A Maturing Quota Management System

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Introduction to QMS

Fisheries Management in New Zealand

Fisheries management in New Zealand has undergone significant changes over the past two decades, some of the most significant events in fisheries management over that period include;

- *"Extending the area of New Zealand fishery management from 12 miles to 200 miles in 1978;*
- *Introducing individual tradable commercial harvesting rights and a comprehensive quota management system to fisheries in 1986, one of the first countries to do so;*
- *Changing from a fixed individual transferable quota system to a proportional individual transferable quota system in 1990;*
- *Clarifying the commercial and customary rights of Maori to fishing resources;*
- *Developing broad principles for the participation of Maori in the commercial development of fisheries in 1992; and*
- *Developing a set of environmental principles in 1996 that established a framework for the sustainability of the fisheries resource, and took into account ecological relationships between fish stocks" (*Hartevelt 1998, p14)

The central feature of Fisheries management in New Zealand since 1986 is the quota Management System [QMS}. Whilst quotas are a frequently used management tool, the New Zealand experience is significant in that the QMS is used to manage approximately 86% of the total commercial harvest within New Zealand's Exclusive Economic Zone (EEZ). Iceland is the only other country whose fisheries management is wholly conducted on this same basis.

It is Government policy to bring all commercially harvested species into the QMS, resulting in considerable institutional bias towards the QMS as the preferred method of fisheries management.

From its beginnings in 1986 the QMS has developed and matured, and the supporting legislation has been amended and rewritten in an attempt to streamline and simplify quota management processes. In particular, the allocation process for the introduction of new species into the QMS has been modified over time to provide for greater certainty in the process, particularly in changing from allocations based on commitment and dependency of fishers participating in the fishery at the time of quota allocations, to allocations based on catch history alone.

In recent weeks the ease with which the introduction of new species into the QMS is to proceed has been further improved by the removal of the requirement that the Minister conduct an assessment of costs and benefits of introducing a new species into the QMS.

Supporters of QMS management welcome these developments, whilst opponents of QMS management view these developments with skepticism;

> *"We note that although New Zealand's officials and fishing industry have cultivated the international community's mistaken belief that the NZ QMS has been a success, the reality is that the only success has been the accretion of power and wealth to those who were grandparented quota and who have dominated decision making and the institutional design of theQMS. Fish stocks have not been well served, nor has the environment, nor have most public interests."*

> Submission by Environmental and Conservation Organisations, Stakeholder Comments and Ministry Response on Draft Statement of Intent [2004/08] and Proposed New Initiatives (MFish, n.d., p5)

As the species introduction and quota allocation processes are "streamlined" the opportunity for fishers and other stakeholders to challenge those processes has been significantly reduced.

We shall briefly examine the development of the QMS, and highlight a number of important issues for the fishing industry that the maturing of the New Zealand QMS in this manner has brought about.

New Zealand's Quota Management System

There have been two distinct stages in the operation of the QMS and quota allocations within that framework, namely

- The QMS as developed under the *Fisheries Act 1983*, as amended in 1986, initially sought to manage developed and over-fished fisheries only. It was a regime primarily based around single stock management. Allocations of quota occurred on the basis of commitment to and dependence on the fishery
- Allocation under the 1996 QMS focuses on multi-species management. All stocks requiring management are now being introduced into the QMS. The allocation of the quota right is based on catch history (MFish 2002 p3).

The Fisheries Act 1983/Fisheries Amendment Act 1986

In 1986 the New Zealand quota management system (``QMS'') was introduced by the *Fisheries Amendment Act 1986,* which restricted the amount of fish taken by fishers in the case of 27 significant commercial finfish species. These fisheries were either over-fished, or were at risk of over-fishing if expansion of effort occurred (MFish 2002, p14)

The QMS had two broad goals;

- The conservation of fisheries resources by limitation in catch levels to achieve maximum sustainable production from the fishery (control output), and
- allocation of harvest rights in the form of Individual Transferable Quota [ITQ], to maximise the net economic return to New Zealand's economy (Annala 1996) by creating appropriate economic incentives; and to bring about rational industry restructuring (Brookers 1995).

Fishers were allocated ITQ, which represent a share of the overall total allowable catch (TAC) in a particular fishery (Brookers 1995). The TAC is a catch limit set to achieve the management objectives for that species. Within the TAC, allowances are made for the commercial sector (the Total Allowable commercial Catch TACC) and recreational and customary interests to ensure the overall catch limit accommodates the needs of each sector (MFish 2002, p 2).

A number of mechanisms were essential to the structure and operation of the QMS as conceived in 1986, namely;

- The establishment of quota management areas and the setting of total allowable commercial catches for each of those areas;
- The allocation of individual transferable quotas and the maintenance of a registry relating to the subsequent holding and leasing of those quotas;
- The imposition of a requirement that fishers must have quota to take fish and that returns be furnished to the Ministry declaring the quantity of fish caught against that quota;
- The enactment of a series of defences designed to cover the by-catch of legitimately targeted fish (i.e. fish for which the fisher holds quota);
- The imposition of severe financial penalties and forfeiture of assets in the event that fish are taken without the fisher holding quota for that species." (Brookers 1995, intro.05)

Individual Transferable Quotas (ITQs) were allocated in perpetuity. In 1986 ITQs were allocated as fixed quantities (in tonnes). To make adjustments to the TAC the Crown would either create new quota and sell it to fishers or reduce ITQs proportionately and compensate fishers at fair market value. The process proved to be expensive and prevented flexible TAC setting. Thus from 1990, while still denoted in tonnes, quota effectively became a percentage of the TACC (MFish 2002, p14)

The operation and monitoring of compliance with the QMS,is reliant on fishers, fish processors, wholesalers and retailers completing a series of interrelated documents or returns which record the movement of fish from capture to market.

Under the *Fisheries Act 1983* (FA83) the main returns were the Catch, Effort and Landing Return [CELR], or Trawl Catch Effort and Processing Return [TCEPR] in combination with the Catch Landing Return [CLR] furnished by the fishing permit holder, the Quota Management Report [QMR] furnished by the quota owner and the Licensed Fish Receiver Return [LFRR] furnished by the Licensed Fish Receiver (Brookers 1995). Later under the Fisheries Act 1996 the QMR was replaced by the Monthly Harvest Return [MHR].

The purpose of these documents is to enable the Ministry of Fisheries to record fish taken against the quota holdings of individual fishers/companies, and to monitor the progress of fish through the system (Brookers 1995). Failure to report as required by regulations is an offence for which there are significant penalties, including forfeiture of fishing vessels and significant fines.

Between 1986 and 2000 a further 15 fisheries species were introduced into the QMS, generally when they became fully developed or over-fished. Midway through this period the process for allocation changed with the *Fisheries Act 1996* and was different to that originally used (MFish 2002, p14).

Fisheries Act 1996

The catalyst for the *Fisheries Act 1996* was the election of a new government in 1990, particularly the commitment of the new Minister of Fisheries to simplify the approach of the Government to fisheries management (Hartevelt 1998).

The 1996 Act was developed at a time where there were;

- Changes in social and environmental values resulting in a need for legislation that emphasised the sustainable use of resources and recognition of the impact of fishing on aquatic ecosystems;
- Increasing conflict between commercial, recreational and Maori interests as to the nature and extent of each group's rights, and the relative position of those rights;
- The introduction in 1994 of an avoidable costs recovery system;
- The establishment of the Ministry of Fisheries (MFish) as a stand-alone Government department in 1995;
- A fisheries registry system in need of upgrading or replacement;
- An increasingly complex and expensive QMS in terms of administration, enforcement and industry compliance (Hartevelt 1998, p15).

As a result of these factors the Minister of Fisheries set up a task force to report to Government with recommendations to simplify the approach to fisheries management. The task force reported back in 1992, recommending;

- That provision be made for the fishing rights of Maori;
- That environmental principles be developed to establish environmental bottom lines for sustainability and taking into account the ecological relationships between fish stocks;
- The introduction of an annual catch entitlement, derived from the quota holdings of fishers, thereby simplifying the complex trading system of quota rights;
- The establishment of catch entitlements for recreational fisheries;
- Establishment of a modified cost recovery system (Hartevelt 1998, p15).

A number of the recommendations were endorsed by Government and were incorporated into amendments to the *Fisheries Act 1983*, or included in a new Act, the *Fisheries Act 1996* (FA96).

The new Act made significant changes to the day-to-day management of the QMS, including;

- revised catch balancing processes;
- the introduction of Annual Catch Entitlement [ACE]:
- revised quota and ACE trading procedures; and
- revised offences and penalties) (MFish 2002, p37).

In addition, the Act also rationalised quota allocation processes, by calculating quota allocations based on the catch history of fishers in the fixed catch history years of the 1990 and 1991 fishing seasons. The commitment and dependence criteria utilised under the *Fisheries Act 1983* were abandoned in favour of the more limited and certain catch history criteria. The allocation criterion was designed to provide a balance between

the rights of existing fishers and allocation of rights based on efficiency. As noted by his Honour Keith J in *Kellian* at para 46;

> *... quota allocation is based on catch history in recognition of existing participants, and tendering (of any unallocated quota) to provide opportunity for new entrants and allocation of catch rights to the most efficient users (ie those that are likely to value the fishery more and therefore pay more in any tender process.*

It was estimated that 70% of the existing QMS-related processes would need to be amended to meet the new obligations under the *Fisheries Act 1996*, and new computer systems developed to support the new QMS processes. Consequently, because of the time that would be required to carry out these changes, the Act provided that its various operational provisions would be commenced by Order in Council (MFish 2002, p37)

Between 1997 and 2001 the Ministry of Fisheries used the *Fisheries Act 1996* allocation mechanisms but under transitional provisions in the *Fisheries Act 1996* used the *Fisheries Act 1983* to actually operate the QMS (MFish 2002, p40)

However the costs of implementation of the *Fisheries Act 1996* proved to be prohibitive and significant concerns were raised that, whilst the *Fisheries Act 1996* was designed to simplify fisheries management, reduce compliance costs and encourage stakeholders to take a constructive role in fisheries management, the regime in fact had the opposite effect (Hartevelt 1998).

Following review of the *Fisheries Act 1996* by an independent reviewer in 1998, the Act was significantly amended in late 1999 in an attempt to remedy these difficulties. Included in these amendments were:

- a change from a balancing regime based on criminal penalties, including the removal of the offence to take fish without the authority of quota, to one based on civil disincentives (for example deemed values),
- introduction of a High Seas permitting regime for all New Zealand vessels, and New Zealand national fishing on the high seas
- capacity to devolve administration of QMS (registry services) to industry based organizations
- a revised cost recovery regime (MFish 2002, p40-41)

The following table reproduced from the Ministry of Fisheries, Background Submission to the Scampi Inquiry (2002) compares the general rationing processes used for allocation of quota in 1986 with those now in effect under the 1996 fisheries legislation;

Issue	1986 (under Fisheries Act 1983)		1996 (under Fisheries Act 1996)
Eligibility to receive quota	Held a permit at date of declaration, or within 12 months of date of declaration, or such longer period as Director-General (D-G) considers appropriate for special reasons relating to particular cases.		Held a permit during the statutory criteria years and holds a permit on the date of declaration. Held a special (moratorium-based) permit during 12 months post moratorium.
Right to challenge permitting decisions (additional to internal administrative review)	Right of judicial review of all D-G's decisions.	From 1992, pre-1986 decisions are validated.	From 1996, right of review of Chief Executive decisions, except that all permitting decisions prior to October 1992 are validated (and thus unable to be challenged), as are those between 1992 and 1996, where the person has not sought an administrative review in the time allowed of the permitting decision pursuant to s 329 of the Fisheries Act 1996.
Basis on which allocation made	Catch history. Based on fishing returns, and D-G can disregard the information not supported by fishing returns made in accordance with the requirements of the Act.		Catch history or Individual Catch Entitlements (ICE). Allocation by catch history to be based on fishing returns during criteria years. Allocation by ICE to be entitlement that existed as at the date of declaration.
Process by which catch history years are set	At the discretion of the Minister of Fisheries. Specified at the same time as declaration bringing stock into QMS.		Criteria years (1990-1992) for catch history set by legislation. Best consecutive 12 months.
Changes between catch history and final allocation	D-G can change allocation if catch history calculation would be unfair in a particular case having regard to commitment to, and dependence on, the taking of fish by that person in that QMA as at date of declaration, and other allocations made.		Chief Executive (CE) must base allocation only on information from lawfully completed catch returns received by the Ministry by 15 October 1992. No provision for catch history to be adjusted by external factors.
Appeal against allocation	To the Quota Appeal Authority (QAA). QAA can consider all the evidence and apply the same criteria that D-G used (de novo hearing). Appeal must commence within three months of D-G decision.		Right to appeal to Catch History Review Committee (CHRC) against Provisional Catch History (PCH). By law, the CHRC can only use catch actually taken and reported, there is no account taken of external factors. Review and appeal must be commenced within a specified time (no less than 60 days).
Transferability of catch history	None.		Where fisher has catch history but is not eligible to receive quota, can transfer catch history in limited circumstances.
Effect of increase in quota on appeal	TAC is increased. Reduction can only be achieved by re-setting TAC at lower level.		All increases are accommodated within 80% of TACC after allocation of 20% to Māori. No compensation paid for reduction of PCH to fit within 80% TACC. Some stocks (4th Schedule) are compensated if a pro rata reduction is necessary.
Nature of ITQ holdings	Fixed tonnage; compensation for reduction in TAC.	Proportion of TACC, no compensation for reduction in TACC.	Proportional share expressed as quota shares; no compensation for reduction in TACC.

(MFish 2002, p15)

A description of the operation of the QMS, under the *Fisheries Act 1996* may be found in the Ministry of Fisheries, Background Submission to the Scampi Inquiry (2002). In summary, under the Act a fisher's catch is counted against their catching rights - the catch balancing regime, and may be described thus:

> *The regime is designed to provide appropriate incentives to encourage fishers to cover all their catch of QMS fishstocks with annual catch entitlement (ACE). Instead of it being a criminal offence to take catch in excess of quota - as it was under the 1983 Act - overfishing is controlled, in the first instance, by graduated administrative incentives based around the payment of deemed values.*
>
> *There are five main parts to the new catch balancing regime:*
>
> - *Interim deemed values are a 'reminder' to fishers to obtain ACE to cover catch during the fishing year.*
> - *Annual deemed values are the main incentive for fishers to cover all catch with ACE. For most stocks, the annual deemed value rate increases as the amount of catch in excess of a fisher's ACE increases.*
> - *Permit suspensions prohibit fishers from fishing if interim or annual deemed values are not paid. Fishing with a suspended permit is a criminal offence and attracts severe penalties.*
> - *Overfishing thresholds (specified as a percentage of ACE) will apply to a few fishstocks where overfishing raises particular concerns. A fisher's permit is deemed to contain a condition prohibiting the fisher continuing to fish in an area where the fisher's catch exceeds ACE by a specified amount.*
>
> *Tolerance levels (specified as a fixed quantity of catch) are designed to prevent overfishing thresholds being triggered by trivial amounts of catch in excess of ACE* (MFish 2002, p17).

The catch balancing regime and the new offence and penalty provisions of the *Fisheries Act 1996* came into force on 1 October 2001.

A Preference for the QMS

The *Fisheries Act 1996* and operation of Government policy has established the QMS as the method of fisheries management in New Zealand preferred above all alternatives. Whilst this approach may be appropriate for many fisheries, this blind adherence to QMS management limits the likelihood of proper consideration of alternatives. Indeed this smugness about the effectiveness of the QMS in obtaining sustainable outcomes and the validity of assumptions behind catch levels has been questioned by international experts (Boyd 2004).

Any person who has read a recent Ministerial advice paper recommending considering the introductions of new species into the QMS may be forgiven for thinking that new species introductions are been driven with a blinkered assuredness that QMS is the best, and indeed the only acceptable way to manage fisheries resources.

In many recent cases various industry stakeholders have criticised the Ministry for championing a bias or preference for management within the QMS structure. During the recent consultation of the Tuna industry, the QMS model was criticised under a number of heads including;

- *Quota does not create wealth, just transfers fishers' income to large companies who buy quota and then pay low prices for fish. Makes owner-operator unprofitable.*
- *Quota will be controlled by a few, and price of ACE will be high, leading to fish being dumped, eg when SBT are caught as bycatch in ALB fishery.*
- *Proposal says high TACC would be set for within EEZ, but this can be difficult to estimate and could still constrain catch. Could also attract criticism from other nations if we under-catch the TACC.*
- *MFish may reduce TAC if fish are absent one year, and is reluctant to raise it again.*
- *Compliance and other financial costs of QMS could outweigh benefits for small to medium enterprises.*
- *QMS presents barrier to new entrants, due to price of quota or ACE.*
- *For under-utilised fisheries like albacore, QMS would limit their potential for expansion and reduce economic benefits.*
- *Strongly support QMS as basic framework for fisheries management but naïve to think that it is necessarily optimal in all situations.*
- *QMS theoretically allows continued entry, but 15 years experience shows quota owners have decreased by 70%.*
- *No reason to set TACC before abundance and distribution is known, or before other countries or RFMOs have set TACC* (MFish 2003, p7-8).

However, support was given to a modified QMS structure for management of the Tuna species. The Ministry was encouraged by stakeholders to explore such innovations further, in place of the proposed standard QMS option (MFish 2003, 7-8). Yet, despite this encouragement to consider alternatives and Ministry acknowledgement that most submitters preferred either a Modified QMS arrangement or other alternatives to QMS management (MFish 2003(2)), the Ministry of Fisheries advice to the Minister a short time later was that:

> *The Ministry considers that standard QMS management would generate more long-term benefits to fishers and New Zealand generally than the modified QMS option* (MFish 2003(3), p2).

In view of the fact that less than two months elapsed between the receipt of submissions and the provision of advice to the Minister, it is apparent that no real consideration of alternatives was made. This may or may not be the correct result for Tuna and other highly migratory species. However, failure to properly consider alternatives may well have led to opportunities to improve fisheries management frameworks being missed.

The Ministry is, however, supported by the Courts in preferring the QMS over alternative management measures. See, for example, *Kellian v Minister of Fisheries* CA 150/02, Keith J Court of Appeal, 26 September 2002, where his Honour Keith J noted;

> *The QMS certainly introduced a major change to the rights and privileges of fishers. Further, it has been progressively applied to more than 45 species, which provide over 85% of the commercial catch. The legislation has also been amended to provide for greater certainty in the introduction of species and stock into the QMS, particularly by the removal of the commitment and dependency grounds for the grant of quota (s28E(3) of the 1983 Act as enacted in 1986). While the Act itself might not make its preference manifest, we consider that the course of the development of the legislation and its administration over the past 15 or more years supports and is reflected in the following passages from the report of the Primary Production Committee of the House of Representatives on the Bill that became the 1996 Act. In that report the Committee*

emphasised that the QMS is the preferred management system for all commercial stocks...

We also need not decide whether the Act is to be interpreted as requiring as a matter of law a preference for QMS over other methods of management and control. Such a reading might lead to unnecessary difficulties in administration. What we can certainly say however is that it is open to the Minister and the Ministry to have a policy strongly supporting the introduction of stock and species into the QMS.

It is this apparent *"QMS or nothing"* approach that concerns industry, who in many cases fear that no real or actual consideration is given to possible alternatives to QMS management. The view of the industry is many times ignored so as to push on with introduction of further species into the QMS.

In the past, the Ministry has been challenged often through the Courts in respect of permitting decisions, proposed TAC cuts, and new species introductions. Claimants are concerned with the often adverse impacts that quota cuts, and quota introductions may have on individual fishers or groups of fishers, and the apparent disregard the Ministry appears to display for those impacts.

Because of the difficulties experienced by the Minister of Fisheries in carrying out these functions, legislation supporting the QMS has been amended to remove most if not all impediments to meeting the government goal of introducing all commercially fished species into the QMS, regardless of the appropriateness of that introduction for the sustainability of the species concerned and the resulting impacts on the industry. In particular, the removal of the commitment and dependency grounds for the grant of quota and the recent repeal of the requirement to carry out a costs benefit analysis has made it extremely difficult to successfully review the Minister's decision to introduce a species into the QMS, thus removing any real opportunity to challenge the quality of decision making processes undertaken by the Minister and his Ministry advisers.

The mechanisms used to tighten control under the *Fisheries Act 1996* are examined below.

Section 329

Decisions made by the Director General of Fisheries in respect of the issuing of (or reduction in) commercial fishing permits in the 1980s and early 1990s had resulted in a number of legal challenges being brought against the Ministry and the DG seeking review of those decisions (MFish 2002).

In order to limit the ability of fishers to challenge the Director-General's past permitting decisions, all decisions of the Director General in respect of the issue of fishing permits up to 1986 were retrospectively validated by the *Fisheries Amendment Act 1992*. Thereafter a similar provision was included in the *Fisheries Act 1996* for all permitting decisions made by the Director General up to 1992, which included the catch history years for quota allocation.

Thus section 329 of the *Fisheries Act 1996* provides:

329. Validation of certain decisions relating to permits—

(1) Every decision and every purported decision of the Director-General of Agriculture and Fisheries—

(a) Made in respect of the issue, variation, refusal, revocation, or cancellation of any fishing permit under section 63 or any special permit under section 64 of the Fisheries Act 1983; and

(b) Made before the 1st day of October 1992—

is hereby declared to be and always to have been valid.

(2) Every decision and every purported decision of the chief executive (whether made by the chief executive or the Director-General of Agriculture and Fisheries)—

(a) Made in respect of the issue, variation, refusal, revocation, or cancellation of any fishing permit under section 63 or special permit under section 64 of the Fisheries Act 1983; and

(b) Made on or after the 1st day of October 1992 but before the commencement of this section—

is hereby declared to be and always to have been valid.

(3) Subsection (1) of this section does not apply to a decision or purported decision referred to in that subsection if the decision or purported decision is being challenged in or is otherwise subject to any court proceedings commenced before the date of commencement of this section.

(4) Subsection (2) of this section does not apply to a decision or purported decision referred to in that subsection if—

(a) The decision or purported decision is being challenged in or is otherwise subject to any court proceedings commenced before the date of commencement of this section; or

(b) The applicant for the permit which was the subject of a decision or purported decision referred to in that subsection—

(i) Has, before the commencement of this section, lodged with the chief executive; or

(ii) Within 12 months after the commencement of this section, lodges with the chief executive—

a notice requesting the chief executive to review that decision or purported decision.

(5) ...

The impact of section 329 is significant. Thus, in *Jenssen v A-G* 3/9/98, Master Thomson, HC Wellington CP163/98, the High Court struck out a statement of claim that attempted to challenge previous decisions of the DG and consequently bring a claim for quota, on the basis that s 329(1) *Fisheries Act 1996* prevented the plaintiff from challenging a decision made before 1 October 1992 in respect of fishing permits issued under the *Fisheries Act 1983* (Brookers 1995, FS329.04).

In the writer's experience, persons who wish to challenge quota allocation processes occurring now are often forced to revisit decisions of the Ministry of Fisheries in and around the catch history years of 1991-1992. The effect of s329, and its predecessor, is to prevent fishers from re-visiting permitting decisions made at the time, as part of that challenge or re-assessment. Because the catch history years in most cases are linked to

fishing activity that took place over a decade ago, a permitting decision made at that time by the Ministry may be particularly relevant to any claim for quota, or compensation in lieu of a quota allocation. Section 329, however, removes the ability to question the Ministry's actions, even where such decisions have been subsequently found to be patently unfair.

Removal of commitment and dependence criteria

When initially conceived, allocations of quotas were to fishers who had held a fishing permit in the previous 12 months, or such longer period as the Director-General considered appropriate for special reasons relating to any particular case. The amount of quota to be allocated was calculated on the basis of their commercial catch history in the previous fishing years. The proportion an individual's catch history bore to the total commercial catch in the Quota Management Area (QMA) of that species determined the share of the TACC received by the fisher in the form of a quota allocation.

However, the amount of quota allocated could be varied if the Director General took the view that the allocation was unfair having regard to the commitment to, and dependence on, the taking of fish of that species in that quota management area by the fisher and any other quota allocated to that fisher (FA83, s28E).

The removal of this commitment and dependence criteria resulted in inequities occurring. Where previously a fisher who had been ill or unable to participate in the fishery at the critical time still had an opportunity to secure quota under the 1983 Act, under the 1996 Act there is no opportunity for the granting of quota in such circumstances. If the fisher had not taken and reported fish of the particular species during the 1990 and 1991 fishing seasons, and therefore generated a catch history, that was the end of the matter.

It is clear the in making changes to the allocation mechanism, the government of the day was cognisant of the potential for inequities to arise, a view summarised by His Honour Keith J in *Kellian*, where he noted at para 45;

> *The major change from the 1983 regime to the 1996 one effected by the repeal of s28E and the removal of the associated procedural and appellate protections also emphasises that the particular circumstances of individuals are not to be considered. It will be recalled that the select committee fully understood that inequities could result from the unqualified application of the catch history years. That toughening of the system and the limiting of it to more general matters was deliberate.*

As a result of the repeal of section 28E *Fisheries Act 1983*, and the decision in *Kellian*, it is clear that in deciding whether or not to introduce a species into the QMS, and in allocating quota, the circumstances of individual fishers is not relevant. Furthermore, the Ministry appears to have interpreted *Kellian* as authority for the proposition that the Minister is not required to consider in any detail the impact a quota introduction may have on fishers except in the most generic sense, making any such consideration a virtual non-event.

In light of this view of the Ministry on the relevance and value of cost benefit analysis, the *Fisheries Act 1996* was recently further amended to remove the requirement to carry

out an assessment of the costs and benefits of introducing a species into the quota management system.

Recent removal of costs benefit analysis

The requirement for the Minister to consider the costs and benefits of introducing a stock into the quota management system was added to the *Fisheries Act 1996* in 2001 (by s 9 *Fisheries Act 1996 (Amendment) Act 1999* (1999 No 101). Within the Ministry of Fisheries Departmental Report Fisheries Amendment Bill 1998 (MFish 1998) (which subsequently became the *Fisheries Amendment Act 1999*), in respect of the need for costs and benefits assessment to occur it was noted,

> *The Minister should be required to have regard to the costs and benefits of introducing a stock into the QMS. The intention of the provision is provide [sic] the Minister with sufficient information to consider the effect of introducing a species into the QMS achieving the purposes and principles of the fisheries Act 1996 (Clause 9).*

Despite the perceived need for an assessment of costs and benefits of species introductions in 1998, there has now been an about-face, with the repeal of this requirement in September 2004.

In the past the Minister has been challenged in the exercise of his power to introduce species into the QMS on the basis that inadequate assessment of costs and benefits of introduction to the QMS has occurred. In many cases, failure to carry out this function adequately may have provided the only grounds to challenge the Minister's decisions, particularly where cursory attempts at such an assessment have been made. In our view, the repeal of this requirement is a cynical attempt to limit the opportunities for review of the Minister's decision to introduce a species into the QMS.

The repeal allows the Ministry to dispense with a requirement to consider the alternatives to QMS management, and in respect of these criteria, chips away further at the integrity of the decision making process. This, coupled with an apparent inability of the Minister's advisors to consider alternatives to the QMS, has resulted in an ever decreasing confidence that decisions taken to introduce a species to the QMS will result in the best alternative for management of that species, or group of species.

Conclusion

The change in allocation criteria and the retrospective validation of past permitting decisions, together with the overriding preference for the QMS exhibited by the repeal of the costs benefit assessment requirement, have certainly met the Ministry's goal of streamlining the quota introduction and allocation process. Very few attempts at reviewing the Minister's decisions through the courts have been successful in challenging species introductions and the allocation of quota. In the future this is likely to continue.

While this reduces the costs of carrying out the objective of bringing a species into the QMS, the question arises, should administrative efficiency override the ability of stakeholders to test and question the quality of the Minister's decision making?

Whilst ultimately the QMS may be the most appropriate method of management, the current assumption that the QMS is best, and that therefore no real assessment of alternatives is required, does not instil great confidence in the fisheries management decisions that result.

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MFish Compliance Background Submission 24 January 2003

Ministry of Fisheries (MFish, no date). Stakeholder Comments and Ministry Response on Draft Statement of Intent [2004/08] and Proposed New Initiatives