and the definitions explicitly relate to the terms wherever they are used in the Act. Thus, this part of the section appears to have wandered across from section 2 (“Interpretation”), where it may have been better accommodated.

Utilisation definition

34 The word ‘utilise’ is defined by the Concise Oxford Dictionary as ‘make use of, turn to account, use’. The word ‘use’, in turn, has a number of meanings—the meaning appropriate to this application is not obvious from the purpose statement itself. The meaning ‘consume as material’ clearly implies extraction. However, ‘avail oneself of’ suggests that utilisation of the fisheries resource (as defined in s8) may be interpreted to include the utilisation of the resource for purposes of pursuing enjoyment from aesthetic/natural character values (e.g. viewing by divers), or existence values (knowing the resource exists in its own right). Such utilisation of the fisheries resource is non-extractive, and does not involve the activity of fishing. This legitimate utilisation enables the users involved to provide for their cultural, social and/or economic well-being (definition of utilisation). Such a broad interpretation of the definition of utilisation, and the purpose of the Act is possible when s8 is read in isolation. However purpose statements are rarely (if ever) used in isolation.

Context

35 The interpretation to be given to s8 needs to be framed in the legislative framework within which the statute exists, the context of the statute taken as a whole, and the intention of Government in introducing the statute.

Context - legislative framework

36 A number of statutes make up the legal landscape within which natural resources of the aquatic environment are managed. Control and management of fisheries resources for purposes other than utilisation, such as absolute protection for conservation, intrinsic or amenity reasons, is

⁷ See, eg, *Worsdale v Polglase* [1981], *Brown v Langwoods Photo Stores* [1991], *Wellington International Airport Ltd v Air New Zealand and others* [1992], and *Parris v Television New Zealand Ltd* [1999] for instances where Courts have variously decided to consider, or not to consider, supporting documents.

provided for under other legislation. Examples include the Marine Reserves Act 1971, the Marine Mammals Protection Act 1978, the Wildlife Act 1953, the Conservation Act 1987 and the Resource Management Act 1991. MFish considers that application of the Fisheries Act should not unnecessarily intrude upon the domains of other legislation.

Context - the statute as a whole

37 The powers in the Act do not empower the Minister or Chief Executive to take any action in relation to sustainability where there is (or has been) no fishing related activity. The general regulation making powers of s297 (those not relating to sustainability) could be used to provide for non-extractive utilisation, but there is nothing specifically provided for the purpose. Overall, the implications of including consideration of non-extractive utilisation would probably be indirect—in applying a provision of the Act, it is likely to be the reason for acting, rather than the effect of the action, that would be modified by such a consideration. However, there is nothing in the statute to suggest that the tools provided are to be used for other than the obvious objective of managing extractive utilisation.

Context - Parliamentary intent

38 As outlined in section 5 of this policy definition, the Select Committee reported that the scope of the Act (and thus the interpretation of s8) is limited to the management of fishing and the effects of fishing on the aquatic environment, in that:

It does not deal with all aspects of the management of the aquatic environment, such as the protection of marine species and habitats, which is provided for through various statutes dealing with environmental management.

39 Additionally the Committee stated:

We recommend that utilisation be defined as conserving, using, enhancing and developing fisheries resources to enable people to provide for their social, economic and cultural well-being. *This reflects that fact that the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource (emphasis added).*

40 In response to submitters' concerns, regarding the environmental principles in the Fisheries Bill (s9), the Committee stated they did not support the inclusion of environmental principles, such as:

- protection and maintenance of intrinsic values;
- maintenance and protection of non-extractive uses of marine flora and fauna; and
- protection of outstanding natural features.

41 These values are provided for explicitly in other legislation... Their inclusion into the environmental principles would introduce a range of non-utilisation values into the Bill and significantly undermine the interface with other statutes. The current interface reflects acceptance that fishing, like other activities, can be curtailed under the RMA and other statutes, on the basis of effects on matters such as intrinsic and amenity values.

42 The Minister's statements in the House, quoted above, indicate that utilisation is about fishing.

Managing fisheries at sustainable levels may, incidentally, provide for intrinsic and amenity values.

Utilisation as enabling people to provide for their well-being

43 The purpose of utilisation (whether it be use, conservation, enhancement or development of fisheries resources for current or future use) is to *enable* people to provide for their social, economic and cultural well-being. Thus, in providing for utilisation, there is also a direction provided in the Act that consideration must be given as to whether the utilisation is enabling people to provide for their well-being. There is no obligation on anyone exercising or performing functions under the Act to provide for people's social, economic and cultural well-being. Rather, the Act is to be used to provide for utilisation, so that people can provide for their own well-being.

44 The RMA also refers to enabling people to provide for their well-being, the following point made in relation to that legislation should also be applied to the Fisheries Act:

Significantly it is not for those exercising powers under the [RMA] Bill to promote, to control, or to direct. With respect to human activities it is a much more passive formulation. People are assumed to know best what it is that they are after in pursuing their well-being".⁸

45 This implies that the core role for those exercising powers under the Fisheries Act is to establish the framework within which people can make their own utilisation decisions. This framework includes sustainability constraints and the specification of property rights of those entitled to utilise fisheries resources.

Summary

46 Utilisation of the fisheries resource, in the context of the Fisheries Act, revolves around extraction. Conservation, enhancement and development are activities to provide for future extraction. Non-extractive utilisation is specifically provided for under separate legislation.

47 The purpose of utilisation is to enable people to provide for their well-being. Powers under the Act should not be used to promote, control or direct utilisation, but to provide a framework within which people can make their own decisions.

Sustainability definition - obligations to future generations

48 Ensuring sustainability requires "maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations"(s8(2)b). This somewhat ambiguous and imprecise concept does not lend itself to an easily implemented set of operational guidelines. What are the needs of future generations from fisheries resources? How should fisheries resources be maintained to meet these needs? What is "reasonably foreseeable"? How much do decision-makers need to know before they can exercise discretion in accordance with this principle?

49 Economic literature examining the needs of future generations and intergenerational equity⁹ is rather theoretical, lacking in general consensus, and provides little advice on implementing a framework. Precise answers are not available. The requirements of implementation will evolve

⁸ Upton 1995 speech on third reading of RM Bill

⁹ eg, "Discounting and Intergenerational Equity", ed PR Portney & JP Weyant, 1999

and change over time, directed by changes in knowledge, societal values and international law.

50 Some sections of the Act provide specific guidance on decisions, and hence on how the purpose of the Act is to be met. For example, s13 specifies the levels at which stocks should be maintained. Achieving the specified levels should meet the purpose of the Act. Where no such guidance is provided, decision makers will need some general guidelines to assist them.

Do sustainability obligations differ across generations?

51 The Act draws no direct distinction between obligations to particular future generations. There is general agreement that our responsibilities to the near future are strong, but debate exists over obligations to far future generations, due to uncertainty and motivation.¹⁰ This distinction may however be academic. Being concerned for future generations takes us well beyond political and economic horizons and, in factoring near future generations into decision making, it is hoped that far future needs will not be severely compromised. The Act reflects the uncertainty in trying to predict needs of far future generations through both the application of information principles in s10 and the reference to “reasonably foreseeable needs” in the future generations objective s8(2)(a).

52 Needs that are “reasonably foreseeable” place a stronger obligation to near future generations than far future generations; it is easier to reasonably predict the needs of near future generations than far future generations. It is reasonable that we can foresee the needs of those in the near future with some accuracy. As we move into considerations of the far future, more uncertainty needs to be attached to our forecasts.

What are “reasonably foreseeable needs”?

53 A need can be defined as a ‘requirement or a want’¹¹. However, reference to “reasonably foreseeable” places a limitation and qualification on our obligation to prosperity, thereby removing what may be seen as fanciful and speculative¹².

¹⁰ Wright, Jan (1988) “*Future generations*” an objective in resource management Paper prepared for RMLR group, pp.3

¹¹ Concise Oxford Dictionary

¹² Richardson op cit.

54 The Environment Court has commented in a number of cases what it thinks ‘reasonably foreseeable’ needs might be, in respect of the RMA.¹³ Examples include:

- local access to a natural remnant
- an estuary “both from an environmental viewpoint and from the viewpoint of being part of the sustainable chain of marine food resources”
- a particular scallop resource, which “was likely to support future generations”
- experiencing a sand dune coastal environment having natural character.

55 We are unlikely to know what the specific preferences and wants of future generations will be. However “[o]ur ignorance of their special needs or tastes does not absolve us from responsibilities for their basic needs”.¹⁴ It is reasonable to assume that many things society as a whole regard as “good” and “bad” will be the same for the near future and similar for the far future. Basic goods are those things such as food, clean water, energy. The above examples suggest that the Environment Court considers that future generations will also require access to environments that are not extensively modified by human activity. In terms of the Fisheries Act, this suggests that the needs of future generations could include non-extractive uses of the fisheries resource.

56 Internationally, reasonable foreseeable needs have been recognised to include a right to life, property, culture and health.¹⁵ The Convention on Biodiversity gives one lead on what the obligation to future generations may include in respect of fisheries. It suggests that keeping options open, maintaining the biodiversity of the genetic stock, and the diversity of stocks, populations and ecosystems is at least part of the obligations.

57 Establishing the likely preferences of future generations is not something that can be determined, in isolation, by a government department or by a Court. Debate throughout a wide range of New Zealand society is needed to tease out what future needs might be.

58 The future generations objective of the Act is not one that requires that decision makers today actively provide for the needs of future generations. The main objective is to maintain the potential of fisheries resources to meet the reasonable foreseeable needs to the extent that they can be derived from the fisheries resource. Enabling future generations to provide for their needs is an “end”; “means for attaining this end will vary”.¹⁶ Thus ‘needs’ should be kept at a generic level. Reference to “maintaining potential” to meet needs suggests that the crucial requirement is to maintain fisheries resources rather than to predetermine future needs and specifically provide for them. The practical effect of this requirement is to act as a constraint on practices that disregard future generations.

¹³ Examples may be found in *North Shore City Council v Auckland Regional Council* [1996], *Harrison PJ v Tasman District Council* [1994], *Jessep JA v Marlborough District Council* [1994], *Minister of Conservation v Kapiti Coast District Council* [1994], *Burnett AH v Tasman District Council* [1995], *Browning SJ v Marlborough District Council* [1997].

¹⁴ Wright, *op cit.*, pp. 3

¹⁵ UN Covenants 1996 “*Economic, Social and Cultural Rights*” and “*Humans Civil and Political Rights*”.

¹⁶ Wright *op cit.*, pp2

Summary

59 Where a section of the Act provides specific guidance on decisions, meeting that specification should meet the purpose of the Act. Otherwise, more general guidelines are required.

60 There is no distinction between different future generations. However, our inability to predict the needs of far distant generations places a stronger obligation to near future generations. Wide social debate is needed to establish the “reasonably foreseeable needs” of future generations at more than the most generic level.

61 Reference to “maintaining potential” suggests that our obligation is to ensure that the renewability of the fisheries resource is maintained indefinitely, at a quantity that provides for continual utilisation. This requirement acts as a constraint on practices that disregard future generations.

Sustainability definition - obligations to avoid, remedy or mitigate adverse effects

62 The avoidance of adverse effects on the aquatic environment (s8(2)(b)) is intrinsically linked to the requirement to enable future generations to provide for their needs (s8(2)(a)), but is also an end in itself. Whilst s8(2)(a) can be seen as a social objective, with an environmental objective inherent in it, s8(2)(b) is an ecological objective that is likely to contribute to social and other objectives in the long term.

63 Both parts of s8(2) are equally important in achieving sustainability and both objectives must be met if utilisation is to be provided for. The Act does not present one as being more important than the other is. In achieving integrated environmental management, being the context in which section 8 sits, the environmental objective may be set based on scientific knowledge about the environment, but should also utilise traditional and community knowledge. It is also likely to be influenced by stakeholder/community perceptions as the obligation to avoid, remedy and mitigate adverse effects is integrated with the other utilisation and sustainability requirements set down in s8 as the ethic for the Act.

64 The RMA contains the same obligation as the Fisheries Act. In *Winstone Aggregate v Papakura District Council* (1998) the Environment Court commented that one of the guiding principles of the RMA is the internalisation of the effects of an activity. Those who create adverse effects must internalise them rather than force the rest of society to bear the burden of dealing with them. There should be full consideration of the options to avoid, remedy or mitigate adverse effects, to select the best practicable one.

What is an “adverse effect”?

65 The Act, at s2, states:

- “Effect” means the direct or indirect effect of fishing; and includes –
- (a) Any positive or adverse effect; and
 - (b) Any temporary or permanent effect; and
 - (c) Any past, present, or future effect; and
 - (d) Any cumulative effect which arises over time or in combination with other effects – regardless of the scale, intensity, duration, or frequency of the effect; and also includes –
 - (e) Any potential effect of high probability; and
 - (f) Any potential effect of low probability which has a high potential impact”

66 The meaning of the definition of “effect” under the RMA, has been examined by the Board of Enquiry (1995) when looking into the proposed Taranaki Combined Cycle Power Station. The Board found the categories in para (a) - (c) to be very general and require the consideration of any effect regardless of scale. It found that para (d) was included to insure that effect was not taken too narrowly to mean a single isolated effect from a particular activity. “Other effects” in para (d) was taken to mean effects arising from other activities, which may in themselves not be adverse. Para (e) and (f) of the definition led the Board to assume that consideration of potential effects of low probability and low potential impact need not be considered to the same extent as effects of the same probability but high potential impact. Therefore any interpretation to the nature of uncertain effects must be reasonable and it is the risk (potential impact) arising from the activity that must be considered.¹⁷

67 Adverse effect is not defined in the Act. The Shorter Oxford Dictionary of “adverse” is “standing opposite, hostile, unfavourable or injurious”. This appears to be a satisfactory definition for the purposes of the Act.

68 Is there a point at which an effect, considered negligible on a small scale, becomes “adverse”? This question can apply to both a spatial scale (eg, a single trawl track compared to several dozen) and a temporal scale (eg, the effects of a seasonal harvesting regime that may be reversed before the start of the need harvesting season). There is no single answer to this question, but it should be asked when considering a particular fishing practice.

69 The environment in which the effect is located is an important factor in determining if the effect is adverse. In *Darroch v Whangarei District Council (A18/93)* it was found that noise and odour do not necessarily amount to adverse effects in a rural environment. In a fisheries context (which looks only at effects on the aquatic environment, not on people) an example might be that sustained disturbance to the sea floor is not considered an adverse effect in a highly mobile open coastal surf environment.

¹⁷ cited in Willis p18-19.

70 A number of other variable factors influence whether an effect will be considered adverse, such as:

- characteristics of the aquatic environment, of the fishing method used, and of effects when environment and method are combined;
- impacts from the removal of fish at the particular scale;
- intensity, duration, time of year, scarcity of environment type at local, regional, national, international level, resilience of habitat, other effects currently occurring in the region, and the relationship of fishing effects to this;
- human perception and values; and
- the level of information available on any of these.

71 Particular circumstances will dictate which are the relevant considerations.

Defining avoid, remedy and mitigate.

72 Avoid can be defined as to ‘keep away or refrain from (a thing, a person or actions), escape or evade’¹⁸. The action is to be carried out before any damage (or any further damage) is caused.

73 Remedy can be defined as ‘a means of counteracting or removing anything undesirable, redress, legal or other reparation. In legal terms a remedy is ‘that which redresses, rectifies or corrects that which has been done wrongly or has caused injury, harm, loss or damage’¹⁹ Willis²⁰ states that remedy is something “done after the damage has been caused”.

74 Mitigate can be defined as ‘to make milder or less intense or severe, moderate’. Willis²¹ characterises mitigation as ongoing or occurring to address the effects being or about to be created, rather than being solely after the damage has been caused.

75 Remedy may be carried out in one of two ways:

- take the situation back to what it would have been prior to the occurrence of the adverse effect;
- redress or (environmental) compensation - thus it need not require taking the situation back to how it was prior to the adverse effect.

76 There does not appear to be any time limitation associated with remedying any adverse effects of fishing on the aquatic environment. Thus imposition of such an obligation does not necessarily need to be linked to plans for future fishing activity, but could be applied to the effects of fishing activity in the past. For equity reasons, it should not be applied to the effects of other people’s previous fishing activity.

77 Similarly, there is no spatial limitation associated with remedying adverse effects. Consider a

¹⁸ Definitions taken from Concise Oxford Dictionary unless otherwise stated.

¹⁹ Oxford Companion to Law

²⁰ *Does anyone have this reference? It is missing from the original version.*

²¹ op cit

terrestrial example. ECNZ applied for a resource consent in the Mackenzie Basin, negotiating with DoC a \$3.2 million restoration fund. River recovery was undertaken elsewhere to compensate for adverse effects from a dam that could not be avoided. If a wider point of reference is taken than the exact local geographical location where the effect occurs, and the adverse effect is considered broadly (in this case, the reduced viability of black stilt in a particular regional area) mitigation in restoring another river area to increase viability may be seen as reducing the severity of effects.

78 Compare with the example of closing a bay to dredging in order to compensate for effects occurring in a nearby bay (in the same region) of the same/similar environmental characteristics. This may be seen as reducing the extent of effects on a regional scale, and hence mitigating the adverse effects of dredging in the first bay. This suggests that different parts of the environment could be traded off. If this is the case, then guidelines are needed to set limits. Equity issues are likely to be significant for such an option.

The relationship between avoid, remedy and mitigate

79 A plain language reading of these words does not suggest any particular relationship between them. However, the literature on the RMA suggests three levels of interpretation:

- 1 Hierarchical - duty is to avoid, then remedy, then mitigate
- 2 Hierarchical - two tiered - duty is to avoid, then remedy or mitigate
- 3 Balance - there is no preference for any approach over another.

Considering the approaches

Hierarchical

80 The Ministry for the Environment (MfE), which oversees the administration of the RMA, stated that:

...adverse effects should be avoided if at all possible...If it is impossible then the adverse effect should be remedied...If this is not possible, mitigation should reduce or alleviate the severity of the adverse effects....

81 MfE concluded that, although the wording of the requirement does not establish a legal obligation of one over the other, the terminology implies an order of importance and the requirement is to ensure that adverse effects are minimised to the greatest extent possible.²²

²² Ministry for the Environment 1991, *Resource Management Information Sheet No. 6* cited in Willis op. cit.

82 With reference to the duty to avoid remedy or mitigate under the RMA, the Minister for the Environment, Simon Upton, stated in 1991:

in practice this should mean that in order of importance potential effects are avoided. Where it is not possible, the potential damage caused by such effect is remedied and where this is not possible any remaining adverse effects are mitigated.²³

83 This interpretation is supported by the Board of Enquiry's findings in 1995 where they stated "the duty is first to avoid and if this is not possible then to remedy, and if neither is possible then to mitigate"²⁴

84 One can conclude that these findings are based on the assumption that there is a deliberate purpose in structuring the objective as avoid, remedy or mitigate rather than any other combination of these, and that purpose is to establish a hierarchy.

Two tiered approach

85 Willis²⁵ argues for a two-tiered approach, because avoidance is the safest option and the remaining two options have different meanings but one is not necessarily better than the other is. Whether or not the damage has already occurred is potentially one way of distinguishing between remedy and mitigation.

Balanced approach - no element is more important than the other is

86 There is no predisposition toward any one element as performance of any one of the three terms meets the purpose of the Act. Under a balanced approach decision makers can weigh up all the contributing environmental factors to the effect along with the possible options open for avoidance etc., consider social, economic and cultural factors, take into account what level of caution required, and opt for the most appropriate option of either avoid, remedy or mitigate.

87 Subsequent to expressing the view stated above, the Minister for the Environment, in a speech in 1995, argued against a hierarchy saying, "neither is there an injunction that the words 'avoid, remedy or mitigate' should be read as a hierarchy so as to create a primary duty to avoid"²⁶. Further to this, the Minister stated in his decision on the Taranaki Combined Power Station:

It is my view that the Act [RMA] does not envisage that 'avoid, remedy, or mitigate' ...should be applied as a hierarchy. If this has been Parliament's intention, it would have made it explicit. As [the purpose] is drafted [it] envisages that avoidance, remediation or mitigation will be options available depending on the circumstances of the particular case.²⁷

²³ Ministry for the Environment 1991. *Environment Update* August. Cited in Willis op cit., pp. 24

²⁴ cited in Willis op cit. Pp. 24

²⁵ op cit.

²⁶ Speech to the Energy and Natural Resources Law Association of New Zealand Incorporated. 1995, pp. 12 cited in Willis op cit. Pp26

²⁷ Upton 1995 *Air Discharge Permit Taranaki Combined Cycle Power Station: Decision of Hon Simon Upton Minister for the Environment* MfE March 1995 Wellington cited in Willis op cit., pp. 26, cited in Willis p26

88 This recognises that in some cases one or other of the options may not be appropriate.

89 In the context of the Fisheries Act, a dogmatic hierarchical approach does not appear to be warranted. Since the adverse impacts must be due to fishing, it will always be possible to avoid them by preventing fishing—if this were intended, the words “remedy or mitigate” become superfluous. Rather, the appropriate response must depend on the circumstances of the case, and should be guided by the environmental principles (s9) and the information principles (s10) in the Act.

90 In some instances, only one response may be effective. For example, if a fishing method results in a loss of biodiversity (which needs to be maintained under s9 of the Act), the permanent loss of a species to an ecosystem cannot be remedied or mitigated, and avoiding the loss is the only option.

91 In other instances, it may be appropriate to consider a range of options. While sustainability is not a purpose to be traded off against utilisation through an analysis of the benefits and costs, the Act allows a range of approaches for achieving sustainability, and these may, and indeed should, be compared in terms of benefits and costs.

Summary

92 The obligation to avoid, remedy or mitigate adverse effects is an ecological objective forming an essential part of sustainability.

93 An “adverse effect” can be one (or more) effect of varying degrees of probability or impact. The environment in which the effect occurs is an important factor in determining if the effect is adverse, but a number of other factors will also determine this determination, and particular circumstances will dictate which are the relevant ones.

94 The Act allows for a variety of approaches for achieving sustainability. In choosing between avoidance, remedy or mitigation as the appropriate response, the decision may depend on the temporal relationship between the fishing activity and the response, the effectiveness of, or the comparative benefits and costs of, different responses.

Summary of proposed policy principles

- Section 8 is a statement of policy to guide people in exercising discretion when applying the Fisheries Act—it does not require any action, nor is it legally enforceable, in itself.
- The purpose is intended to reflect the fact that (in the Select Committee’s words) “..the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource”.
- The Fisheries Act manages fisheries resources to provide for extractive uses—providing specifically for non-extractive use is encompassed by other legislation.

- The obligation to maintain the potential of fisheries resources to meet the reasonably foreseeable needs of future generations means ensuring that the renewability of the fisheries resource is maintained indefinitely, at a level that provides for continual utilisation.
- In choosing between avoidance, remedy or mitigation as the appropriate response to potential adverse effects of fishing, the safest response, and probably preferred where little information is available, is avoidance—in general, the appropriate response may depend on the temporal relationship between the fishing activity and the response, or on the comparative benefits and costs of different responses.
- There are links with many parts of the Act—compliance with specific sections of the Act, and with the principles set out in sections 5, 9 and 10, should ensure that the purpose of the Act is met.

Meeting the purpose of the Act in practice

95 The above summary indicates that section 8 has been provided to guide people, including those in the Ministry of Fisheries, in understanding and applying the Fisheries Act. It is not there to constrain people so that they cannot be innovative or flexible, for fear of being challenged for having “broken the law” as set out in section 8.

96 The Fisheries Act 1983 did not have a purpose statement. It was primarily concerned with processes, rather than outcomes. The Fisheries Act 1996 is different, because it is primarily concerned with outcomes—a range of tools is provided, and decision-makers need to choose between them, guided by the purpose and principles of the Act.

97 As the Select Committee pointed out, the Government’s wish was to facilitate the activity of fishing. Facilitate means “make easy, promote, help forward” (Concise Oxford Dictionary) and implies a more positive role for the Ministry than regulating to control utilisation of the fisheries resource. It also has a role in helping stakeholders to devise innovative and flexible arrangements to meet their needs, and to ensure that they, too, appreciate the purpose of the Act.

98 Meeting the purpose of the Act means, in the shorter term, that the Ministry of Fisheries aligns its processes and its decision making to meet that purpose. Whether the purpose of the Act is met, in the long term, is something only future generations can determine.

Links to other parts of the Fisheries Act

Parts I and II

99 The Committee stated that “[t]o achieve the Bill’s purpose, environmental principles, information principles and environmental standards are provided in parts I and II”. Whilst s8 has linkages to all parts of the Act the greatest linkages are to Parts II and III. Where the principles further define what is required to achieve the purpose, sustainability measures set the bottom line and consultation provides us with a tool for making the value judgements required by Part II.

100 All people exercising or performing functions, duties or powers under the Act, in relation to

the utilisation of fisheries resources or ensuring sustainability, are required to act in a manner consistent with (or at least take account of) the provisions of:

- Section 5 — Application of international and treaty settlement obligations
- Section 9 — Environmental principles
- Section 10 — Information principles.

101 Both s9 and s10 commence with: “ All persons exercising or performing functions, duties or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following principles”.

102 The principles stated in these sections outline definite concerns that need to be addressed in making decisions relating to utilisation or sustainability under the Act. Guidelines provided to ensure compliance with the principles will also ensure that the purpose of the Act is being met, as they will be at a more detailed level than is possible from consideration of the purpose alone. This paper should therefore be read in conjunction with the policy definitions for sections 5, 9 and 10.

Part III

103 This part of the Act is particularly concerned with meeting the “sustainability” part of the purpose. The provisions it contains are the means by which Parliament intended that part of the Act’s purpose to be achieved.

104 “Sustainability measures” are *‘any measure[s] set under Part III of the Act for the purpose of ensuring sustainability*. Clearly, the Minister must keep the purpose of the Act in mind when setting or varying sustainability measures, and yet there are provisions suggesting the importance of other factors. For example, s11(1) requires the Minister to take into account “any effects of fishing on any stock and the aquatic environment”, an obligation wider than that in s8(2)(b). Compliance with s11(1) must automatically entail compliance with s8(2)(b), but requires consideration of additional factors.

105 Section 13 of the Act provides another example. There is a specific requirement (s13(3)), when setting of total allowable catch, where the Minister, having established the level at which MSY exists for a particular stock, “shall have regard to such social, cultural and economic factors as he or she considers relevant” in considering the way or rate at which a stock is to be moved to a level where MSY can be produced. This process of decision making is consistent with the purpose of the Act, provided that “relevant” social, economic and cultural issues are considered by the Minister in a manner consistent with the purpose and are therefore those relevant to enabling people to provide for their well-being through utilisation.

106 Section 15 provides a different kind of example. In dealing with protected species under the Wildlife Act 1953 or the Marine Mammals Protection Act 1978, s15(1)(a) states that the Minister *shall* take all reasonable steps to ensure that the maximum allowable fishing related mortality level set by [a] relevant population management plan is not exceeded. However, s15(1)(b) states that the Minister “*may* take such other measures as he or she considers necessary to avoid, remedy or mitigate adverse effects of fishing on protected species”, with a similar provision appearing in s15(2). Such action would be clearly consistent with s8(2)(b), although any action (other than that required by s15(1)(a)) appears to be optional.

107 Each of these examples indicates that application of the “sustainability” part of the Act’s purpose is a necessary but not sufficient condition for successfully executing the provisions of Part III of the Act. If the Minister’s decisions are made in accordance with the relevant provision, then Parliament’s purpose in passing this Act should be met. To the extent that any decision does not meet this purpose, Parliament has failed to provide the appropriate tools in Part III.

Part IV onwards

108 Scattered throughout the remainder of the Act are provisions referring to “utilisation”, “ensuring sustainability” or “the purposes of the Act”. Some examples are discussed below.

Section 25A

109 In recommending the alteration of a QMA, the Minister must be satisfied that “the purpose of this Act would be achieved better by altering” the QMA. This (recent) section suggests the concept of degrees of meeting the Act’s purpose. There is not just the question of whether or not the purpose is being achieved, but how well it is being achieved. There is no outside criterion against which to judge how well the purpose is being achieved, so the criterion must be contained within the purpose itself. This means that utilisation is better provided for, and/or that sustainability is better ensured. This, in turn, suggests that providing for, and/or ensuring, are not absolutes, but that there are degrees of providing and/or ensuring, and that these may be improved upon.

Section 62

110 In providing relief from the effects of forfeiture, a Court must first have regard to “the purpose of this Act (including the purpose of section 56 or section 59 of this Act)” as well as the socio-economic impacts on affected parties and the costs to MFish. This is similar to a number of provisions in the Act, in that it reminds people of the importance of the Act’s purpose when making decisions that appear to be more directed at other concerns. It should not be interpreted to mean that anyone may disregard the Act’s purpose when dealing with matters arising from a provision lacking this reminder.

Section 86

111 MFish may suspend a foreign fishing licence if the Minister “considers that it is necessary or expedient to achieve the purpose of this Act”. This suggests that achieving the purpose of the Act can be a matter of expediency (expedient means “advantageous, politic rather than just”) as much as a matter of necessity. An alternative interpretation has been put forward that it is the suspension that is necessary or expedient *in order* to achieve the purpose of the Act—such an interpretation is more in keeping with the remainder of the Act, but it is inconsistent with the grammar of the provision.

Section 97

112 Section 97 allows the chief executive to issue special permits. In considering an application, under s97(3), the chief executive shall take into account the purpose and principles of the Act, other than for the management or eradication of unwanted aquatic life. This exclusion appears to

be inconsistent with the purpose of the Act. The exception has been created deliberately, so as to avoid having to manage unwanted aquatic life sustainably, as other species are.

Section 186

113 In empowering the Minister to declare, through regulation, any part of New Zealand fisheries waters to be a mataitai reserve, s186(2)(b) requires the Minister to “have regard to the need to ensure sustainability in relation to the reserve.” In a similar manner to s62, it reminds the Minister of the importance of sustainability when decisions are made on matters that do not appear *prima facie* to be concerned with sustainability. This provision is different, however, in that it sets a scale for the sustainability: the mataitai reserve. The provision means that there is a need to ensure sustainability within the reserve itself. In the absence of a defined scale, MFish usually considers sustainability at the level of a Quota Management Area. There is no requirement in the Act to this effect (although the management tools available make the QMA a natural scale) and some flexibility outside of s186 may be appropriate.