

**In the High Court of New Zealand
Auckland Registry**

CIV2005-404-4495

Under Part I of the Judicature Amendment Act 1972

In the matter of an application for review

between

**The New Zealand Recreational Fishing Council Inc, and
New Zealand Big Game Fishing Council Inc**

Plaintiffs

and

Minister of Fisheries

First Defendant

and

The Chief Executive of the Ministry of Fisheries

Second Defendant

and

**Sanford Limited, Sealord Group Limited and Pelagic
& Tuna New Zealand Limited**

Third Defendant

**Affidavit of Richard Owen Boyd in Support of Plaintiffs First Amended
Statement of Claim**

Affirmed this day of February 2006



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I **Richard Owen Boyd** of Wanaka, a fisheries scientist and consultant, solemnly and sincerely affirm that:

1. Purpose

- 1.1 I have the qualifications and experience set out in my affidavit of 31 August 2005.
- 1.2 Since my affidavit of 31 August 2005, the Minister of Fisheries has made further decisions for kahawai fish stocks affecting the 2005-06 fishing year commencing 1 October 2005. In making these decisions the Minister cut kahawai TACs, TACCs and non-commercial allowances by a further 10% in all kahawai quota management areas.
- 1.3 The purpose of this further affidavit is to address the Minister's 2005 decisions for kahawai. In considering this I have read and reviewed certain submissions of key stakeholders, the Ministry of Fisheries' 2005 Final Advice Paper dated 14 September 2005 (FAP 2005), the Initial Position Paper 2005 (IPP 2005) and the Minister of Fisheries' 2005 decision letter for the 2005-06 fishing year.
- 1.4 In this affidavit I also comment on the following matters that are raised in the 2005 decision making process:
- the Ministry of Fisheries' FAP 2005 and the IPP 2005;
 - An issue raised in the option4 submission to the IPP 2005;
 - the Minister's 2005 kahawai decisions.
- 1.5 I acknowledge that I have read the Code of Conduct in Schedule 4 of the High Court Amendment Rules 2002 and I agree to comply with it.

2. The Minister's 2005 Decisions

- 2.1 The Minister's decision was communicated by the Minister's successor, Hon Jim Anderton by letter to stakeholders in November 2005. Attached as exhibit "A" is a copy of the Minister's decision letter (the electronic copy attached is undated but the original is understood to be dated 22 November 2005). I refer to this as the Minister's decision letter.
- 2.2 Prior to the 2005 decisions, the Minister received advice from the Ministry. A true copy of the 2005 FAP is annexed as exhibit "B". The full document covered some 700 pages affecting a number of other fish stocks. The copy attached includes pages 1 to page 82 which contains generic policy advice, and then pages 371 - 468 which covers the IPP 2005 and FAP 2005 in relation to kahawai.
- 2.3 The FAP 2005 also contains MFish's advice and discussion of submissions made by the recreational fishing sector and by the commercial fishing sector concerning:
- a. General statutory obligations and policy guidelines;
 - b. Management of recreational and customary catch;
 - c. Approach to localised sustainability issues;
 - d. Management above B_{MSY} ;
 - e. Precautionary Approach;
 - f. Use of Anecdotal Information;
 - g. Consideration of the Purpose and Principles of the Act; and
 - h. Compliance Plans.
- 2.4 The IPP 2005 and the FAP 2005 contained MFish's advice in relation to two options for the setting of TACs, allowances and TACCs in the kahawai fishery, the options being to either:
- a. Retain the status quo for the TACs, allowances and TACCs for each kahawai quota management area, with no change made to recreational bag limits, pending the availability of further information on the recreational kahawai take (option 1); or

- b. Make an across the board 10% reduction of all TACs with a proportional reduction of customary and recreational allowances and of TACCs within each TAC and each quota management area to fit total catch allowances within each reduced TAC (option 2).

The Minister's 2005 Decisions Letter

2.5 Material parts of the Minister's 2005 decision letter contain the following statements:

The previous Minister agreed earlier this year to review the TACs for kahawai for the 2005-06 fishing year. The IPP proposed to either retain the TACs at existing levels, or to reduce TACs by 10%. The large response to these proposals made it clear that management of our kahawai fisheries remains an important issue for all sectors.

The Minister considered the issue of the management target for kahawai. Kahawai is a key fishery for the non-commercial sector and is significant for parts of the commercial sector. The Act provides considerable discretion over the target levels for fisheries. The Minister signalled the Labour Party policy on managing important shared fisheries above B_{MSY} - I intend to seek advice from MFish on implementation of this policy during the coming year.

Regardless of any determination to manage kahawai above B_{MSY} , the Minister believed there was sufficient concern to warrant reconsideration of existing TACs to provide an acceptable level of certainty that kahawai stocks will remain at current levels or increased in size. Information on recent trends in kahawai stock abundance is conflicting. Submissions were also in conflict over the current status of the stock. Non-commercial fishers considered the stock had declined significantly, remained below desired levels of abundance, and would likely not increase with any certainty or as rapidly as they would like under the TACs that were set in 2004. The commercial sector considered there was no evidence of stock decline and no basis for a reduction to removals.

The last stock assessment for kahawai was undertaken in 1997. Given the age of the stock assessment the Minister believes there is considerable uncertainty over stock status and estimates of sustainable yield. Given this uncertainty and the importance of the fishery he took a risk adverse approach to management of this species.

He was not satisfied that the current TAC provides sufficient certainty of maintaining or improving current biomass. Therefore, after carefully considering the merits of each option and the issues raised in submissions, he decided to reduce TACs for all kahawai stocks by 10%. This decision provides more certainty that kahawai stocks will remain at current levels or increase in size.

He also decided to proportionally reduce all allowances and TACCs to fit within each TAC. The Minister's decision on TACs, TACCs and allowances for all kahawai stocks are set out below.

Stock	TAC (tonnes)	Customary allowance (tonnes)	Recreational allowance (tonnes)	Other sources of fishing-related mortality (tonnes)	TACC (tonnes)
KAH 1	3315	495	1680	65	1075
KAH 2	1530	185	610	30	705
KAH 3	935	115	390	20	410
KAH 4	14	1	4	0	9
KAH 8	1040	115	385	20	520
KAH 10	14	1	4	9	9

In making the decision the Minister was aware the required reduction in commercial and noncommercial catches to fit within the new TACs will have socio-economic impacts. He carefully considered the balance between measures designed to provide more certainty of maintaining or increasing the biomass, and the socio-economic impact. On balance he considered the 10% reduction to the TAC and proportional change to the TACC and allowances best meets his concerns regarding risk to the stock while mitigating socio-economic impact.

There has been no change to recreational bag limits for kahawai since the Minister's 2004 decisions on catch limits and allowances. Monitoring the recreational catch of kahawai to determine whether it remains within the revised allowances set for the fishery will be a matter of priority. If monitoring indicates that the allowance is being exceeded then management measures will be implemented to ensure the positive effect of the TAC reductions is not compromised.

New stock assessment information on kahawai will be available in 2007. It is intended that the TACs for this species be reviewed again at that time to ensure the management framework is operating as intended.

Effects of the Minister's 2005 decisions

- 2.6 The Minister adopted option 2 from the FAP 2005 and reduced the TACs, TACCs, and non-commercial allowances for all kahawai quota management areas proportionally, by applying a 10% proportional reduction from the levels set in the Minister's 2004 decisions. The cumulative effect of this 10% cut together with the 15% reduction applied in his 2004 decision means that the non-commercial allowance has been reduced by a total of 25% over the past two years.
- 2.7 In my opinion, there is an inconsistency between the Minister's 2005 decisions and the Minister's 2004 decisions. Little, if any, further information was available and the decision to reduce the TACs for all stocks was made within one year of introduction of the kahawai stocks

to the quota management system when a reduction of 15% had already been made compared to recent kahawai catches at the time the Minister set initial TACs, TACCs and the recreational allowance in 2004. I would expect there to be evidence of a material change in the status of all kahawai stocks or a significant change in the status of the kahawai fishery for the Minister to make such a large new cut in the TAC so soon after his 2004 decision.

2.8 As I outline later in this affidavit, in advising the Minister prior to his 2005 decisions, the Ministry of Fisheries has provided the Minister with advice on a much more comprehensive consideration of a range of policy issues concerning allocation. However the 2005 kahawai TAC and allocation recommendations in the FAP continue to be based on a combination of an uncertain 1997 stock assessment, initial allocation between sector groups based on recent catch history (current utilisation) in the years immediately prior to 2004, an assumption that the status of kahawai stocks is the same in all quota management areas, and the application of proportional reductions in allowances to all sector groups in order to achieve any necessary reductions in the TAC.

2.9 Except for their responses to new policy material in the IPP 2005 (such as management of kahawai stocks above B_{MSY}), the issues raised by sector groups that were summarised in the FAP 2005 on the status of kahawai stocks are largely unchanged from submissions raised by the same sector groups in 2004. I agree that there is considerable uncertainty in the status of kahawai stocks, but I am unconvinced that this uncertainty is materially greater in 2005 than it was in 2004 or that the incremental increase in uncertainty from the passage of one further year is sufficient reason to apply a further arbitrary 10% cut in the TAC and allocations to sector groups. Uncertainty about the status of the kahawai resource and the concern of some sector groups about the status of kahawai stocks in certain quota management areas was just as great in 2004 as in 2005.

2.10 In my opinion, in spite of the much more detailed policy discussion provided to the Minister of Fisheries, the final recommendations of the Ministry of Fisheries on the setting of the TAC, allowances for non-

commercial interests and the setting of the TACC in 2005 have the same flawed basis as in 2004 as I set out in paragraphs 23 – 25 of my affidavit of 31 August 2005.

2.11 The FAP 2005 and the Minister's decision letter indicate that the objective of the 10% TAC reduction (and proportional reductions of customary and recreational allowances and the TACC accordingly), was to increase the certainty that kahawai biomass would remain at current levels or increase in size. However, the Minister's 2005 decisions had the same underlying basis as the Minister's 2004 decisions, being decisions based on current fishing sector utilisation estimates (or a proportion of that use) in the years immediately prior to 2004.

2.12 It follows that the critique of the Minister's decisions in 2004 for kahawai which I presented in my affidavit of 31 August 2005 still applies to the 2005 decisions. The Minister has applied the same flawed approach to the decision making as was applied in 2004 that I identify in paragraphs 23 – 25 of my affidavit of 31 August 2005. The submissions of the recreational sector about the status of kahawai stocks and the diminution of the recreational fishery IPP are mainly in relation to kahawai stocks and recreational fishing in KAH1 and KAH2. Recreational groups submitted that the kahawai stock in KAH8 was in reasonable condition and no further catch reduction was required. However, the Minister's 2005 decisions have been applied equally to all kahawai quota management areas and to all sectors (customary, recreational, commercial) regardless of the size of each quota management area, the history of commercial and recreational fishing in each area, the concerns of the recreational sector about certain areas or indicators of depletion in each area.

3. The Ministry of Fisheries' 2005 FAP

3.1 In the 2005 FAP, the Ministry provides a much more comprehensive discussion of a range of policy issues concerning allocation than it did in the 2004 FAP. At pages 18 onward there is a discussion of allocation models. At pages 55 onward there is a summary of industry

submissions on allocation followed by a comprehensive response from the Ministry on the issues raised in submissions. In my opinion, this more detailed discussion on allocation in the 2005 FAP is both insightful and helpful to understanding the considerations associated with decisions on allocation and re-allocation.

- 3.2 At paragraph 91 on page 19 of the 2005 FAP in the section of the FAP on claims-based and utility-based allocation models, the Ministry states (in relation to utility values) that comparing the two marginal curves in Figure 1 (page 20) is made problematic by both the lack of available information and the lack of a readily available basis for making comparisons between recreational and commercial fishers. The lack of information and uncertainty about utility values for different sectors has been used by the Ministry in previous FAPs as a reason for preferring claims-based (i.e. current utilisation) allocation. In spite of this acknowledged lack of information on utility values, the Ministry has still not, to my knowledge, proposed or undertaken any new research to address this lack of information or to assess whether it might be feasible to develop a method for comparing utility values between sectors. This is in direct contrast, for example, to the Ministry's very considerable ongoing investment in stock assessment research and investment in research to obtain new information on fish stocks, information on recreational harvest levels and research to develop new methods for fish stock assessments in various fisheries.
- 3.3 The 2005 IPP (which is reproduced in the 2005 FAP at page 371 onward) contains a discussion of the merits of the management of kahawai stocks above the biomass that generates the MSY. The Ministry suggests that the benefits of such an approach include the increased availability of fish and increased size of fish and that such an approach would be likely to benefit the recreational sector, but not the commercial sector. I agree that the potential benefits of such an approach to the recreational sector may include increased availability of kahawai to recreational fishers as well as the likelihood of catching larger fish. However, the Ministry states that management of stocks above B_{MSY} does not provide the opportunity to maximise the yield from the fishery. In other words, the TAC would need to be reduced. Under

the present proportional allocation approach that the Ministry prefers, it would therefore follow that management of stocks above B_{MSY} would result in a reduction in the catch allowance for the recreational sector. Any benefit to the recreational sector from increased availability of kahawai or larger fish would potentially be swallowed up by a reduction in the recreational allowance. This example demonstrates the limitations of the Ministry's current policy in preferring proportional allocation.

- 3.4 The 2005 IPP also indicates that (in relation to management of stocks above B_{MSY}) that if this option provides a greater benefit to one sector that the Minister should consider whether such a benefit is reasonable. The Ministry then indicates that such a decision would be reasonable where stakeholders generally agree or where the available information indicates that greater utilisation benefit would result. The Ministry adds that in their 2004 submissions, stakeholders generally agreed to management of kahawai stocks above B_{MSY} and that it has quantitative information to indicate that recreational fishers valued kahawai more than commercial fishers. It seems clear from the 2005 IPP that the Ministry had the necessary information to show that the kahawai resource is more highly valued by the recreational sector than the commercial sector. In the light of this information, it is my opinion that the Ministry should have advised the Minister in the FAP 2005 that in making his allowance for the recreational sector prior to setting the 2005 kahawai TACC, a strictly proportional approach to allocation would not recognise the higher value placed on kahawai by the recreational sector and would potentially not recognise the full recreational interest in this particular fishery.
- 3.5 In spite of the Ministry's more detailed discussion of allocation issues in the 2005 FAP there is no change to the underlying basis for the Ministry's 2005 recommendations on the setting of the kahawai TAC, non-commercial allowances and TACC decisions. The 2005 kahawai TAC and allocation recommendations in the 2005 FAP remain unchanged from the recommendations in 2004 that were based on what is described as the 1997 stock assessment (more accurately referred to as a "simulation model"), initial allocation between sectors based on

recent catch history (current utilisation) in the years immediately prior to 2004 and the application of proportional reductions in allocations to sector groups.

- 3.6 In mid-December 2005, the Minister of Fisheries announced a project to develop a new policy for shared fisheries. The Minister's letter and details of the policy project are set out on the Ministry of Fisheries' website. A true copy of the documents are annexed as exhibit "C". This project will be very useful in addressing what I consider to be a long-standing need for policy development that will improve certainty and transparency in the allocation of fisheries resources between sectors. According to the details of the project, the development of the policy through to its implementation will take nearly three years. Although I am encouraged by the Ministry's project to develop an allocation policy, the fact that a policy is being developed should not be a reason for maintaining the status quo concerning allocation in the meantime. Previous Ministry attempts to develop recreational fisheries policy and allocation policy since the introduction of the QMS in 1986 have so far all failed to come to fruition.

4. **option4 Submission**

- 4.1 In its submission to the 2005 IPP, option4 states:

The reality of the "at or above MSY" policy is that we are actually managing many of our fisheries below MSY. There is a demonstrable reallocation from non-commercial fishers to commercial fishers during the fishing down and overfishing phase, and again when catches are reduced "proportionately" to rebuild the fishery. (page 37 of the option4 submission).

- 4.2 The Ministry of Fisheries includes this point at paragraph f) on page 59 of its 2005 FAP in its summary of matters raised in option4's submissions on the IPP. I note this particular submission because it highlights the issue of re-allocation away from the recreational sector that has taken place over time in the kahawai fishery as a consequence of the growth of the commercial fishery which the recreational sector has had no control over. This re-allocation away from the recreational sector over time was cemented in place by the policies that were adopted in

2004 when kahawai was introduced into the QMS. These policies were to prefer recent catch history (current utilisation) as the basis for initial allocations to all sectors and to then apply proportional reductions where required so that allocations to all sectors did not exceed the TAC for kahawai.

- 4.3 Option4's 2005 submission also reproduced information from the 2004 FAP on which the Minister based his 2004 decision, including Figure 1 on page 7 of the submission. This figure is also presented at page 461 of the FAP 2005 and graphically illustrates the point that was raised by option4 in its submission on the 2005 IPP. The figure shows a significant reduction in the relative share of the total catch of kahawai taken by the recreational sector compared to the commercial sector over the years from 1970 to 1998 as the commercial purse-seine fishery developed. (The apparent large increase in the recreational catch in 1999 and 2000 in Figure 1 is a consequence of a change in method for estimating recreational harvest and, in my opinion, should be considered as un-substantiated until new research that the Ministry has recently commissioned into the level of recreational kahawai harvests becomes available.)

5. **Concluding comments - Minister's final 2005 kahawai decisions**

- 5.1 In spite of the much more detailed policy discussion provided to the Minister of Fisheries, the final recommendations of the Ministry of Fisheries and the final decisions of the Minister on the setting of the TAC, allocations to non-commercial interests and the setting of the TACC have the same basis as in 2004. Whilst the Minister decided to reduce the TAC by 10% (and made proportional reductions to non-commercial allowances and the TACC accordingly), the objective of the TAC reduction was to increase the certainty that kahawai biomass would remain at current levels or increase in size. No consideration appears to have been given by the Ministry of Fisheries in the FAP 2005 or by Minister to the possibility that the status of kahawai stocks in different areas may not be the same, in spite of the submissions of some sector groups.

AFFIRMED by **RICHARD OWEN**)
BOYD at Wanaka this day of)
February 2006)
before me:)

A Solicitor of the High Court of New Zealand