

Fishing-Related Mortality, the Precautionary Principle and the Law in New Zealand



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New Zealand sea lion

Phocarctos hookeri/Whakahao/Kaki



Thanks to NZ Sea Lion Trust

Hector's/Maui Dolphin

Cephalorhynchus hectori (maui)



Thanks to NZ
Whale and Dolphin
Trust (Steve
Dawson and Liz
Slooten) and Will
Rayment
(University of
Otago) and Scoop
NZ

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Fishing and FRM in NZ

- 4.4 million km² of fisheries waters, consistently within top 5 sectors contributing to the economy. 20-30% of population enjoys recreational fishing. Common methods: trawling, set-netting & long-lining.
- 736 NZ sea lions drowned 1997-2007, 40% decline since 1995. Fishing is the 'main threat' to Hector's dolphin, in continuing decline, an estimated 55 Maui's over age 1 remain.

FRM Measures, Fisheries At 1996

- Sea lions: Marine Reserve (12nm) and FRML set by Fisheries Minister. 2012 FRML lifted: SLEDs
- Dolphins: set net bans by Fisheries Minister
- **Slow and difficult progress, Department of Conservation having largely withdrawn. Why?**
- **S 9:** 'provide for the utilisation of fisheries resources while ensuring sustainability' ... a balance
- **S 15:** Minister can take *necessary* measures to avoid, remedy or mitigate the effect of FRM

Section 10: Information Principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

- (a) Decisions should be based on the best available information:
- (b) Decision makers should consider any uncertainty in the information available in any case:
- (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:
- (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

Northern Inshore Fisheries Company Ltd v Minister of Fisheries

- Set net bans for Maui dolphins, West Coast NI
- Failure to base decision on BAI contrary to s 10(a)
- Information on economic impact out-of-date
- Importance of s 10(a), duty language, s 10(d) not mentioned

Squid Fishery Management v Minister of Fisheries

- Closure of squid fishery when FRML reached
- Industry argued for a 'discount' for vessels using SLEDs
- Minister refused: absence of information on effectiveness of SLEDs
- Industry indicated research showing 90% of sea lions escape trawl nets successfully via SLEDs, although up to 40% were likely to suffer life-threatening injuries
- This information did not reach the Minister, therefore he was not 'in a position to make an informed decision', breach of s 10(a)

Squid Fishery Management v Minister of Fisheries (CA)

- 2003-4 FRML of 62 sea lions
- Minister had based his decision on Wade (PBR) rule, but all parties accepted Breen Kim model was BAI
- **But why?** Breen Kim model untested, returning hugely different results to Wade
- High Court: 'it was open to the Minister to take cognisance of the fact that this was the first time the [Breen Kim] model was being used and so to query the degree of uncertainty associated with it.'

NZ Federation of Commercial Fishermen v Minister of Fisheries

- Extended set net and trawling bans for dolphins
- ‘In the usual course decisions are to be based on [BAI] ... Before making [a] decision the Minister is required to consider this [and so] must know what information is available and at what cost and in what timeframe. If he or she decides not to base [a] decision on the [BAI] there would have to be a reason ...’
- A potentially heavy burden on Minister

- *In all cases, information deficiencies resulted in precautionary measures being set aside*
- BAI statements ‘can actually work against the [precautionary] principle with respect to [its] second application – whether to prohibit or restrict an existing activity before there is conclusive proof of harm. [T]he ... best information requirement ... reduces the ability to make precautionary decisions ...’ (*Warwick Gullett*)

Contrary to ...

Raison d'être of the precautionary principle, a policy choice that aims to resolve paralysis in decision-making in favour of the environment

International agreements to which NZ is a party
eg: Convention on Biological Diversity: 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat')

Contrary to ...

Relevant international instruments eg:

- **Rio Declaration** 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'
- **FAO Code on Responsible Fisheries** 'The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.'