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

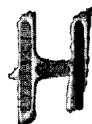
and

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

Third Defendant

Plaintiffs Legal Submissions

Dated this 6th day of November 2006



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1. Introduction / Problem Statement

1.1 The plaintiffs are two established incorporated societies, who act as "umbrella" organisations representing a large number of other recreational fishing and recreational marine related interests.

1.2 This case has been brought by the plaintiffs as a test case seeking directions as to the nature and extent of the public's recreational fishing rights when setting TAC's and TACC's under the quota management scheme (QMS).

1.3 Section 8 of the Fisheries Act 1996 provides:

> 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 wellbeing.

1.4 The statutory purpose to utilise fisheries resources "to enable people to provide for their social, economic and cultural wellbeing" is a direct recognition of the importance of recreational fishing in the New Zealand social and cultural context. The Act does not have as its purpose maximisation of commercial return.

1.5 Recreational fishing, in all its aspects, is a popular and highly valued activity in New Zealand. The protection and enhancement of fisheries resources to provide for recreational fishing values is a statutory purpose.

1.6 The plaintiffs assert that the Minister's 2004 and 2005 decisions were flawed in a number of respects. However, central to the plaintiffs' case is the assertion that the Ministry's policies, accepted by the Minister, failed to reflect the statutory significance accorded to people's social, economic and cultural wellbeing and instead gave undue and erroneous weight to commercial interests.

1.7 The affidavit by Rick Boyd, a deponent for plaintiffs, outlines the context against which these proceedings are brought (from summary at page 2 of exhibit B):

> New Zealand adopted a rights-based approach to management of its commercial fisheries in 1986 with the introduction of an individual transferable quota management system (the 'QMS'). There was no attempt at that time to incorporate recreational fishing within a [property] rights-based framework. This means that commercial fishing rights under the QMS are very well defined, but recreational fishing rights are less clear.
>
> Under the Fisheries Act 1996, the Minister of Fisheries must first set a total allowable catch (TAC) for the entire fishery before setting a total allowable commercial catch (TACC) which cannot exceed the TAC. In setting the TACC, the Fisheries Act requires that the Minister of Fisheries must and allow for recreational and other non-commercial interests. He is also required to consult with sector groups and after he makes his decision he must provide the reasons for his decision in writing.
>
> The Fisheries Act 1996 provides no statutory guidance on how the Minister is to make allocation decisions and no priority is given to any sector. This leaves allocation decisions entirely up to the Minister. There is no other Government policy on allocation to guide decision making or sector groups. As a result, the current process is politicised and expensive to service for all sectors.
>
> Efforts by Government to develop a rights-based approach to recreational fishing policy have not been successful due to a lack of consensus within the recreational fishing community. All stakeholders, including Government, believe that recreational fishing rights need better definition.
>
> The strengths of the New Zealand model come from the explicit statutory requirement to make an allowance for the recreational (and other noncommercial) interests when setting a TACC within a sustainable TAC. Recreational and other non-commercial interests must be taken into account. The weaknesses of the New Zealand model arise as a consequence of a lack of clear definition of recreational fishing rights and the uncertainties and costs this creates for all stakeholders.
>
> Other jurisdictions can learn from the New Zealand experience. Most importantly, recreational rights should be defined at the same time as commercial rights so that all stakeholders have comparable rights and similar incentives to participate in co-management. There are a number of important allocation issues that need to be resolved at the same time to underpin a rights-based approach to fisheries management. These issues include how the rights are defined and controlled for each sector, the priority of rights for each sector, the basis for initial allocation of rights between sectors, how future changes in allocation are to be made, compensation for re-allocation of rights between sectors, who should be responsible for determining transfers of rights between sectors, who will 'hold' the recreational allocation on behalf of recreational users and should have the right to harvest the recreational allocation.

1.8 The last paragraph by Boyd points to the type of issues which might arise in the event of any reform of the public right to fishing. These proceedings take place against a background of recently announced policy and/or legislative reform:

- Anderton, 30 October, exhibit B.

1.9 Apart from identifying the stakeholder interests the Fisheries Act 1996 (the Act) provides no express guidance on how the Minister is to make allocation decisions. The key provision s.21 states:

21. Matters to be taken into account in setting or varying any total allowable commercial catch—

(1) In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for—

(a) The following non-commercial fishing interests in that stock, namely-

(i) Maori customary non-commercial fishing interests; and

(ii) Recreational interests; and

(b) All other mortality to that stock caused by fishing.

1.10 In the "Snapper 1" proceedings, a case in which the recreational fishers took little part, the Court of Appeal and High Court have previously held that the legislation provides no "priority" to any given fishing sector:

- *New Zealand Federation of Commercial Fisherman Inc. & ors v Minister of Fisheries & ors* (Wellington, HC, CP237/95, McGechan J).
- *New Zealand Fishing Industry Association & ors v Minister of Fisheries* (Court of Appeal, CA 82/97, 22 July 1997) (together the "Snapper 1 case").

1.11 However, s.21 provides for the specification of non-commercial fishing interests before commercial interests, a clear statutory indication that the commercial allocation cannot precede commercial rights; and that commercial rights, if any, are subject to the provision of non-commercial fishing rights.

1.12 The issue is not solely about allocation between the sectors , but about the biomass at which the fish stocks should be managed. As fisheries resources have been exploited by commercial fishers, biomass of fish stocks has declined, and recreational fishers have experienced a significant decline in the quality of the fishery and in individual catch rates.

1.13 The proceedings challenge the Minister's 2004 and 2005 decisions for the kahawai fish stocks, a fish described in the Minister's 2004 decision as the "people's fish".

1.14 These proceedings were filed on 12 August 2005, after the Minister had made his August 2004 decisions entering the kahawai fish species into the quota management system with effect from 1 October 2004. A further decision was made by the Minister on 28 September 2005 with effect from 1 October 2005. As a result of the passage of time the fishing years 2004/ 2005 and 2005/ 2006 are spent.

1.15 The Minister has signalled his intention to review his decisions pending the availability of a stock assessment likely (but not certain) in 2007.

1.16 It is understood that the Crown accepts that there are issues raised in the proceedings relevant to allocative decisions by the Minister of Fisheries for near-shore fish stocks which require resolution. In December 2005 the Minister announced his intention for a "Shared Fisheries policy review" leading to possible legislative changes. The current Minister has (in the last week) released a public consultation paper on shared fisheries, and signals intended legislative change in 2007. Public consultation is yet to occur, and no legislation has been drafted.

1.17 The proceedings are an appropriate context in which to address the correct approach under the existing statutory regime to be taken to allocation of fish stocks between the recreational and commercial sectors.

1.18 The plaintiffs seek, in particular, declaratory style directions which will be relevant to future fisheries management decision making in respect of kahawai, and also in respect of other fish stocks where there is a relevant recreational/ non-commercial interest.

2. Judicial Review – Overview

2.1 The Minister's 2004 decision was to set *initial* TAC's for kahawai under the QMS.

2.2 The Minister's 2004 and 2005 decisions are "catch-history" decisions for both setting TAC's, and allocating the TAC's to the commercial and non-commercial sectors. The Minister's TAC and allocation decisions were based on catch history. In other words, the Minister's decision to set TAC's, and then to allocate the TAC between sectors in each QMA was based on the current use of the kahawai fishery (or a proportion of that use). The Minister notes uncertainty associated with the 1996 stock assessment, (paragraph 8, Minister's 2004 decision letter) and then says:

> "9. The alternative basis for setting TACs is to base them directly on the current use of the kahawai fishery (or a proportion of that use). This method has the advantage of reflecting public policy and other decisions already made for the fishery and the current reliance on the fishery by each sector. These considerations are reflected in the current management arrangements for the fishery and current catch. I have noted that some industry submissions supported adopting this option."

2.3 The Minister then allocated the TAC's between the fishing sectors based on their recent share of the total catch. After examining two options for setting TAC's (one based on current utilisation, the other based on a 15% reduction of both commercial and recreational utilisation) (paragraph 14, Minister's 2004 decision letter) the Minister set the TAC's at 15% below the level of recent catches.

2.4 Then applying the Ministry's proportional policy to allocation between the fishing sectors, in turn based on the Ministry's preference for allocating between sectors in terms of catch history, the Minister then cut the allocation to each of the commercial and recreational sectors by 15% compared to their recent catch history or, "current use".

2.5 The Minister's decision on allocation for kahawai (allowing for recreational interests, Maori customary fishers, and setting the TACC) stated (para 21):

> "...I believe that the information on current use provides the best basis for allocating between each interest group. Accordingly, I have decided to set allowances and TACCs that reflect current use in the fishery, reduced proportionally to fit within the bounds of the TAC set to ensure sustainability."

2.6 The Minister also announced that he might need to adopt additional management measures to achieve the catch reduction (paragraph 22).

2.7 In setting an *initial* TAC under the QMS the Minister had the opportunity to determine that there will only be a non-commercial allowance after allowing (as the recreationals sought) for commercial by-catch. To make that decision he would have had to evaluate the social, economic, and cultural wellbeing associated with utilisation of the fisheries resource while ensuring its sustainability, and decide that the commercial sector should only be able to take kahawai as a by-catch.

2.8 Fisheries management is a complex area. The (then) Minister was a recent appointee in 2004. The Minister was reliant upon the Ministry's advice in formulating options in the initial advice paper (IPP) and final advice paper (FAP). The effect of the Ministry's advice was to shut-out and exclude other options apart from setting TAC's and allocation between sectors based on catch-history information.

2.9 From the Ministry's advice papers, it is clear that the Ministry applies a policy of assessing fisheries management in terms of catch-history and applies this catch-history approach in accord with its preferred policy of "proportionality" when allocating the TAC between the fishing sectors. Neither "catch-history" nor "proportionality" is stipulated by the legislation when making decisions under sections 13, 20 and 21 of the Act. The Ministry has been unduly sensitive to the possibilities of a compensation claim by the commercial fishing sector in the event of any allocation between the fishing sectors not based on a "proportional" catch history approach.

2.10 While the Minister's decisions nominally give the non-commercial fishing sector a majority share of the fishery (some 58%) in actuality recreational fishers experience poor catch rates in some areas such that in these areas (including the Hauraki, an area of declared national importance) the provision does not meet the statutory purpose of providing for people's social, economic and cultural wellbeing.

2.11 In making decisions, the Minister's first step is to set "sustainability measures".

2.12 Before doing anything the Minister is required to consult: s.12.

2.13 In setting sustainability measures the Minister is required to take into account any effects of fishing on any stock and the aquatic environment, and other matters: s.11(1); have regard to the provisions in s.11(2); and take into account other matters in s.11(2A). In setting the TAC relating to each quota management stock the Minister sets a TAC that maintains a stock "at or above a level that can produce a maximum sustainable yield, having regard to the interdependence of stocks": s.13(2)(a).

2.14 Having then set the TAC, the Minister's next decision is to allow for the non-commercial interests in each stock, and after that, set the TACC in each stock, if any.

2.15 These decisions take place against the purpose of the Act which is to provide for the utilisation of fisheries resources (which includes enabling people to provide for their social, economic, and cultural wellbeing) while ensuring sustainability.

2.16 By failing to adequately reflect social, economic and cultural considerations and following Ministry advice that catch-history was the "best" information upon which to make all decisions, and then to make proportionate reductions in key kahawai stocks KAH 1, 2, 3 and 8 in the 2004 and 2005 years, the Minister made reviewable errors of law:

TAC's:

2.17 In setting TACs the Minister failed to consider and ensure the sustainability at or above B_{MSY} in each stock, as the "catch-history is best" approach:

a. Concentrates the greatest exploitation of the fishery in areas which have been most heavily fished in the past. Approximately 48% of the TAC is allowed within KAH1, which includes one of the most vulnerable areas, the Hauraki Gulf;

b. Without adequate empirical evidence or a reliable stock assessment, the decisions assume a national kahawai stock, and then fail to take into account the different history of fishing, sustainability and stocks within each quota management area.

TACC's:

2.18 By adopting the Ministry advice that catch-history is best for allocating between fishing sectors, and in making provision for the recreational interests, the Minister failed to:

a. Adequately consider the social, economic and cultural wellbeing of recreational fishers as a sector, or as individuals, consistent with the purpose of the Act;

b. Consider the degradation of the quality of recreational fishing caused by the increased commercial exploitation and utilisation of the fishery resource from the 1970s onwards. The application of "catch-history" based on the present state of utilisation, subsumes non-commercial interests to commercial interests, when combined with a catch-history that has been affected by elevated commercial catch levels during the

fishing down of the kahawai stocks, which has correspondingly reduced the ability of recreational fishers to actually catch fish.

c. As a result of applying the Ministry's policy for using current catch reduced proportionally, the decisions failed to recognise that current catch was not an adequate measure of the recreational interest in a fishery. The result was allocating decisions that did not adequately consider or reflect recreational fishing values. In some areas, such as the Hauraki Gulf, the degradation of the fishery is such that the allocation decisions do not enable recreational fishers to actually catch fish, at least in any meaningful sense and so do not enable people's wellbeing.

2.19 By the adoption of the "proportional" policy, and by basing decisions on "catch history" information the Ministry used and applied information which measures the *well-being* of the commercial fishing sector, but not of the non-commercial sector. In fact, there was anecdotal, catch rate and quality of fishing experience information available which should have been considered as justifying reservation of kahawai for recreational and customary fishers. Such a consideration was appropriate in the context of the known doubts about the sustainability of the fishery, particularly in the Hauraki Gulf, and the low value (approximately $1.30 per kilo or $1,300 per tonne) placed on end use of the kahawai by the commercial fishers.

2.20 It is accepted that the Minister's 2004 decision does refer to some "anecdotal" information (para 17), but the policy options presented to the Minister discouraged adequate consideration of the statutory social and cultural objectives and recommended either the status quo, or "across the board" and arbitrary reductions in all QMA's, as distinct from applying this information (especially catch rate per unit of effort (CPUE) data to assessment of individual QMA's and stocks in the full statutory context. The result was arbitrary decision making determined by preset and general policies, with the effect that the same reduction was made in KAH1 as was made in areas where recreational fishing organisations did not express catch rate dissatisfaction, such as KAH8.

TAC's/ TACC's/ "Interests" – Hauraki Gulf

2.21 In addition the Ministry's advice failed to recognise and apply the mandatory obligations under the Hauraki Gulf Marine Park Act 2000, relevant to setting TAC's, TACC's, and allowing for recreational interests.

2005

2.22 The Minister's 2005 decisions were based on the 2004 decisions as the "starting point". Consequently, the plaintiff says that the same errors and omissions were carried forward into 2005, as were made in 2004.

2.23 However, the IPP 2005 did propose a new policy, of managing important "shared fisheries" above B_{MSY}. It was recognised by MFish that managing a fishery at B_{MSY} results in fewer fish being left in the sea, but greater overall productivity and, hence, yield. This suits commercial fishers who generally favour lower stock levels with a higher annual yield. However, non-commercial fishers favour maintaining higher stock levels because fish are more abundant and individual fish are larger. Accordingly the fishing experience is enhanced. This advice, after the initial TAC setting in 2004, is tacitly an acknowledgment that the "catch history is best" approach to allocation amongst fishing sectors significantly disadvantages the interests of the recreational sector when stocks have been depleted by commercial fishing methods.

2.24 Consequently, the 2005 IPP, and the more recent Cabinet Paper on "Shared Fisheries", October 2006, illustrate the deficiency inherent in the "catch history is best" approach in the Minister's 2004 decision, which was the starting point for the Minister's 2005 decisions.

2.25 Accordingly the plaintiffs claim that, as a consequence of the Ministry's advice the Minister's 2004 and 2005 decisions failed to correctly apply the statute, and either take into account irrelevant or failed to take into account relevant considerations.

3. Public Rights of Fishing

3.1 At common law there are recognised public rights of navigation and fisheries. In *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 153, 169, (PC) Viscount Haldane said:

> [T]he subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the High Seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous to the ocean, if, indeed, it did not first take rise in them. The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than these rights of navigation. Finding its subjects exercising these rights as from immemorial antiquity the Crown as parens patriae no doubt regarded itself as bound to protect the subject in exercising it, and the origin and extent of the right as legally cognisable are probably attributable to that protection, a protection which gradually came to be recognised as establishing a legal right enforceable in the Courts.

3.2 In *Malcolmson v O'Dea* [1863] 11 All ER 1155 the House of Lords held that since the Magna Charta the Crown could not establish exclusive fishing rights by grant, and that public rights of fishery could not be overturned except by statute; and see:

- *Halsburys Laws of England* (4th Edition), Volume 18: Fisheries, page 258,paragraph 609.
- *Waipapakura v Hempton* (1914) Vol 33 NZLR 1065, 1071, per Stout C J.

3.3 The same point was considered by the High Court of Australia in *Harper v Minister for Sea* Fisheries: (1989) 168 CLR 314, 329-330 where Brennan J said:

> In *Malcolmson v O'Dea*, it was held that, after Magna Charta, the Crown, in whom the title to the bed of tidal navigable rivers was vested, was precluded from granting a private right of fishery, the right of fishery being in the public. The law so stated was followed in *Neill v Duke of Devonshire*. And in *Lord Fitzhardinge v Purcell*, although Parker J held that the Crown might grant title to the bed of the sea or of a navigable title river to a subject, his Lordship held that no such grant can operate to the detriment of the public right of fishing.

3.4 How does this public right to fish relate to the doctrine of aboriginal (native) title? In *Foreshore and Seabed,* citing the judgment of Kirby J in *Commonwealth v Yarmirr* [2001] 208 CLR 1, 129, HCA the author says:

> "Aboriginal (and, for that matter, Maori) customary fishing rights in this sense do antedate Magna Carta and are not contrary to it".

- *Foreshore and Seabed*, Lexis Nexis, (2005), Richard Boast, page 42.

3.5 The common law of England continues as part of the laws of New Zealand so far as it had been part of those laws before the commencement of the Imperial Laws Application Act 1988 and as applicable to the circumstances of New Zealand. This required that the law had been existing in England on 14 January 1840.

Regulation of the Public Right of Fishing

3.6 It is believed that prior to 1983 very few controls existed in relation to recreational catch.

3.7 The Fisheries (Amateur Fishing) notice 1993/297, enacted under the Fisheries Act 1983 did not include any specific bag limit but contained a minimum mesh size (100mm) and minimum species length (25cm). These regulations were subject to various amendment:

- Fisheries (Amateur Fishing) Regulations 1983, Amendment No. 1, 1984/138.
- Fisheries (Amateur Fishing) Regulations 1983 Amendment No. 2, 1984/342.
- And subsequently, were replaced by the 1986 Amateur Fishing Regulations.

3.8 Since 1986 commercial fisheries have been managed by a system of individual transferable quota for commercial fishers, and the allocation of fisheries in line with directions for management contained in the Fisheries Amendment Act 1986, and the Fisheries Act 1996 (and regulations).

3.9 Section 89(1)(a) exempts amateur fishers from licensing.

3.10 Recreational fishing is controlled primarily by the Amateur Fishing Regulations which impose daily bag limit restrictions per fisher: Fisheries (Amateur Fishing) Regulations 1986 (SR 1986/221). See also Fisheries (Auckland and Kermadec Areas Amateur Fishing) Regulations 1986 (SR 1986/222); Fisheries (Auckland and Kermadec Areas Amateur Fishing) Amendment Regulations 2004 (SR 2004/282), Fisheries (Central Area Amateur Fishing) Regulations 1986 (SR 1986/223); Fisheries (Central Area Amateur Fishing) Amendment Regulations 2004 (SR 2004/283), Fisheries (Challenger Area Amateur Fishing) Regulations 1986 (SR 1986/224), Fisheries (South-East Area Amateur Fishing) Regulations 1986 SR 1986/225, and Fisheries (Southland and Sub-Antarctic Areas Amateur Fishing) Regulations 1991 (SR 1991/57). (Collectively the Amateur Fishing Regulations).

3.11 Within the Amateur Fishing Regulations recreational fishers' take is controlled and regulated by techniques such as closed areas, closed seasons, daily limits, method restrictions, size restrictions and combinations of these restrictions.

3.12 Within the Auckland and Kermadec area the daily bag limits provide:

- A bag of no more than 20 fish (in total) of the following species, blue cod, blue moki, bluenose, butterfish, elephant fish, flatfish, john dory, kahawai, red cod, red gurnard, red moki, red snapper, rig, school shark, tarakihi and trevally.
- 30 grey mullet.
- 15 snapper (limited to 9 snapper within the Auckland fishery management area (east)).
- A bag of 5 hapuku/ bass and kingfish.
- 3 kingfish.

Continued Existence of Common Law Public Rights to Fish

3.13 A question which arises in this case, and for the Minister in considering how he shall allow for "recreational interests" before setting any TACC under section 21 of the Act, is whether the common law rights of public fishing have been abrogated entirely or merely modified and regulated by the fisheries legislation and regulations.

3.14 It is submitted that there is nothing in the Fisheries Act 1983, the Fisheries Act 1996, and Regulations which indicates an intention to abrogate entirely the common law public rights of fishing. As a rule of general construction any provision purporting to restrict or abolish existing rights is construed strictly and the removal of existing rights by statute either occurs expressly or by necessary implication.

3.15 It is submitted that there is deliberate openness with the recognition of non-commercial and recreational "interests". Conceptualising recreational "interests" as "rights" enjoyed by the public, and protected by the law, is not only recognition of their common law origins, but it is submitted, of assistance when it comes to considering the commercial fishers declaration that the Crown pay compensation for infringement of their "rights" if decisions are made favouring the public "rights" of recreational fishers.

3.16 Common law rights, albeit modified by regulation can live or co-exist together, as noted in:

- Burrows, *Statute Law in New Zealand,* Third Edition (2003) pp380-384;

- *Cooper v Attorney General* [1996] 3 NZLR 480, 483 citing Ch 29, Magna Carta, Barragwanth J.

4. The Fisheries Act 1996: Scheme of the Act

4.1 The Minister's power to make decisions under sections 13, 20 and 21 of the Act must be considered in the light of the scheme of the statute as a whole. In construing the Act as a whole the long title states that the Fisheries Act 1996 is:

> An Act -
>
> a. to reform and restate the law relating to fisheries resources; and
>
> b. to recognise international obligations relating to fishing; and
>
> c. to provide for related matters.

4.2 The interpretation section 2 defines important terms and phrases including:

- "best available information".
- "effect".
- "environmental principles".
- "maximum sustainable yield" (MSY).
- "quota management area" (QMA).
- "quota management stock".
- "stock".
- "sustainability measure".
- "total allowable catch" (TAC).
- "total allowable commercial catch" (TACC).

4.3 Section 5 states the Act is to be interpreted in a manner consistent with the Treaty of Waitangi (Fisheries Claims) Act 1992, and New Zealand's international obligations relating to fishing.

4.4 Section 8 specifically describes the purpose of the Act: to provide for the *utilisation* of fisheries resources while *ensuring sustainability*. The Act emphasises the utilisation of fisheries resources :

- *Kellian v Minister of Fisheries* (CA 150/02, at pp 16 and 20, Keith J, delivering judgment for the Court of Appeal).

4.5 All person exercising powers etc under the Act are required to "take into account" the environmental principles in s.9 and the information principles in s.10.

4.6 Setting the TAC is a "sustainability measure" (as defined). The Minister may set or vary any sustainability measure for one or more stocks or areas and in doing

so is required to have regard to the provisions of section 7 and 8 Hauraki Gulf Marine Park Act 2000: s.11.

4.7 The Minister must consult before doing anything under s.11 and s.13(1): s.12. The Minister must give reasons as soon as practicable in writing for his decision. The practice has evolved for the Ministry to consult via an initial position paper (IPP) upon which it invites submissions. The Ministry then formulates its advice as a final advice paper (FAP) which incorporates the initial advice, and a proposed decision (sometimes with options) is presented to the Minister to make a decision.

4.8 Section 13 is the default management provision for the quota management system, requiring the Minister to set a total allowable catch that maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks. The Minister is not required to set an *initial* TAC unless he also proposes to set a TACC: s.13(10).

4.9 Part 4 of the Act relates to the quota management system, once the Minister had declared, by notice in the Gazette, any stock to be subject to the quota management system: s.18. The notice given under s.18 defines the quota management areas to which the notice relates: s.19(1):

- Fisheries (Declaration of New Stocks Subject to Quota Management System) Notice (No 2) 2003 (SR 2003/277), which introduced 17 new stocks to the QMS, including kahawai, and defined the quota management areas.

4.10 Sections 20 and 21 provide that in the setting or varying of any TACC:

- The Minister may set or vary a total allowable commercial catch at, or to, zero: s.20(3).
- The TACC shall not be greater than the total allowable catch set for that stock: s.20(5).
- In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for the non-commercial fishing interests in that stock; s.21(1).
- Before doing so Minister shall consult such persons and organisations as the Minister considers are representative of those classes of persons having an interest in this section: s.21(3).

4.11 Part 6 of the Act – Access to Fishery, includes:

- s.89 all fishing is prohibited unless authorised by permit. Fishing in accordance with amateur fishing regulations, and not for the purpose of sale is exempted from the requirement for fishing permit: s.89(2)(a).
- s.93 – qualifications for holding fishing permit[s] and moratorium [prior to introduction to the QMS this restricted issuing fishing permits for kahawai unless the fisher was entitled to hold a permit under the qualifying years].

4.12 Part 7 – has certain dispute resolution provisions.

4.13 Part 8 – registration of transfer – mortgages, caveats etc provides holders of individually transferable quota with property rights attributes.

4.14 Part 9 – relates to taiapure – local fisheries and customary fishing.

4.15 Part 16 – miscellaneous provisions includes regulation making power:

- s.297 general regulations.
- s.298 regulations relating to sustainability measures.
- s.302 general provisions as to regulations.
- s.308 protection of the Crown from liability.
- s.311 areas closed to commercial fishing methods.

Entry of Kahawai to the QMS

4.16 The entry of a stock to the QMS triggers mechanisms in the Act for the calculation of provisional catch history, leading to notification to commercial fishers of eligibility to receive provisional catch history, subject to the entitlement of the (then) the Treaty of Waitangi Fisheries Commission to receive 20% of the individual transferable quota for each quota management stock under s.44.

4.17 In 1986 amending legislation introduced the quota management system. Subsequently in 1990 the QMS was subject to major amendment by the introduction of proportional ITQs.

4.18 Litigation by Maori fishing interests successfully prevented the further entry of fish species into the QMS. The Maori fisheries litigation, and rising environmental awareness culminated in a substantial rewrite in the Fisheries Act 1996.

4.19 The then Minister of Fisheries (Hon Doug Kidd) when introducing in 1996 the Fisheries Bill, following the report back of the Primary Production Committee's report quoted the principal changes (*Hansard,* volume 557, page 14022 [31 July 1996]:

> There were a number of important advances that I would like to draw to the attention of the House. First is what I know the committee has come to call 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. The purposes and principles are augmented by the information principles that require decision makers to be cautious in the face of uncertainty.
>
> An important element of the development of the quota management system is revised allocation procedures to facilitate the introduction of further species into the quota management system. This will be a significant improvement on the disruptive process used in the past that took years to resolve, and increased catch limits in an uncontrolled and unsustainable manner. Some matches relating to species brought into the system in 1986 and 1987 are still outstanding in the courts all these years later, and that is manifestly unsatisfactory.
>
> Introducing further species to the quota management system will also enable the Government, importantly, to fulfill its obligation to Maori pursuant to the settlement of the Maori commercial fishing claims by providing 20 percent of new species brought into the system to be transferred to the Treaty of Waitangi Fisheries Commission. Managing in the quota management system is essential to ensuring species are harvested on a sustainable basis, and will provide the mechanism to allow the orderly development of fisheries for many species with consequent economic growth and development.

4.20 The report of the Primary Production Select Committee on the Fishery Bill anticipated that new species introduced to the QMS "generally, the basis for allocation will be catch history, subject to the transference of 20% of the quota for each species as it is introduced into the QMS...":

- Report on Fisheries Bill, Primary Production Committee, page ii.

4.21 Concerns of the fishing industry as to the compulsory acquisition of 20% of quota for new stocks into the QMS gave rise to the Select Committee making a specific recommendation as to certain species to be introduced to the QMS. This included kahawai, who were amongst the species to be identified in the Fourth Schedule of the Act as requiring specific legislation in order to be introduced into the QMS:

- Report of Primary Production Committee on Fisheries Bill, page xviii.

4.22 The Fisheries Amendment Act 2000 amended the Fisheries Act 1996 to provide for a process for the introduction into the QMS for the stocks listed in Schedule 4 of the Act, including kahawai.

4.23 New Schedule 4A provided for a payment of compensation under section 50G(1) of the Act for stocks to be transferred to the Crown. Compensation was fixed at $780 per tonne (exclusive of GST) for kahawai.

4.24 Relevant provisions being:

- s.30 Provisional Catch History to be Mechanism for Allocation of Quota.
- s.33 Qualifying Years (applying qualifying years between October 1990 and October 1991) [now repealed].
- s.34 Calculation of Provisional Catch history.
- s.35 Notification of eligibility to receive Provisional Catch History. S.35(6) provided that for kahawai (a stock listed in schedule 4) were to be allocated in accordance with sections 50A to 50G if the provisional catch history for the stock based on the qualifying years is likely to exceed 80% of individually transferable quota shares in that stock. This meant that the 20% of the commercial allocation to be allocated to the Treaty of Waitangi Fisheries Commission under s.44 was achieved by the Crown acquiring 20% if they exceed more than 80% of the TACC. The Crown was required to compensate commercial fishers in accordance with a formula in schedule 4A.
- s.93 Qualifications for holding fishing permits and moratorium.
- See FAP 2004 para 66, page 17.

  [The compensation and qualifying years provisions for schedule 4 stocks were repealed as from 1 October 2004, by s.61 Fisheries Amendment Act (No 3) 2004 (2004 No 76)].

4.25 As it related to recreational interests in a public right of fishing, the 1996 legislation clearly anticipated that all fishing sectors would be subject to the overarching purpose provisions of the Act to provide for the utilisation of fisheries resources while ensuring sustainability.

4.26 However, the concept of "utilisation" (as defined) was not expressed by the legislature in narrow commercial terms but specifically includes concepts of use of a wider public nature or interest. This is consistent with the Act's purpose and principles which include providing for people's social, economic and cultural wellbeing through fishing.

4.27 Further, the 1996 Act left unaffected from the 1983 legislation the "cascading" scheme that non-commercial interests are to be allowed *before* any provision (if any) for the commercial fishing sector. In its original form the 1983 Fishing Act provided (as amended by the 1986 amendment) that:

a. **Fisheries Act 1983, s 28C**

[28C. Declaration of total allowable catch —

1. *The Minister may, **after allowing for the Maori, traditional, recreational, and other non-commercial interests in the fishery**, by notice in the Gazette, specify the total allowable catch to be available for commercial fishing for each quota management area in respect of each species or class offish subject to the quota management system.*

[Part 2A(ss28B-282C) was inserted 1 August 1986 by 510 Fisheries Amendment Act 1986 (1986 No 34)]

b. Section 28D was inserted and substituted as from 1 April 1990 by s5(1) Fisheries Amendment Act 1990 (1990 No 29) to read:

[28D. Matters to be taken into account in determining or varying any total allowable commercial catch— Fisheries Amendment Act 1990 (No 29)

(1) When setting or recommending any total allowable commercial catch under section 28C of this Act, or varying or recommending any variation in a total allowable commercial catch ....the Minister shall -

(a) After having regard to the total allowable catch for the fishery, including any total allowable catch determined under section 11 of the Territorial Sea and Exclusive Economic Zone Act 1977, allow for—

(i) Maori, traditional, recreational, and other non-commercial interests in the fishery; and

(ii) Any amount determined under section 12 of the Territorial Sea and Exclusive Economic Zone Act 1977 as the allowable catch for foreign fishing craft:

c. Treaty of Waitangi ((Fisheries Claims) Settlement Act 1992 substituted (from 23 December 1992) s.28D(1)(a)(i), namely:

(i) Non-commercial interests in the fishery; and

d. These amendments remained in force until replaced by s.21 Fisheries Act 1996.

4.28 Consistently, the 1996 Act provided a discretion by the Minister to set the TACC at, or to, zero.

4.29 The setting of a TACC will constrain the size of the catch by the commercial sector.

4.30 Specifically, the legislation recognises the public right of fishing, and that commercial rights, if any, are subject to the provision of public fishing rights.

5. The Kahawai Fishery

5.1 There are two species of kahawai found in New Zealand. There are pelagic school fish living a large part of their lives from mid-water to the surface and live in a variety of habitats, ranging from tidal rivers, estuaries and coastal bays, through to open waters:

- Holdsworth, 26 August 2005, para 5.2 – 5.6, page 9.
- IPP 2004, Appendix 2, page 39.
- IPP 2005, para 106, page 393.

5.2 The nature of recreational interests in a fishery vary. Kahawai behaviour, and the formation of visible schools in near-shore waters make the species readily available to recreational fishers, whereas orange roughy, as a deep water species is generally not:

- Boyd, 31 August 2005, para 31.

5.3 There was a time when there would be a kahawai school around most shallow reefs and headlands where kahawai would come into bays and estuaries and where they would be caught from the shore. Historically, some of the largest shorebased fisheries were located at river mouths, notably the Motu River in the eastern Bay of Plenty:

- Holdsworth, 26 August 2005, para 5.8, page 10.

5.4 Widespread distribution and previous abundance and accessibility has earned kahawai the tag of being the "people's fish":

- Ingram, para 26.

5.5 Shorebased fishing (or near-shorebased fishing) remains common with Northland Maori communities, who regard kahawai as a staple food, and whose socio-economic status increases the reliance upon the ability to gather food from traditional sources including the sea, and which is relevant to cultural wellbeing:

- Tau.

5.6 Experienced fishers, (who have experience in both the commercial and non commercial fishing sectors) depose that it is now a rare occurrence to see a school of mature kahawai within the Hauraki Gulf Marine Park Area, and that this was once a common place occurrence:

- Ingram, para 58.
- Rintoul (in reply).

5.7 Recreational fishers attribute the decline in the quality of recreational fishing for kahawai with the rise of the purse seine catch:

- See generally, Ingram, President of the New Zealand Recreational Fishing Council, and Romeril, President of the New Zealand Big Game Fishing Council Inc.

5.8 Walshe, a deponent for the plaintiffs, and former Regional Manager for the Auckland region of the Fisheries Management Division, MAF, notes the effects of the introduction of the quota management system, the commercials "race for fish" when kahawai were left out as a non-QMS species (para 5, affidavit of KAR Walshe). He notes the increase in commercial kahawai catch post 1974 (para 6) and that despite Ministry statements to the contrary, during the late 1980s, the Ministry did not have sufficient scientific evidence to establish whether catch levels were sustainable or not (para 6.10, acknowledged by Dr Sullivan, para 26).

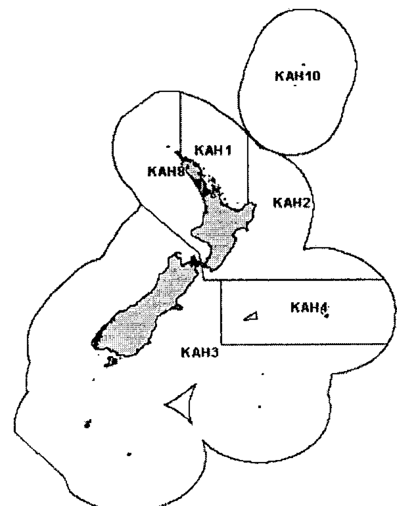
5.9 Sales value (in dollar terms) per kilogram of the Sanford's purse seine catch, were being $1.08 for the 2001-2002 year; $1,22 for the 2002-2003 fishing year; and $1.30 per kilo for the 2003-2004 fishing year:

- Annexures to the Affidavit of VH Wilkinson, VW1, page 486.

5.10 Kahawai entered the QMS by the Fisheries (Declaration of New Stock Subject to Quota Management System) Notice (No. 2) 2003, when the Minister of Fisheries gave notice under sections 18 and 19 of the Fisheries Act 1996 to enter the kahawai (and other) species to the QMS, and determined the quota management areas.

5.11 These QMA's, and a comparison of the subsequent decisions for the 2004/2005, and 2005/2006 fishing years, (setting TACs) is set out below.

	2004/05 TACs	2005/06 TACs
KAH 1	3,685	3,315
KAH 2	1,705	1,530
KAH 3	1,035	935
KAH 4	16	14
KAH 8	1,155	1,040
KAH 10	16	14
Total	**7,612**	**6,848**



5.12 The majority of the catch is located in KAH1.

6. Snapper 1

6.1 In the *Snapper 1* proceedings the High Court (McGechan J) and Court of Appeal dealt with the commercial fishers challenge that for the fishing years 1995 and 1996 the Minister had set the total allowable commercial catch for Snapper 1 at an inappropriately low level, and negated resulting conservation benefits by failing to impose sufficient controls on a growing non-commercial catch. There were also claims by Maori commercial and customary interests. A key question before the High Court and the Court of Appeal was whether the legislation gave "priority" rights to the recreational sector. In summary, the Courts held:

- The legislation does not require the Minister to give priority to recreational fishing over commercial interests, or for that matter, priority of any one sector over another.
- It is not outside or against the purposes of the Act for the Minister to allow a preference to non-commercial fishing when setting TACC's.
- There is no implied duty for the Minister to fix or vary the non-commercial allowance at any particular proportion of the TACC or the TAC. The allocation in whole or part, is a matter for the Minister's assessment bearing in mind all relevant considerations on each occasion the Minister revisits the issue.
- The Minister should not reduce the TACC for conservation reasons unless able to take, or taking, reasonable steps to avoid the reduction being rendered futile through increased recreational fishing. The precise legal and factual context in which this finding was made (by the High Court) will need to be examined closely given the counterclaim in this case which seeks relief requiring the Minister to restrain the recreational catch of kahawai.

High Court - Background

6.2 The background to the case was that in the preceding 1994/95 year the commercial TACC for Snapper 1 had been 4929 tonnes. In the 1995/96 fishing year the Minister set the commercial TACC at 3000 tonne, a 39% reduction. The Minister had in the previous year reduced daily recreational bag limits from 15 to 9 and indicated an intention to amend commercial fishing regulations to implement seasonal closure for commercial fishing in the Hauraki Gulf. The commercials fishers challenged the Minister's decisions.

6.3 The Paepae/ Taumata 2 and Hauraki claim pleaded a priority for Maori customary take.

6.4 The third respondent NZRFC was joined at the Crown's suggestion to represent the interest of recreational fishers. McGechan J "declined to order public funding, and no doubt at least partly in consequence it has played a somewhat restricted role" (page 17).

6.5 McGechan J chartered the origins of the QMS system introduced by the Fisheries Amendment Act 1986 (see page 19).

6.6 The Court noted amongst the background issues that:

- The Court referred to the history of European Fishing in the Hauraki Gulf, from 1890 or thereabouts, especially for Snapper, see page 18.
- The Court recorded concerns for the commercial sector about the "burgeoning" recreational catch.
- Estimates of recreational catch varied between 1500 tonnes to 2700 tonnes. There had been several years of poor recruitment, and it was necessary to double the present biomass of the fishery in order to reach a stock capable of maintaining a yield at BMSY (see page 25, and page 112).
- The Court recorded policy developments on both recreational and Maori fronts.
- The Court recorded the developments leading to the 1992 Deed and Deed of Settlement, and subsequent Settlement Act with Maori (page 21).
- The Court also recorded the policy developments, whereby the original QMS scheme, which had envisaged ITQ as a property right, alteration of which would require payment of compensation by the Crown, was amended, so that in 1990 there was a major change when the Crown decided to shift the "biological risk" ie the risk TAC and thus ITQ might be reduced for conservation (biological) reasons, over onto the industry "no longer with the Crown compensating": page 21 – 22.
- For SNA1 the MFish advice to the Ministry was that the stock was declining, and that current removals were not sustainable, and that a rebuild was necessary.
- MFish advice was that the Hauraki Gulf/ Bay of Plenty sub stock was "about half BMSY", and that recreational and commercial catches were declining (see p.26 onwards).
- The Minister in his decision noted low recreational CPUE at average snapper catch per person per boat trip was about 1.9 fish, and between

40 – 50% of trailer boat fishers caught no snapper on a given fishing trip (see page 33). [compare, Holdsworth on catch rates in Hauraki].

- The Minister considered "other controls", and noted future research being commissioned, with the intention that the Minister would use research results to develop additional measures for both commercial and non-commercial fishers that would assist the biomass to rebuild towards MSY and provide further information to assess and "if necessary, further constrain non-commercial catch" (page 36).

- The Court addressed the international law background (from page 61). The Court noted the precautionary principle in the Rio Declaration (page 77), and the United Nations Convention on the Law of the Sea (UNCLOS), which supported resource utilisation for direct human consumption (page 84 – 85).

- The Court accepted that caution is appropriate, by reference to the Rio Declaration (page 86).

- The commercial fishers claimed that the Minister effected a "reallocation" in derogation of property rights of ITQ holders, and erred in law through failing to impose effective management controls on non-commercials (page 87 – 88).

- The Court noted that the 1983 Act was an Act to provide for both "the management and conservation" of fisheries: At page 89 the Court said that "within that duality, the Act is directed to both commercial and non-commercial fishing: page 89. The Court found that the Minister's decisions were not an improper exercise of powers within the purpose of the Act. The Court said:

> Moreover, the QMS is not the start and finish of legislative purposes. Conservation, and non commercial (including Maori customary) fishing have their own recognised place. When the Minister reaches a decision in relation to fishing which impacts adversely on holders of ITQ, but which is intended to serve legitimate conservation purposes, or which advantages—deliberately or incidentally—non commercial interests, that does not in itself imply any improper purpose. The Act encompasses management of non commercial as well as commercial fishing. **It is not outside or against the purposes of the Act to allow a preference to non commercials (e.g. greater CPUE) to the disadvantage in fact of commercials and their valued ITQ rights, even to the extent of the industry's worst case of a decision designed solely to give recreationals greater satisfaction.** Both are within the Act.

6.7 The Court rejected the assertion that property rights prevented the Minister from exercising discretion to reduce TAC: page 91 – 92.

High Court – No Priority

6.8 McGechan J was not persuaded that the Minister had been shown to have operated in 1995 or 1996 on an assumption of law that non-commercial or either of the individual recreational or customary takes had priority at law ahead of commercial interests page 102.

6.9 The Court referred to the question of priority for Maori customary fishers, by reference to s.28D (the predecessor to s.21 of the 1995 Act): pages 150, 151 and 152.

> The question as to priority of Maori customary fisheries is an interesting and difficult one.
>
> **Section 28D does not use the word "priority", or any synonym. It assumes the determination of a TAC (MSY, controlled by qualifiers). It then directs the Minister, after "having regard" to the TAC, to "allow for" (now) "non commercial interests". The shift in wording is to be noted. The Minister does not merely "have regard to" non commercial interests. He is to "allow for" non commercial interests. At risk of fatuity, "allow for" means "make an allowance for".** No express guidance whatever is given as to any relative priority between Maori customary take and recreational take comprised within "non commercial".
>
> Is there any direction as to priority between the whole of "non commercial" and "commercial"? If so, does that help? **There is an ambiguity in the word "allow". It could mean "allow for the whole of, or it could mean "make an allowance, whether for whole or less". I do not think Parliament intended to bind the Minister to "allow for" the whole non commercial (mainly recreational) interest as a first priority, regardless of impacts on commercials. Parliament in 1986 was not operating with a clean slate.** There was an established industry, and reduction in catches could have severe economic effects (as this proceeding exemplifies). A recreational policy was being worked up. It postulated priorities in some popular spots, but no general priority direction. Nor was there a clean slate in 1990 or 1992. **It is likely Parliament intended to leave a discretion to the Minister to adjust any resource shortage as between the competing interests as the Minister saw fit at the time; and "allow for" is to be construed as meaning "allow for in whole or part".**
>
> That provides a context for the internal "non commercial" allocation question, to which I return. If the Minister was to have flexibility between commercial and non commercial, it would not be surprising if like flexibility was intended within non commercial. Possibly, the whole of non commercial could not be allowed for in light of commercial requirements; In that case, one or more components of non commercial (notably Maori customary or recreational) may necessarily suffer. In the absence of express direction, I see no reason why that should not be a matter for the Minister to weigh likewise. If anything else had been intended, one would expect something to be said.
>
> However, that is not the end of the matter. In weighing the matter up, and as at 1995 and 1996, it would have been proper for the Minister to take into account the Treaty obligations, including protection, associated with Maori customary fishing. It would be appropriate to give some weight to that component; but all would depend upon the particular circumstances of time and place, and the

> extent to which other ' demands were compelling. I find myself back, by a different route, to the position taken years ago in *Roach v Kidd* (supra). It could also be that in a situation of "shared pain", the Maori customary component could warrant a greater weight than the merely recreational; but again, all would depend upon circumstances to be weighed by the Minister at the time.
>
> Whatever the historical niceties, the modern statue does not confer priority within s28D discretion; but the Minister should consider any weight that should properly be given in light of derivation and Treaty obligations associated with the Maori customary catch.

6.10 After considering the Fisheries Settlement Act, etc, the Court found against Maori customary fishing being accorded a priority right, but accepted that the legislation recognise the existence of a Treaty protected Maori customary claim, and Treaty obligations to help recognise its use and management practices (pp 167 – 168).

6.11 The High Court declined to grant relief: p. 176.

Court of Appeal

6.12 An appeal to the Court of Appeal was made by three commercial fishing interests, together with Maori commercial fishing interests. Tipping J gave judgment for the Court.

6.13 The timing of the Court of Appeal's decision meant that the Minister's earlier decisions were made under the 1983 Act. The decision the Minster was to make for the 1997/98 fishing year was under the Fisheries Act 1996.

6.14 At page 6, Tipping J giving judgment for the Court, set out the 1983 Act (then applying):

> Section 28D of the 1983 Act specified those matters which the Minister was obliged to take into account in determining or varying the TACC. As the relevant terms of s28D [1] are important, we set them out as they stood at the time of both decisions:
>
> "... the Minister shall -
>
> (a) After having regard to the total allowable catch for the fishery, including any total allowable catch determined under section 11 of the Territorial Sea and Exclusive Economic Zone Act 1977, allow for -
>
> (i) Non commercial interests in the fisher;
>
> (ii) Any amount determined under section 12 of the Territorial Sea and Executive Economic Zone Act 1977 as the allowable catch for foreign fishing craft:
>
> (b) Where considering any reduction in a total allowable commercial catch, have regard to -
>
> (i) Where or not the imposition of other controls under this Act on the taking of fish would be sufficient to maintain the fish stock at a level where the current total allowable commercial catch could be sustained; and

(ii) Whether or not a reduction in the level of fishing could be achieved by the Crown's retaining or obtaining the right to take fish under any appropriate quota and not making those rights available for commercial fishing:"

CA - Error in Failure to Consider Crown/ Shelving

6.15 The Court of Appeal found that the Minister's 1995 decision was in error through the failure of the Minister to consider the mandatory requirement in paragraph (b)(ii) of s.28D(1).

6.16 As Tipping J set out at pages 7, 8 and 9, the Minister failed to consider whether or not a reduction in the level of fishing could be achieved by the Crown retaining the right to fish by not making those rights available to commercial fishing by the Crown acquisition of quota. The Court described this "as an error of law because Parliament had expressly required the Minister to have regard to the possibility of Crown acquisition of quota on the terms referred to in paragraph 2(b)" (page 9, second paragraph).

6.17 The Court found that the Minister had been misdirected by his officials who wrongly advised the Minister that he could not consider this possibility because of a Government policy decision against paying compensation (pages 8 and 9).

6.18 The Court noted that in 1996 the Minister was not considering a reduction in quota "simply maintaining the level at 3000 tonnes" (page 10). On this basis s.28D(1)(b) was not (then) a mandatory consideration. However the Court found that the Minister was clearly working from the wrong basis [... the Minister was clearly working in that decision from a base of 3000 tonnes when he should have been working from the earlier base of 4938 tonnes .....]. For those reasons the Court of Appeal found that the 1996 was flawed also.

CA - Proportionality

6.19 The appellants submitted in the Court of Appeal that if a reduction in TACC was justified, quota holders should bear not more than their proportionate share of that reduction along with recreational interests which should also bear their proportional share. At p.17-18 the Court said:

> The appellants' proportionality argument which was based on the concept of equality of sacrifice must first face the acknowledged fact that neither Act makes any express provision to that effect. If proportionality is a legal requirement it must arise implicitly. The appellants recognise this and submit that the necessary implication should be made. **It is important to recognise that what is allowed for by the Minister in respect of the interests for which he must allow before setting the TACC, is not a quota as such. To take recreational fishers as an example, the "allowance" is simply the Minister's best estimate of what they will catch during the year, they being subject to the controls which the Minister decides to impose upon them e.g. bag limits and minimum lawful sizes. Having set the TAC the**

Minister in effect apportions it between the relevant interests. He must make such allowance as he thinks appropriate for the other interests before he fixes the TACC. That is how the legislation is structured. We do not consider it implicit in the relevant section or in the scheme of the Act as a whole that once the ratio of recreational tonnage to commercial tonnage is fixed there can be no change in that ratio except on an increased biomass. Section 21(2) of the 1996 Act obliges the Minister to consult interested parties including Maori, environmental, commercial and recreational interests. He must do this before setting or varying TACC. Each group will no doubt seek to advance its own position in the process. We can see no reason why either as his primary purpose or as a consequence of some other purpose the Minister should not be able to vary the ratio between commercial and recreational interests. To do that is in our judgment within his powers.

...

A further matter which points against any implication of proportionate reduction is that the Minister is in our judgment entitled to bear in mind changing population patterns and population growth. If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation carefully to weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group. In summary, it is our conclusion that neither the specific sections (28D and 21) nor the Acts when viewed as a whole contain any implied duty requiring the Minister to fix or vary the recreational allowance at or to any particular proportion of the TACC or for that matter of the TAC. What the proportion should be, if that is the way the Minister looks at it from time to time, is a matter for the Minister's assessment bearing in mind all relevant considerations.

7. The Minister's 2004 and 2005 Kahawai Decisions

7.1 The 2004 IPP advised the Minister that there were currently no scarcity within the kahawai fishery, and that current levels of utilisation for all sectors combined could be accommodated within the proposed TACs (para 34). On this basis, there was no requirement to consider "reallocating" the fishery between sector groups.

7.2 The 2004 IPP proposed TACs, allowances and TACCs based on MFish's assessment of current utilisation, namely:

a. The average of the 1996 and 1999/2000 recreational harvest survey estimates for kahawai (paras 17 and 100 and Table 7);

b. A customary allowance of 50% of the current level of recreational utilisation (para 43);

c. Average annual commercial landings as reported for the period between 1997 and 2002 (para 45).

7.3 In shared fisheries, MFish has a policy preference in favour of the catch history allocation of the TAC in the absence of clear information to the contrary (para 33).

2004 Final advice

7.4 Following submissions, in the 2004 FAP, MFish advised the Minister that:

a. The IPP proposals were based on the assumption that kahawai stocks are currently at or above B_{MSY} (para 32);

b. The 1996 stock assessment indicated that by 1996 the biomass of kahawai had declined to around 50% of its original level (which was well above B_{MSY}). Information on recent trends in stock abundance was limited but did not indicate a continued decline in stock size (para 308);

c. Based on the 1996 stock assessment, the best available estimates of annual yield were estimates of 7,600 tonnes and 8,200 tonnes (para 311);

d. Although relevant as a "reference point" for TAC setting, the stock assessment information was too uncertain and dated to use as a basis to set TACs, and as an alternative TACs should be based on current utilisation i.e catch history (paras 311 and 312);

e. Recent advice from the Recreational Technical Working Group was that the estimates of recreational catch from the 1999/2000 and 2000/2001

surveys may be implausibly high for some important fisheries and they cautioned against their use (para 90);

f. Revised estimates of recreational use prepared by MFish were appropriate to use as a basis for estimating current recreational catch, based on the lowest of the estimates in the 1999/2000 and 2000/2001 recreational harvest estimates so as to exclude implausibility estimates for KAH2 and KAH3 (paras 91-97 and Table 3);

g. The combined MFish estimate of recreational catch, customary catch, fishing-related mortality and commercial catch now exceeded the 1996 stock assessment yield estimates. While the 1996 stock assessment estimates are outdated and uncertain, they remained the only reference points of sustainable yield for kahawai and there was a risk that current utilisation may not be sustainable (para 317);

h. MFish's preferred TAC options were to either (para 319):

   i. Base TACs on current utilisation; or

   ii. If the Minister considered that current levels of utilisation were at levels that present a risk to the stock, make an "*arbitrary*" 15% reduction in recreational and commercial use in key stocks (KAH1, 2, 3, 8);

i. If the lower TAC option was chosen, MFish supported a proportional reduction to recreational allowances and TACCs (para 325);

j. Management intervention would be required to constrain recreational catch if the Minister elected the lower of the TAC options proposed (para 320);

k. MFish's initial view was for reduction in the daily recreational bag limit, although MFish would provide the Minister with further advice on how this might be achieved following consultation with recreational fishing interests (para 326).

The Minister's 2004 decisions

7.5 On 5 July 2004 the Minister made final decisions for the kahawai stocks, including:

a. Setting TACs on the basis of a 15% reduction on MFish estimates of current utilisation for KAH 1, KAH 2, KAH 3 and KAH 8;

b. Allowing for recreational interests on the basis of a 15% reduction on MFish estimates of current utilisation for KAH 1, KAH 2, KAH 3 and KAH 8;

c. Allowing for Maori non-commercial fishing interests on the basis that the customary catch was 25% of the MFish estimate of the current recreational harvest for each QMA, but without the 15% reduction;

d. Allowing for other sources of fishing related mortality for each QMA on the basis it was an arbitrary 2% of the MFish estimates of current recreational, customary and commercial utilisation;

e. Setting TACCs on the basis of 15% reduction on MFish estimates of current utilisation for KAH 1, KAH 2, KAH 3 and KAH 8.

7.6 The Minister advised stakeholders of the reasons for the Minister's 2004 decisions by letter dated 10 August 2004 (the 2004 Decision letter).

7.7 The Minister's allocation decision on kahawai in 2004, was based on catch history. In other words, the Minister's decision was to apportion the TAC between sectors based on their recent share of the total catch. The TAC was set at 15% below the level of recent catches. Thus, with a proportional allocation based on catch history, the decision cut the allocation to each of the commercial and recreational sectors by 15% compared to their recent catches.

7.8 The Minister's decision on allocation for kahawai stated (at para 21):

> I believe that the information on current use provides the best basis for allocation between each interest group. Accordingly I have decided to set allowances and TACCs that reflect the current use in the fishery, reduced proportionally to fit within the bounds of the TAC set to ensure sustainability.

7.9 The Minister also announced that he might need to adopt additional management measures to achieve the catch reduction, and signalled he was considering the possible introduction of a reduced recreational daily catch limit of kahawai to ensure that the recreational catch remained within the allowance he had made. However, the Minister subsequently decided not to implement any change to the recreational daily bag limit.

7.10 On 13 December 2004 the Minister decided to make no change to recreational controls on kahawai for the 2004/05 fishing year. In the Minister's press release the Minister stated that:

> Reasons for not changing the bag limit include the agreed uncertainty that exists over the size of the recreational take for kahawai, as well as uncertainty over whether recreational fishers are reaching their current allowance.

- Holdsworth, para 19.16.

- Ministers affidavit, para 44-49.

2005 Decisions

7.11 On 8 July 2005, the Minister gave a speech to the NZ Recreational Fishing Council AGM and conference in which he signalled a new approach to the kahawai species, including a new policy proposal – that species important to recreational fishers should be managed above B_{MSY}. The Minister's speech notes state (inter alia) that:

> "It would acknowledge that one size doesn't fit all. For the recreational sector abundance of stock, a corresponding increased catch rate, or ability to catch larger fish, might be more important than extracting the maximum sustainable yield."

- See page 683-693, exhibits VW1 to affidavit of VW Wilkinson.

7.12 Also on 8 July 2005, MFish released a new Initial Position Paper (IPP 2005). This contained the "new approach" of managing above B_{MSY}.

7.13 The IPP 2005 was followed by consultation, and subsequently the release on or about 14 September 2005 of a new Final Position Paper (FAP 2005).

7.14 The FAP 2005 contained MFish's advice for two options for the setting of TACs, allowances and TACCs in the kahawai fishery to either:

a. Retain the status quo for the TACs, allowances and TACCs for each quota management area, with no change made to recreational bag limits, pending the availability of further information on the recreational take (option 1); or

b. An arbitrary 10% reduction of all TACs and a proportional reduction of customary and recreational allowances and of TACCs within each TAC and each quota management area to fit within each reduced TAC (option 2).

7.15 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:

- General statutory obligations and policy guidelines.
- Management of recreational and customary catch.
- Approach to localised sustainability issues.
- Management above B_{MSY}
- Precautionary Approach.
- Use of Anecdotal Information.

- Consideration of the Purpose and Principles of the Act.
- Compliance Plans.

7.16 The Minister adopted option 2 from FAP 2005 and in relation to quota management areas KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10 set TACs, TACCs, and non-commercial allowances at a 10% proportional reduction from the levels in the Minister's 2004 decisions.

7.17 The Minister's 2005 decisions are recorded in writing in a letter dated 22 November 2005.

8. Utilisation/ Utility Value

Pleadings

8.1 The plaintiff's amended statement of claim asserts that in setting TACs and TACCs based on current fishing sector use catch history, the 2004 and 2005 decisions are contrary to the purpose of the Act, namely, the utilisation of fisheries resources while ensuring sustainability for each stock;

- Amended SOC.

8.2 The "Utility value" of kahawai is linked to the statutory purpose of enabling people to provide for their social, economic and cultural wellbeing;

8.3 The plaintiff says that decisions based on catch history information, and the use of this information as a "starting point" do not measure the social, cultural and economic effects of maintaining the present low level of catch (CPUE) for the recreational sector, and that this is a reviewable error of law;

- Amended SOC.

Fisheries Act 1996

8.4 The Act defines "utilisation" at s.2. The definition is an "enabling" one so as to enable people to provide for their social, economic and cultural wellbeing. "Sustainability" (which includes meeting the foreseeable needs of future generations), must be ensured *while* providing for utilisation.

8.5 The concept of utilisation is not expressed in narrow commercial terms and includes concepts of use indicating elements of a wider public nature and interest. There is no primacy given to economic wellbeing as measured in commercial terms. Social, economic, and cultural wellbeing are on a par.

8.6 The Act does not suggest a meaning of "cultural wellbeing". That will take meaning from the nature of the fishery resource in question. In the New Zealand context "recreational" fishing is often as much concerned with putting food on the family table, as it is with "recreation". If proper consideration of factors such as "social" and "cultural" wellbeing are to be applied consistent with the purpose of the Act then the information selected as "best" must further the statutory purpose.

8.7 The IPP 2004 discussed but is dismissive of estimating so-called "utility value" for the kahawai fishery at paragraphs 126-130.

8.8 Industry submissions opposed anything other than a claims based "catch history" approach to setting TACCs. Industry said that the use of "utility" information had the potential to undermine the QMS and the integrity of the ITQ.

- 2004 FAP, para 193.

8.9 MFish's response in the 2004 FAP was:

> "MFish considers that catch history information is a more certain basis for allocation than utility and has a policy preference for its use. Utility information for kahawai is uncertain. You should weight this uncertainty if you consider the use of utility information as a basis for allocations for kahawai."

- 2004 FAP, para 200.

8.10 Recreational submissions focused upon the relatively low value of the commercial catch;

- 2004 FAP, para 186.

8.11 The IPP 2004 noted attempts to estimate the economic recreational value from a study provided by the South Australian Centre for Economic Studies. Regardless of the difficulty of comparing prices obtained by commercial fishers with non-market based contingent valuation studies, a part measure of "wellbeing" is whether recreational fishers can reliably catch fish. It is submitted that MFish failed even this simply analysis and so failed to adequately advise the Minister in respect of recreational wellbeing (leaving aside any uncertainty over comparison of economic valuations). It is submitted that the failure by MFish to advise the Minister of the recreational CPUE data and other qualitative indicators of recreational catch within each QMA in 2004 (or the effects of a reduction in the allowance) meant that the Acts "utilisation" purpose was not met and the Minister was not correctly advised as to the appropriate social, cultural and economic effects of the "catch-history" approach taken.

- Holdsworth paras 19.24. .

8.12 In Snapper 1 the Court of Appeal said: (p 14 – 15)

> "In short, the Minister now has a clear obligation to move the stock towards MSY and when deciding upon the time frame and the ways to achieve that statutory objective the Minister must consider all relevant social, cultural and economic factors. **For the future the Minister might think it wise in making his decision to refer expressly to the social, cultural and economic factors which he has considered to be relevant to his decision, and any matters pressed upon him which he has not considered to be relevant.**" (emphasis added)

> "While the question of relevant under s134(3) is prima facie for the Minister, a decision that something is not relevant which obviously is, or vice versa, would be susceptible of judicial review on *Wednesbury*

principles. While the point was not the subject of much argument, we are of the preliminary view that the economic factors of which s13(3) speaks need not necessarily be confined to matters directly affecting the fishing industry. In our view wider considerations affecting the national economic interest are capable of being regarded as relevant. MSY is itself directed at the national interest as well as at sectional interests and this supports the view that national economic factors can be relevant to a TAC under s13."

8.13 And at page 16:

> "Of course, if the Minister is considering any reduction in TACC with a consequential reduction in quota, **he must carefully weigh the economic impact of what he proposes to do both on individual quota holders and on the QMS generally."**

8.14 It was not until after the recreational outcry over the 2004 decisions that MFish provided the Minister with advice on the allocative implications of the 15% reduction in the recreational allowance. In the Ministry's letter to the Minister dated 5 November 2004 the Ministry provided advice based on NIWA analysis of recreational survey information (see page 602 – 603, exhibit VW 1 affidavit of Vaughan Wilkinson). The Ministry proposed (at paragraph 9) a bag limit of no more than 6 kahawai per person, calculated on a national basis. The analysis presented by the Ministry to the Minister does not analyse catch per QMA, but is nationalised.

8.15 Compare, Holdsworth's analysis, that recreational bag limits would have be to reduced to as low as 3 kahawai per day if the Minister is to implement a 15% reduction in recreational harvest in KAH 1:

- Holdsworth, 26 August 2005, paras 19.7 – 19.13, pages 46 – 48 (uncontested).

8.16 It is submitted that there is a clear implication that the Ministry in advising the Minister in respect of his 2004 decisions did not advise the Minister of the social, economic, and cultural impact when making a 15% (and subsequently in 2005, a further 10%) proportional reduction in the recreational allowance. There is no "careful weighing" of the social, economic, or cultural implications to recreational fishers from reductions in the recreational allowance because decisions made in respect of allowances "across the board" in each QMS are not being related to the implications for individual catch rate. A further implication is that the Minster is receiving from the Ministry advice as to the economic implications in respect of individual quota holders, and on the QMS, but not in respect of the implications to individual fishers and the recreational sector generally. It is submitted that this is the result of the Ministry's default

policy preference to set TAC's, TACC's and recreational allowances on the basis of "catch history" and the "proportional" policy, which was adopted by the Minister without considering the implications of reductions to the recreational sector, and is inconsistent with the utilisation purpose of the Act.

8.17 Comparisons of utility value of fish stocks between the commercial and non-commercial sectors may be difficult but this does not enable the Ministry or the Minister to walk away from evaluation of the purpose of the Act.

8.18 In 2005 the Minister adopted the 2004 decisions as the "starting point" for evaluation of the social, economic and cultural factors:

- Barnes, para 3, referring to para 93 of the Minister's affidavit.

8.19 It is submitted that this is the wrong "starting point" as a result of the errors made in the Minister 2004 decisions.

9. Best Available Information

Pleadings

9.1 The plaintiffs say that the selection of catch-history as the "best" information in the Minister's decisions in 2004 and 2005 misapplied the information principles set out in s.10 of the Act, and was not based on the best available information in respect of the TAC's/ TACC's and interests. In particular that there was a failure to consider the impact of commercial fishing on individual recreational catch rates or catch per unit of effort (CPUE) in relation to individual QMA/s stocks, and in relation to individual fishers, and that this failure is a reviewable error;

- Amended SOC.

9.2 The counterclaim also alleges a failure to apply the information principles by reference to the 1996 stock assessment, and in relation to recreational harvest estimates;

- Counterclaim.

Fisheries Act 1996

9.3 Section 10 sets out the information principles which "shall be taken into account" by all persons exercising or performing functions, duties, or powers under the Act, in relation to the utilisation of fisheries resources or ensuring sustainability.

a. Section 2 provides the following definitions:

> "Best available information" means the best information that, in the particular circumstances, is available without unreasonable cost, effort or time.
>
> "Information" *includes* -
>
> (a) Scientific, customary Maori, social or economic information; and
> (b) Any analysis of any such information.

b. The definition of information is inclusive;

c. Section 10(a) states that "decisions should be based on the best available information";

d. Issues to be considered in relation to the concept of "best available information" include:

- The availability of information.
- The quality and range of the available information.

- That information is 'available without unreasonable cost, effort or time'.

e. Section 10 makes an explicit reference back to the purpose of the Act;

f. Central to the plaintiffs position is that to be "best" the "information" must be relevant to the exercise of the power in question, and the nature of the interest/ sector utilising the fishery resource:

- *Kellian v Minister of Fisheries* (unreported, CA150/02, Gault P, Keith J, Tipping J, 26 September 2002, para 44, Keith J giving judgment for the Court).
- *Auckland City Council v Ministry of Transport* [1990] 1 NZLR 264 (HC and CA), 324 per Somers J, 335 per Bisson J (Cooke P concurring on this point), 285-286 per Wylie J in the High Court. (If a factor is to be considered, there is a duty on the authority doing so to be sufficiently informed on it).
- *Roaring Forties Seafoods Limited v The Minister of Fisheries* (HC, Wellington, CP 64/97, Ellis J.

g. In *Squid Fishery Management Co Ltd v Minister of Fisheries & Anor* (CA, Hammond, William Young & O'Regan JJ, CA 39 / 04, July 13, 2004) the Court (and the High Court decision of France J) set out the approach to the information principles. The Court of Appeal in a decision delivered by William Young J, said at page 15, paragraph 75:

> *The legal framework*
>
> [75] The Minister, as is often the case under the Fisheries Act, was required to balance utilisation objectives and conservation values. In the context of a harvestable species, this requires utilisation to the extent that it is sustainable, see *Westhaven Shell Fish Limited v Chief Executive, Ministry of Fisheries* [2002] 2NZLR 157 at para [46] and *Kellian* v *Minister of Fisheries* (CA150/02, 26 September 2002) at para [34] ...

h. The Court referred to the decision of France J in the decision on appeal: [*Squid Fishery Management Company Ltd v Minister of Fisheries*] (HC Wellington, CIV-2003-485-2706, France J):

> [80] In this exercise, the information principles provided for in s10 of the Act were applicable. So the Minister was required to take into account the principle that decisions "should be based on the best available information" but with the appropriate allowances for uncertainty and caution where information is uncertain, unreliable or inadequate.

> [152] The applicant acknowledges that management measures will usually (as here) produce a continuum of potential outcomes or options...
>
> [156] Further, s 10(a) only requires the Minister to "take into account" the principle that decisions are to be based on the best available information.
>
> (Authorities on a similar phrase are discussed in *Greenpeace New Zealand Incorporated v Minister of Fisheries* (High Court Wellington, CP492/93, 27 November 1995, Gallen J, at 25-26)).
>
> [157] The applicant submits that s 10(a) reflects a trend internationally to require states to act on the best scientific information when making these sorts of decisions. The applicant also says that the objective of s 10(a) is to preclude decisions being based on "political whim" or expediency. Paul Starr, a scientist who gave evidence for the applicant, suggests that the approach to the model means "science" was only part of the Minister's decision and that there are other, "largely unstated", objectives influencing the Minister. That was not a matter developed in argument and the Minister does explain the other, legitimate, factors he considers.
>
> [158] In considering the requirement to take into account the best available scientific evidence in Article 61(2) of UNCLOS, Burke says this means,
>
> "the scientific information needs only be taken into account as part of the wider context which determines the proper measure." (WT Burke, "The New International Law of Fisheries UNCLOS 1982 and Beyond", at p56).
>
> [159] Burke makes the point there are two elements to the requirement, namely, giving weight to the information; and the quality of the information. As to the latter, Burke says Article 61(2) "does not demand perfection" (at p57).
>
> [160] In the Fisheries Act, the principle is that the decision is to be "based" on the relevant information. The ordinary dictionary meaning of "base" suggests using as a foundation or ground (see Funk & Wagnalls New Standard Dictionary (1924)).

Recreational Harvest Estimates: Evidence

9.4 As noted previously, MFish provided revised estimates of recreational harvest within each QMA to use as the basis for estimating current recreational utilisation/catch, and in advising the Minister in the FAP 2004 based these estimates on the lowest of the estimates in the 1999/2000 and 2000/2001 recreational harvest estimates, but excluded implausibly high estimates for KAH2 and KAH3;

- paras 91-97 and Table 3 FAP 2004.

9.5 These recreational harvest estimates use a diary survey method. The scientific evidence from the plaintiff's witnesses accept that there is considerable uncertainty concerning the recreational harvest estimates;

- Holdsworth, para 20, page 51.
- Boyd (reply) para 13-17.

9.6 Boyd, who was responsible for undertaking the 1999/2000 and 2000/2001 national marine recreational fishing surveys states, in his reply affidavit of 18 October 2006:

> There was (and still is) considerable uncertainty and debate about the reliability of the 1999/2000 and 2000/2001 recreational harvest estimates. In spite of qualifications that have been attached to those estimates, the national surveys provide the only information on recreational harvests for the majority of fish stocks. There was no other scientific information available on which to base estimates of recreational harvest. (para 14)
>
> What is clear in both the affidavits of Peter Todd and Paul Starr is that there has been detailed examination of the recreational harvest estimates from the national marine recreational fishing surveys. The estimates are sensitive to a number of key assumptions and many consider the estimates to be unreliable. However, these were (and remain) the only recreational kahawai harvest estimates available for most stocks. In my opinion they were the best scientific information available to the Ministry at the time the Ministry provided its advice to the Minister in 2004 and 2005. (para 17)

9.7 The plaintiffs challenge:

a. The use of these (uncertain) recreational harvest estimates, which are measures of recreational utilisation in each QMA i.e. "catch history" is not the "best" information on which to base management of a significant recreational fishery. The plaintiffs' case is that consideration of social, economic and cultural wellbeing requires the use of information relating to quality of catch (including CPUE) not estimates of the quantum of current catch, and;

b. The Minister's decision that current use estimates from the recreational harvest surveys do not address the individual stock circumstances of each of the kahawai quota management areas and simply results in repetition of the current situation without regard for whether that meets the statutory objectives.

Catch History as "Best": Evidence

9.8 The evidence for the recreational fishers is that the nature of public fishing rights have different qualitative values from commercial fishing, when assessed against the Act's purpose and principles of providing for people's social, economic and cultural wellbeing through fishing.

9.9 Application of "catch history" information does not represent that qualitative aspect. Commercial fishers value volumetric tonnage of fish or yield, while recreational fishers commonly measure success in terms of such diverse attributes as the quality of the experience, the availability and abundance of fish, how quickly fish can be caught, their size, and (for Maori) the ability to express manākitanga. The evidence is that there are a diversity of different motivations and attributes involved in recreational fishing:

- Walshe.
- Tau.
- Ingram.
- Rintoul.
- Holdsworth.

9.10 This is at odds with the "catch history" approach of the Ministry's policy adopted in the decision(s) of the Minister which applied existing utilisation information (or measures of existing catch) as "best" when assessing TAC's, TACC's, and allowing for recreational interests.

9.11 The result was a failure to properly evaluate the nature and scope of recreational fishing rights, and a failure to properly "allow for" recreational fishing interests because, despite the apparent allocation of a "majority share" of the fishery to the non-commercial sector, the competition from the commercial sector and its superior technology means that the recreational catch rate and quality of kahawai caught is inadequate to meet the statutory wellbeing purposes. The Minister himself deposes that recreational submissions expressed in 2005 particularly strong sustainability concerns in relation to the Hauraki Gulf Marine Gulf area and referred to a NIWA survey that indicated that it took a recreational fishers eight boat trips on average to catch one kahawai in the Hauraki Gulf in 2004 (para 105).

9.12 In fact MFish had certain, and available boat ramp survey data collected since 1991 which was available to show low catch rates within regions, and individual QMAs/ stocks, but which was not relied on by the Ministry in advising the Minister;

- Holdsworth, 26 August 2005, para 23, appendix. Holdsworth's reply paras 4 – 10.

9.13 There was *some* consideration of recreational catch per unit of effort (CPUE). But this was cursory and dismissive of low catch rate information (see

paragraph 349 and 350 FAP 2004). It was said at paragraph 350, page 112, 2004 FAP:

> "While reported catch rates are low a range of factors including variations in the time spent targeting other species can explain this. Targeting kahawai can involve great amounts of time searching for the highly mobile schools of fish."

9.14 Plainly, greater amounts of effort will be spent locating kahawai if they are not abundant. The FAP 2004 MFish acknowledged, that in considering possible management options to constrain recreational catches, and in preferring a reduction in the daily bag limit:

> "MFish has yet to analyse recreational survey information to determine what an appropriate bag limit should be to achieve the desired level of reduction." (para 229)

9.15 In 2004 MFish did not advise the Minister of the very poor catch rates for kahawai in the Hauraki Gulf. It was not until 2005 that the Minister was informed of results of declining catch rates within the Hauraki Gulf and then without adequate consideration of the possibility of protecting and enhancing the quality of the recreational fishing experience by either reducing or eliminating the commercial take.

- Holdsworth (reply) para 12.

9.16 The information provided by MFish to the Minister concerning possible bag limit reductions in terms of individual catch rates for individual recreational fishers was not prepared until after the Minister's 2004 decisions, see:

- MFish letter to the Minister dated 5 November 2004, page 602, exhibit VW 1 to affidavit of Vaughan Wilkinson.

9.17 It is submitted that boat ramp survey data was adequate to have been considered in comparison with (uncertain) recreational harvest estimates;

- Holdsworth (reply) paras 4, 12 - 14.

9.18 The Minister's 2004 decision does refer to some "anecdotal" information (para 17), but with an inadequate consideration of the options available to the Minister. The policy options presented to the Minister were to recommend either the status quo, or "across the board" and arbitrary reductions in all QMA's, without applying available information on poor recreation catch rates which was of sufficient reliability (especially catch rate or CPUE data) to be applied to the assessment of individual QMA's and stocks. The result was arbitrary "across the board" decision making i.e. one size fits all, with the effect that the same arbitrary reduction in TACs, TACCs and provision for recreational

interests was made in KAH1, as was made in areas where recreational fishing organisations did not express catch rate dissatisfaction (KAH8).

1996 Stock Assessment: Evidence

9.19 The plaintiffs evidence is that the 1996 "stock assessment" derives from simulation modelling, providing a range of possible estimates of MSY for all kahawai quota management areas *on a national level*, which fails to provide detailed information for each individual QMA. Consequently the Ministry could not provide the Minister with the information needed to set TAC's to achieve target biomass levels at or above B_{MSY} with any real certainty;

- Para 9.4 – 9.9, Holdsworth.
- Compare, Dr. Sullivan, para 28 *it is not realistically possible to obtain an accurate stock assessment and, instead, the kahawai stock is strictly speaking "monitored" rather than "assessed". Without an accurate stock assessment for kahawai, it is not possible to say what the maximum sustainable catch levels would be for kahawai.*

9.20 In the absence of the reliable stock assessment, it was necessary to focus on other information to ensure sustainability within each QMA, and when properly allowing for recreational interests within each QMA;

- Para 19.16 Holdsworth.

10. Ensuring Sustainability in Each Stock or Area

Pleadings

10.1 The plaintiff challenges the decision making in relation to each stock or area and says that there are reviewable errors in respect of consideration of individual QMA's and stocks:

- Amended SOC.

Fisheries Act 1996

10.2 Decisions affecting sustainability measures are made in respect of one or more stocks or areas after "taking in to account" and "having regard to" the matters in s.11(1), (2) and (2A). The TACs are made in respect of each stock: s.13(2).

10.3 The plaintiff relies upon the "arbitrary" nature of the 15% or 10% proportionate reductions in effect made "across the board" without differentiating individual QMA's:

- Holdsworth.
- Holdsworth (reply).

10.4 To be "taken into account", matters must necessarily affect the exercise of the discretion:

- *R v CD* [1976] 1 NZLR 436, 437, Somers J (distinguishing "shall have regard to" as not being synonymous with "shall take into account").
- *Te Runanga O Raukawa Incorporated v Treaty of Waitangi Fisheries Commission,* CA 178/97, Thomas J, Keith J, Tipping J, at page 5.

The Evidence

10.5 The evidence for the recreational fishers is that the Ministry had available information as to differing qualities of the fishery within each QMA which was not taken into account by basing decisions on existing catch history:

- Holdsworth, 25 August 2005, para 15.1 – 15.12.
- Boyd, 31 August 2005, para 23 & 24.
- The Minister deposes (para [ ]) that:

> "... many of the individual circumstances concerning each fisheries management unit were inherently taken into account by my TAC decisions in 2004, which reflected recent catch history".

- Compare, Boyd (reply), para 34, para 35.

10.6 Setting sustainability measures for one or more stocks or areas plainly need to take into account the circumstances of each stock: s.11(1) and (2). Boyd, for the plaintiff, states: at paragraph 23, (affidavit of 31 August 2005) that:

> In his evidence JH [John Holdsworth] notes that the Ministry in the IPP and the FAP, and the Minister in making his decisions, assumed a single national kahawai stock and failed to take into account the different history of fishing and status of each individual stock in each kahawai quota management area ("QMA"). In my opinion and based on kahawai research and published reports which are known to the Ministry, it is far from certain whether kahawai in New Zealand form one national stock or comprise more than one separate self-sustaining populations or stocks. The adoption of a number of separate kahawai QMAs under the quota management system (the "QMS") was a therefore a prudent management decision by the Minister. **However, what the Ministry and Minister then failed to consider was whether the simulation model used as a benchmark for setting all of the kahawai TACs - which was based on an assumed single national stock - was a reliable guide to the sustainability of the kahawai stock in each individual QMA. This is a fundamental matter of relevance to sustainability**. If kahawai in New Zealand comprise a number of separate populations, then the application of the results of the simulation model could potentially be very misleading when applied to individual stocks. Given the lack of certainty that there is only one national kahawai stock, I am surprised that the Ministry and the Minister failed to consider options for TACs in each individual QMA that took this specific risk into account.

10.7 The author of the preliminary simulation model, Dr Bradford, clearly recognised that the assumption of a single stock was a major assumption of the simulation model, see:

> ***Preliminary simulation modelling of kahawai stocks, Elizabeth Bradford, NIWA, June 1996, page 8 (from exhibit VW1 to Affidavit of Vaughan Wilkinson, page 303, 311)***
>
> I make the major assumption that kahawai can be treated as one stock. Tagging experiments (Wood et al. 1990, Jones 1995) show that some kahawai move large distances. At this stage, I can not make a realistic estimation of the immigration to the emigration form the individual Fishstocks. The biological information currently available is inadequate to distinguish the Fishstocks.
>
> ***Update of kahawai simulation model for the 1997 assessment and sensitivity analysis, Elizabeth Bradford, NIWA, April 1997, page 4 (from exhibit VW1 to Affidavit of Vaughan Wilkinson, page 396, 400)***
>
> 3.2 Stock Structure
>
> A single stock was assumed because of lack of information about kahawai stocks. Tagging returns suggest that Kahawai remain in, or return to, the same area for several years, but some fish move throughout the kahawai habitat. The extent of kahawai movement around New Zealand will determine whether kahawai can be considered as a single stock.

10.8 In reply to Boyd, compare:

- Dr. Sullivan, for the first and second respondents, paras 24-25, who refers to the 2005 Plenary documents.

24. From 1981 to 1984, kahawai were tagged and released in a major research study around New Zealand into the movements and stock structure of kahawai. Wood et al (1990) summarised the results of the tag recoveries up to 1986, which showed that, although most kahawai were recovered close to the area of release, other moved large distances, between both main islands of New Zealand and both coasts. Based on this information kahawai are considered to form one stock in New Zealand waters.

25. Although they are considered to form one New Zealand-wide stock, kahawai stocks have been defined as separate units for management purposes. These stock divisions mainly reflect the historical pattern of the commercial purse seine fishery. In terms of the management of kahawai overall and reductions in catch limits to achieve sustainability goals, **the resource should be treated as one stock and it would generally be appropriate to make the same variations to the TACs for each stock.**

- Starr (reply, October 2006) para 21 – 21.4, who states at para 21.1 (in reference to exhibits PS-1 and PS-2, the 2004 and 2005 Plenary reports for kahawai):

21.1 The available evidence on kahawai stock structure is clearly laid in the recent (2004 and 2005) Plenary documents, under the heading "3. STOCKS AND AREAS". They state:

> "Tagging returns suggest that kahawai (*A. Trutta*) remain in, or return to the same area for several years, but some move throughout the kahawai habitat. The pattern of kahawai movement around New Zealand is poorly understood and there are regional difference in age structure and abundance which are consistent with limited mixing between regions, however kahawai (*A. Trutta*) are assumed to be a single biological stock".

10.9 Compare, Boyd (reply, 18 October 2006, paras 19 – 23, and 34).

10.10 In accordance with the information principles, the Minister was required to be cautious, and consider the implications of making arbitrary and uniform changes to individual stocks within each QMA.

10.11 In the event that the Court considers that any conflict of scientific evidence on this point cannot be resolved on judicial review, then it is submitted that:

a. Dr. Sullivan's opinion that *it would generally* be appropriate to make the same variations does not state the circumstances in which it would be appropriate to make non uniform variations.

b. the unlikelihood as a matter of law (since to take into account requires matters to necessarily affect the exercise of discretion) that the matters in s. 11(1) and (2) fall uniformly across each QMA. Plainly the consideration of the Hauraki Gulf Marine Park is a special consideration that the Minister must consider when TAC setting for KAH1 by reason

of the known poor catch rates in the Hauraki which are a matter affecting sustainability, and the effect of fishing due to the proximity of the Bay of Plenty based purse seine fleet to the southern boundary of the Marine Park;

c. Holdsworth's (uncontested) evidence of differing recreational catch rates/CPUE information across different QMAs (see Part E, Appendix to Holdsworth's Affidavit sworn 26 August 2005);

d. the absence of an accurate stock assessment for kahawai (acknowledged Dr. Sullivan, para 28);

e. the absence of any certainty as to what level of kahawai catch is sustainable (para 26, Dr. Sullivan);

f. the absence of knowledge as to whether past higher catches were sustainable (para 23.5, Dr. Sullivan; and K Walsh para 6.10);

g. the clear requirement in law for assessment in respect of each QMA of the sustainability measures, and especially the matters in s.11, which are not, on a true and proper interpretation of the Act matters which can be uniformly and arbitrarily applied across each QMA in the manner in which the Ministry has advised the Minister to approach his task; and entirely ignores the express statutory obligations to have particular regard to the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000.

11. The Requirement to Allow for Recreational Fishing Interests in that Stock Before Setting the TACC.

11.1 A central pleading in the plaintiff's amended statement of claim is that the Minister incorrectly approached the exercise of his mandatory obligation to allow for the recreational fishing interests in each QMA, by determining that current use estimates were the "best" information upon which to allow for recreational fishing interests in the kahawai fish stocks.

11.2 Like s.28D of the 1983 Act, s.21 of the 1996 Act contains no express guidance to the Minister in how the Minister "shall allow for" non commercial fishing interests in "that stock".

11.3 The Minister's decision on "allowances", and his reasons for the 2004 decision are contained at paragraph 21 of his August 2004 decision letter.

11.4 The MFish advice at paragraphs 178 – 183, and 197 – 200, 2004 FAP advises the Minister that he has a wide discretion in allocation decisions, but that MFish has a policy preference for claims based allocation, and for allocation proportionality between the sectors.

11.5 What the MFish advice / FAP 2004 does not do, is advise the Minister:

a. That he was not under an obligation to make any allocation to the commercial sector (subject to the Crown's obligation to Maori). In fact the advice on "Statutory Obligations and Policy Guidelines" incorrectly stated the Minister had to "allow for" the TACC (2004 IPP/FAP para 64, page 17).

b. Of the allocative implications to the non commercial sector of a reduction in biomass due to the history of commercial fishing;

- Boyd.

c. Whether the Ministry's preferred policy of allocation on a claims based approach, whereby allocation based on current catch was preferred, is a reasonable proxy for the nature and extent of recreational fishing interests in each fish stock.

- Boyd.

11.6 It is submitted that the correct approach to allowing for recreational interests under section 21 is:

a. There is a broad Ministerial discretion, but:

b. The starting point is the nature and the shape of the interest to *be allowed for* in each stock/area. It is submitted that because of the

Ministry's predilection for catch history/ proportional allocation decisons the Minister misconstrued the nature and extent of recreational interests in the kahawai stocks. The Ministry's advice shut out any opportunity for the Minister to determine that there will be only a non-commercial allowance, or to decide that commercials should only be able to take kahawai as by-catch.

c. The decision in relating to *that stock*, requires an evaluation of interests to be allowed for in each QMA, which the Minister failed to consider.

d. *Particular regard* was required to the provisions of the Hauraki Gulf Marine Park Act 2000.

e. Non-commercial fishing interests are to be allowed for *before* any TACC, if any.

f. Allowing for the "interests" requires an evaluation of the effect on individual recreational catch rates within each QMA.

Nature and Character of Recreational Fishing Interests in Kahawai

11.7 If the Minister is to follow the mandatory legislative directive, namely *shall allow for* non-commercial fishing interests, the nature shape and character of those interests requires evaluation and assessment.

- Compare *Snapper 1,*McGechan J, page 146:

> "The first question for the Minister is the true shape and character of this Maori customary right which he is obliged to take into account"

11.8 Adopting Ministry advice, the Minister considered that recreational catch estimates from the 2000/ 2001 survey were the "best" information upon which to allow for the interests. There is nothing in the Act which requires the Minister to allow for the interests by a total volumetric allocation. The current recreational harvest estimates are not an adequate "proxy" for the recreational interests.

11.9 The use of current catch estimates as the measure of the interests creates an apparent paradox, whereby, ostensibly, in KAH1 there is a majority allocation to the recreational sector, but in the Hauraki Gulf kahawai catch rates are so low that for practicable purposes and in a qualitative sense, there is no meaningful allowance because fish are not available in sufficient abundance to be caught on a regular basis. Certainly there is no allowance which would satisfy the purpose of social, economic and cultural wellbeing.

11.10 Allowing for recreational interests, therefore necessarily involves:

- Making a qualitative evaluation of the nature and extent of those interests;

- Using meaningful measures for the interests, i.e. which measure how readily kahawai can be caught, whether they are of a decent size etc, being amongst the primary attributes valued by recreational fishers;
- Recognise that recreational fishing interests vary by method, shore based, boat based, often as a non-target fish, and includes sustenance fishers who fish for food:
  - Ingram;
  - Boyd, recreational fishing interests more complex than a simple measure of catch;
  - Tau.

11.11 In selecting the harvest estimates as the best information on which to allow for the interests, the Minister should be alive to a distinction between quantitative measures (i.e. total tonnages represented by catch estimates) and qualitative measures as to the quality of the recreational fishery e.g. CPUE, fish length and availability, on a regional basis.

- Holdsworth/Boyd.

11.12 MFish did advise the Minister in their generic policy advice in the FAP 2004 that when allowing for customary fishing interests that "current catch by customary Maori may not reflect the extent of customary interest in a species" and that current levels of catch do not take account of customary needs, as current levels of catch may have been constrained by a lack of abundance: See FAP 2004, page.18:

> 70 The consistent overfishing of the TACC or an allowance, which results in the reduction of the TAC, as a general principle, ought to be attributed to the stakeholder group responsible for the overfishing. Equally stakeholders may elect to exercise their fishing rights in a manner which results in their allocation in a fishery being undercaught. Voluntary closures and temporary shelving of allocation may be undertaken as a means of improving the abundance of a species and the availability of certain sized fish. **Current catch by customary Maori may not reflect the extent of customary interests in a species. Decisions may be made not to fish a species due to non-availability. The allocation process should endeavour to take account of customary needs and not simply reflect the currently levels of catch, which may have been constrained by a lack of abundance.**

11.13 However that advice was not translated across to the Ministry's advice on the recreational interests, in selecting the current use information as "best".

11.14 The Minister should have been specifically advised (in 2004) that when making *initial* decisions affecting recreational interests the fishing down of the biomass prior to the introduction of a species to the QMS will have an adverse effect on

the interests of the sector, because estimates of current use will not necessarily be a reliable indicator of a sectors interest in the fishery. The Minister's 2004 decision was an *initial* allocation:s.13(10). If the Minister in making a reasonable or adequate allowance is logically to use current recreational catch estimates as a proxy for the recreational allowance, the Minister and the Ministry should be alive to the potential for erosion in recreational interests (based on such a proxy) being caused by the fishing down of biomass from the introduction of the fishery to Industry. It is submitted that in 2004, the Ministry, in advising the Minister failed to properly recognise that recreational/ non-commercial fishing interests, in an established non-commercial fishery had been adversely affected by the decline in biomass caused by commercial fishing.

- Boyd.
- Winstanley.
- Compare, FAP 2005 (for management above B_{MSY}), and the recent "Shared Fisheries" paper.

11.15 In allowing for recreational interests it is necessary that the Minister should understand the implications of an allowance, because any decisions involving "utilisation" is "to enable people to provide for their social, economic and cultural wellbeing": s.8(2). In making allowances, and reducing those proportionately with reductions to the commercial sector, the Minister was not provided with advice that the proportional reduction would lead to likely bag limits of 3 fish per amateur fisher in KAH 1:

- Holdsworth, para 19.13.

11.16 Prior to the decision-making in 2004 the Minister did not receive advice from the Ministry as to implications for daily bag limits, which are the primary regulatory control on individual amateur fishers, and consequently has not been given adequate understanding by Ministry officials of the cultural, social and economic implications of decisions on individual recreational fishers.

11.17 The interest to be allowed for is *in that stock*. By comparison, the equivalent provision in s.28D(1)(a) of the 1983 Act referred to interest *in the fishery*. It is submitted that on proper interpretation, consideration of each allowance is required within each fisheries management area i.e. within each QMA.

11.18 There are known regional differences in the structure and characteristics of the kahawai stocks, even though it is not known whether there is more than one self supporting stock, or whether there are multiple self supporting stocks. Yet the Minister's decisions in 2004 and 2005 were arbitrary. Reductions in the

recreational allowances were made at an arbitrary 15% and 10% across the board, without evaluating regional differences.

- Holdsworth.
- Boyd.
- Starr, at para 63.1, acknowledges known regional differences in the structure of the kahawai population.

11.19 There is a further aspect to the requirement to assess the interests within individual areas, due to the requirement in KAH1 for the Minister to have *particular regard* to the provisions of s.7 and s.8 of the Hauraki Gulf Marine Park. This point is elaborated on below, and illustrates the absence of regional considerations (see below regarding Hauraki Gulf Marine Park Act).

11.20 There is a mandatory nature to the Minister's requirements when allowing for the recreational interests, as indicated by the words in s.21(1) "the Minister shall allow for". In comparison, s.20(3) provides that a TACC can be set or varied to zero. There is no similar provision in the Act confirming an express right for the Minister to set a recreational allowance at zero (although there will be fish stocks in which the recreational sector has no interest, e.g. off-shore fish stocks only available at depth and beyond recreational fishing methods).

11.21 In making his 2004 and 2005 decisions, the Minister was not expressly advised that he could make a zero allocation for TACC while allowing for the non-commercial interests.

11.22 The Minister is required to allow for the interest *before* setting the TACC, *if any*. The Court of Appeal in Snapper 1 noted that the interests were to be allowed for *before* any TACC setting. This accords with the legislative history of s.21.

11.23 In contrast, in his 2004 and 2005 decisions, the Minister in adopting the Ministry's proportional approach makes a contemporaneous/ concurrent allocation (and allowance) based on the proportion of existing catch of sectors.

11.24 Logically, it follows that the Minister is *in effect* taking the commercials' interests into account when allowing for recreational interests. In adopting the MFish policy preference to allocate to all sectors based on existing catch estimates, and then reduce the allowance, again in accordance with the Ministry's policy preference of proportional reductions between fishing sectors, it is submitted the Minister started from the wrong position, and made an error of law by not allowing for recreational/ non-commercial interests before/ prior to setting the TACC. A contemporaneous/ concurrent allocation based on a policy preference to allocate in accordance with "existing" or "proportionate" "shares" in a fishery especially in the case of an initial allocation, incorrectly assumes a

starting point for TACC allocation above zero, and takes account of commercial interests.

11.25 There is also the risk that the use of language as advised by the Ministry to the Minister of "allowance", "proportion" and "share" is treated as synonymous with "allow for" and "interests". This risks confounding the nature of recreational interests which are (on the analysis set out above) founded as a common law public right to fish, subject to regulation by the Amateur Fishing Regulations, and subject to the purpose and sustainability measures of the Act, and the Minister's mandatory obligation to "allow for" these interests in s.21.

Proportionality

Pleadings

11.26 The plaintiffs challenge the MFish "preferred policy" for making proportional allocations between the commercial and non-commercial fishing sectors:

- Amended SOC para 3.20, 3.3.

11.27 The reductions in TAC's and TACC's and interests were all made on a proportional basis "against existing catch" for each QMA for both of the years 2004 and 2004:

- Amended SOC.

11.28 In *Snapper 1* the Court of Appeal rejected an obligation to make changes between sectors on a proportionate basis (pp 16 – 18). While the Court of Appeal contemplated (at p 18) the potential for a greater recreational demand arising from population change or growth, the recreational sector has never received any non-proportional increase in its allowance:

- Ingram.

11.29 In fact the Ministry's preferred proportional policy discriminates against the recreational sector at low or reducing biomass:

- Barnes, para 4.
- Holdsworth.
- Boyd.

11.30 The MFish proportional policy is clearly linked to risk avoidance in response to claims to compensation by commercial fishers if there is ever "reallocation" to non-commercials under section 21 of the Act:

- Barnes, para 8, exhibit A.

- See numerous references were made by the Ministry to the risks that "reallocation" of the commercial allocation may be subject to compensation claims against the Crown:
  - FAP 2004, para 66, page 17.
  - FAP 2005, para 68, page 15, para 1, page 55.
  - FAP 2005, see submissions by commercial fishers, paras 3, 7, 9, 15, pages 55 – 77, and see MFish response to submissions, para 27, page 61, sub paragraph F, para 65, page 68, under the heading "liability for compensation" para 72 – 89, pages 69 – 72; and para 162 – 164, page 435.
  - See MFish letter to the Minister dated 10 June 2004 on review of 2004 decisions on the catch limited allowances, page 636, exhibit VW 1 to affidavit of Vaughan Wilkinson, see paragraph 18 of Ministry letter, page 639 VW 1.

11.31 In its advice in FAP 2005 MFish did note that the Minister had an overriding discretion not to follow the MFish preferred policy, presumably to avoid the "preferred policy" or "default" policy on proportionality being seen as a fixed policy, or a fetter on the exercise of the Minister's discretion (although this was done without providing the Minister with adequate information for him to consider exercising his discretion to prefer recreational over commercial interests i.e. to make non-proportional decisions):

- FAP 2005 [ ].

11.32 It is submitted that the persistence of the Ministry's preferred policy, contrary to the Court of Appeal's determination that the Minister had the freedom to allow for the recreational interest in whole or in part, and the absence of adequate advice, leads to an error of law being committed as the "interests" to be allowed for are constrained by the application of the Ministry's preferred proportional policy, which would never admit the potential for a fish stock to become a wholly "recreational fish", or a commercial by-catch only fish, as the representatives of the recreational sector sought for kahawai in their submissions.

- Boyd (reply), paras 26 - 31].

12. Hauraki Gulf Marine Park Act 2000

12.1 The Plaintiffs' claim that the Minister's 2004 and 2005 decisions fail:

a. to *have regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when setting the sustainability measure, the TAC for KAH1.

- Amended SOC.

b. to *have particular regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act (HGMPA) 2000 when setting the recreational allowance/ TACC for KAH1.

- Amended SOC.

12.2 Section 13 HGMPA states:

> 13. Obligation to have particular regard to sections 7 and 8
>
> Except as provided in sections 9 to 12, in order to achieve the purpose of this Act, all persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 must, in addition to any other requirement specified in those Acts for the exercise of that power or the carrying out of that function, have particular regard to the provisions of sections 7 and 8 and of this Act.

12.3 The Fisheries Act 1983 and 1996 are both listed in Schedule 1 to the HGMPA.

12.4 An exception is s.12 HGMPA, which states:

> 12. Amendment to Fisheries Act 1996—
>
> Section 11(2)(b) of the Fisheries Act 1996 is amended by adding the expression ``; and", and by adding the following paragraph:
>
> **``(c) sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act)—."**

12.5 Section 11(2) of the Fisheries Act states:

> (2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of—
>
> ......
>
> **[(c) Sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act)—]**
>
> that apply to the coastal marine area and are considered by the Minister to be relevant.

12.6 The setting of TAC's are a sustainability measure, defined in section 2 FA as:

> "Sustainability measure" means any measure set or varied under Part 3 of this Act for the purpose of ensuring sustainability:

12.7 As a result, the Minister, is required:

a. to *have regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 for the Hauraki Gulf when setting the sustainability measure, the TAC for KAH1, but qualified as considered by the Minister to be relevant.

b. to *have particular regard to* the provisions of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when exercising powers or functions for the Hauraki Gulf, including setting the recreational allowance and the TACC.

12.8 The *provisions* of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 state:

7. Recognition of National Significance of Hauraki Gulf

(1) The interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.

(2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity—

(a) to provide for—

(i) the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and

(ii) the social, economic, recreational, and cultural well-being of people and communities:

(b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:

(c) to maintain the soil, air, water, and ecosystems of the Gulf.

8. Management of Hauraki Gulf

(1) To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are—

(a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:

(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:

(c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural, and spiritual relationship:

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:

(f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand. (Emphasis applied)

12.9 A High Court decision (in a resource management context) which provides some illustration of the HGMPA is *Gulf District Plan Assn Inc v Auckland CC* [2004] NZRMA 202 (HC); Williams J. The Court held that persons exercising powers for the Gulf must have "particular regard" to s 7 and s 8, but ss.9-12 are exceptions in respect of the operation of s 13 and s 9(4) relating to resource consent applications which only required the court to have "regard to" the Hauraki Gulf Marine Park Act 2000.

12.10 The qualifying words of section 11(2) of the Fisheries Act convey Ministerial discretion, "as considered by the Minister to be relevant". The same element of discretion is not present when exercising other powers or functions for the Hauraki Gulf under the Fisheries Act 1996, due to s.13 HGMPA.

12.11 The legal requirement to "have regard to" was set out by the Court of Appeal in *Te Runanga o Raukawa Incorporated v the Treaty of Waitangi Fisheries Commission,* CA 178/97:

> There was some debate on the ambit of the words "have regard to" in s8(a). Reference was made to such cases as *Ishak v Thowfeek* [1968] 1 WLR 1718 (PC) and *R v CD* [1976] 1 NZLR 436 per Somers J. Mr Finlayson endeavoured to contrast the words "have regard to" with the words "take into account", as Somers J did in *R v CD*...
>
> ... In the context of s8(a) the words "have regard to" mean simply that the Commission must consider the statutory criteria in making its decisions under that section. What, if any, weight the Commission gives to a particular criterion in the particular case is for the Commission to decide. All that is necessary is for the Commission to turn its mind to each criterion in considering whether to grant assistance. The Court cannot review how the Commission weights the three criteria inter se. Nor can it review a decision by the Commission to prefer one criterion over one or both of the others unless the Commission's ultimate decision is unreasonable or irrational in administrative law terms. That is no longer alleged in this case. (page 8)

12.12 The requirement to have "particular regard" to something is to bring the factor into the mix of decision-making and to give greater weight to that factor in the determination than other relevant circumstances....

- See *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, 517, line 29 – 30, per Ronald Young J.

12.13 The Minister's decision letter for 2004 gives no leads to his thinking, insofar as the decision letter in 2004 is silent in respect of the Hauraki Gulf. The same decisions in percentage terms were made for KAH1, as were made for the other QMA's. It is not apparent that the Minister turned his mind to consider the provisions of sections 7 and 8 in his 2004 decisions.

12.14 The Minister does refer (at para [ ]) to the Ministry advice he received at paragraph 65 of the 2004 IPP.

12.15 Paragraph 65 of the IPP 2004 states:

> MFish is not aware of any considerations in any regional policy statement, regional plan or proposed regional plan under the Resource Management Act 1991, or any management strategy of plan under the Conservation Act 1987, that are relevant to setting TACs for kahawai at this time (as required by ss11(2)(a) and (b)). **MFish is also aware of the provisions of the Hauraki Gulf Marine Park Act 2000.** The Hauraki Gulf is defined in that Act to include all coastal waters and offshore islands from near Te Arai Point offshore to the Moko Hinau Islands, and south to Homunga Point (north of Waihi Beach). **This Act's objectives are to protect and maintain the natural resources of the Hauraki Gulf as a matter of national importance. Kahawai are known to occur within the boundaries of the Hauraki Gulf and MFish considers that the setting of sustainability measures for kahawai will better meet the purpose of the Act.**

12.16 The Ministry's advice that kahawai are "known to occur" within the boundaries of the Hauraki Gulf advises the Minister about the geographic extent of kahawai distribution, not the state of the recreational kahawai fishery within the Hauraki Gulf.

12.17 The Ministry's advice that that the setting of sustainability measures for kahawai will better meet the purpose of the [Hauraki] Act, is a bland statement. What is required is regard to the provisions of sections 7 and 8 in the TAC setting process. That requires consideration of each of the matters specified in section 7 and 8.

12.18 The Ministry's advice does not cite the "provisions" of the HGMPA to the Minister.

12.19 If the Minister in exercising powers under the Fisheries Act is to recognise the national importance of the Hauraki then her must be advised and consider each of the matters specified in the Act which must include recreational catch rates within the Hauraki Gulf. If the Minister is to consider a factor he has to have sufficient information to properly consider it. The 2004 FAP have limited reference to recreational complaints of poor catch rates in the Hauraki:

- See page 166 FAP 2004 re NZ Angling submission that "declining kahawai numbers had resulted in the cessation of the "Saltwater Sundays" programme in the Hauraki Gulf.

- The NZRFC submission refers to poor recruitment of kahawai in the Hauraki Gulf, see page 168 FAP 2004.

12.20 MFish advice at para 349 FAP 2004 is:

> **Recreational catch per unit effort (CPUE)**
>
> 349 MFish agrees with submissions that little data is available to quantify recreational catch rates during the 1980s prior to the development of the purse seine fishery. However, an examination of landings rates from boat ramp surveys conducted in 1991, 1994, 1996, 1998, 2001, 2002 and 2003, showed that throughout the time series, landings rates have been similar in East Northland, Northland, and Hauraki Gulf, both in magnitude and in the pattern of fluctuations. Generally they have been lower in recent years than experienced in the mid 1990s, but similar to those observed in 1991. In the Bay of Plenty, landing rates have been higher and more variable than in the other areas".

12.21 Limited advice based on a comparison of Hauraki Gulf recreational catch rates to 1991 levels, (which coincided with the intensive period of purse seine fishing, and with the commencement of commercial catch limits) is an inadequate reference to the matters of national importance in ss 7 and 8 HGMPA when setting sustainability measures, and when having particular regard to Hauraki Gulf in setting recreational allowances/ TACC.

12.22 As to what is intended by "matters of national importance", compare:

- Section 3 of the Former Town & Country Planning Act 1977.
- Section 6 Resource Management Act 1991.
- *Environmental Defence Society Inc and Anor v Mangonui County Council* (1989) 13 NZTPA 197 (CA).
- *Hansard*, Second Reading Speech of Conservation Minister, 24 November 1998, page 13685.

12.23 Subsequent to the 2004 decision the Minister asked the Ministry to accelerate research to decide whether kahawai should be included in an October 2005 review of sustainability measures:

- See MFish letter to the Minister dated 10 June 2005 – review of 2004 decisions on catch limits and allowances, page 636, exhibit VW 1 to affidavit of Vaughan Wilkinson. MFish note, at page 638, that there are fewer kahawai encountered in the Hauraki Gulf in 2004 than in previous years despite increased levels of sampling. The majority of fish landed in the Hauraki Gulf are juveniles, and recent years the proportion of large fish has declined. The Minister's handwritten notes record that the Minister request MFish to present him with options for area constraints in

the Hauraki Gulf on 13 June 2005, see page 641, exhibit VW 1 to affidavit of Vaughan Wilkinson.

- MFish subsequently present proposals to the Minister for area constraints in the Hauraki Gulf, along with new initial position paper (IPP 2005) for a review of sustainability measures and other management controls for kahawai, see MFish letter to the Minister dated 6 July 2005 – proposal for review of management measures, page 642, exhibit VW 1 to affidavit of Vaughan Wilkinson. It is noted that the fresh proposals for area constraints in the Hauraki Gulf are not synonymous with the geographic boundaries of the Hauraki Gulf Marine Park Act, nor in considering constraints within the Hauraki Gulf, the Minister's attention is not drawn to the proximity of the purse seine fleet based in Tauranga with the southern boundary of the Hauraki Gulf Marine Park .

12.24 The Ministry's advice in the 2005 FAP notes the Hauraki Gulf issue:

- 2005 FAP, paras 241, 242, 243, 244-248

12.25 The Minister's decision letter for 2005 similarly gives no leads to his thinking, insofar as the decision letter is silent in respect of the Hauraki Gulf. The same decisions in percentage terms were made for KAH1, as were made for the other QMA's. Again, it is not apparent that the Minister turned his mind to the provisions of sections 7 and 8 in his 2005 decisions.

12.26 It is submitted the Ministry's 2005 FAP advice on the HGMPA (and as a consequence, the Minister's decisions):

a. Misinterpret (as in 2004) the obligations under HGMPA as being synonymous with the objectives of the QMS.

b. The Ministry's advice does not apply the provisions of ss 7 and 8 HGMPA to the exercise of powers to set allowances under section 21, i.e. to have particular regard as is required by s.13 HGMPA;

c. Considers that voluntary measures within the Hauraki Gulf on the purse seine method are sufficient to meet the provisions of ss 7 and 8 HGMPA; whereas on a true and proper interpretation HGMPA acts a geographical constraint on the exercise of powers and functions for KAH1. Expressed another way, the advice to the Minister fails to consider or provide the option of reducing TAC or TACC in KAH1 (and a non-proportional allowance) to protect and enhance the quality of recreational fishing with the Hauraki Gulf.

d. The requirement to have regard to, or have particular regard to the provisions of ss 7 and 8 HGMPA (as appropriate) cannot logically be

confined or limited to a consideration of management internal to the boundaries of the Hauraki Gulf, when the decision-making concerns KAH1 as a whole, and where fish populations within the Hauraki Gulf are affected by fishing effort outside of the Hauraki Gulf. If the Minister is to consider enhancement of the resources of the Hauraki Gulf, in the context of making decisions for fish stocks within KAH1 he is not confined to management responses within the Gulf itself as the MFish advice over voluntary purse seine restrictions implied.

e. Demonstrates a lack of consciousness of the imperatives and significance of sections 7 and 8.

13. Obligation to Constrain Recreational Catch

13.1 The Court of Appeal and the High Court's decisions in Snapper 1 were based on s.28D(1)(b) (now repealed) of the 1983 Act in the context of a reduction of quota held by commercial fishers.

13.2 The High Court noted that under s28D(1)(b) the Minister – before reducing the TACC – is obliged to consider whether imposition of other controls on the taking of fish would suffice to maintain stock at levels where current TACC could be sustained".

13.3 McGechan J said at pages 102 - 103:

> "There is no express obligation in the Act upon the Minister to impose controls on recreational fishers. No section states that when the Minister reduces TACC, the Minister must also impose management restrictions on non-commercials necessary to safeguard potential stock conserved. The regulation making power in s.89, quite apart from being exercisable by the Governor General and not the Minister, is permissive not mandatory. However, there is clearly a relationship. Under s.28D(1)(b) the Minister – before reducing the TACC – is obliged to consider whether imposition of other controls "on the taking of fish" would suffice to maintain stock at levels where current TACC could be sustained. While more usually viewed in terms of potential controls on commercial taking, the provision is not so restricted. The Minister can, and should, consider the possibility of additional controls upon recreational fishing also. In addition there is room for common-sense. There will be no point in restricting TACC for conservation purposes if the commercial catch so conserved simply disappears upwards on recreational hooks, there would be no conservation gain. **I am satisfied that when Parliament empowered the Minister to reduce the TACC for conservation purposes – not to improve recreational catch rate, but for conservation purposes – it expected the Minister to take any concurrent steps necessary to minimise sabotage by recreational fishing it is a consideration going beyond s.28D(1)(b). It does not much matter how the obligation is labelled. The most direct route is an obligation implied into s.28D power. Alternatively, on Padfield analysis the Minister is not to adopt policies calculated to frustrate the conservation purposes of the Act. Alternatively again, the obligation can be characterised as a Wednesbury rationality point;** preventing the Minister from blowing hot and cold. ... the significant point is that both law and common-sense dictated that a Minister should not reduce the TACC for conservation reasons unless able to take, in taking reasonable steps to avoid the reduction being rendered futile through increases recreational fishing".

13.4 The Court noted (at page 103) that the Minister considered that recreational CPUE was insufficient and warranted a modest increase. His previous years decision had reduced recreational bag limits (page 103). The Court referred to the Minister's decision referring to further research. The Court said:

> There has been some research effort, and more is planned, within financial constraints. It is a credible decision to await research results before further recreational constraints are imposed; particularly given a need / to create acceptance. Failures in the past

> to research adequately, or to implement / research, if they occurred, do not inevitably imply failures for the future. The view is open that recreational compliance depends, in real life, on an informed consent, and that research is a necessary preliminary.

13.5 The Court found an unproved breach of the "legal obligation on the Minister to take reasonable steps to prevent recreational capture of TACC reductions": page 106, 173.

13.6 On this point, Tipping J said, at p17-18:

> There was a further complaint which can conveniently be dealt with under this heading. It was suggested that the Minister's decision was flawed because he had not taken any or any sufficient steps to constrain the recreational fishery. This is a point similar to one raised by the Maori appellants to be dealt with later. It is sufficient for present purposes to say that we are satisfied from the evidence that the Minister has made bona fide efforts to constrain recreational fishing. Bag limits have been substantially reduced over recent years and the minimum legal size for snapper was quite recently increased from 25cm to 27cm. In addition, the Minister has forecast further work in this area which satisfies us that he is very much alive to the need to restrain recreational fishing in a way which seeks to prevent the commercial sacrifice being caught on recreational hooks. The imprecision of the actual recreational catch is one good reason why strict proportionality would be near impossible to achieve. That makes it difficult to imply an obligation to achieve it. **Once one retreats from the proposition that strict proportionality is required, there can be no satisfactory solution other than that the Minister must act reasonably to seek to stop the saving resulting from TACC reductions being lost to recreational fishing.**

13.7 A number of factors which made the case for restraint of the recreational catch in SNA1 more compelling:

- Stock assessment information was that biomass was standing at approximately one half B_{MSY}, and had previously poor recruitment years; page 25, McGechan J.
- There was clear evidence that increasing recreational catch would prevent further rebuilding of the stock to B_{MSY}, page 41, McGechan J .

13.8 In the present case the Minister was not constrained from reducing the commercial catch to benefit the recreational catch:

- Section 28D(1)(b) is now repealed.
- If any such obligation can apply, it is only where the reduction is required for sustainability reasons.
- The Minister cannot be constrained from reducing the commercial catch to restore or enhance the recreational catch, pursuant to the statutory purpose of providing for people's social, economic and cultural wellbeing or for the purposes identified in the Hauraki Gulf Marine Parks Act 2000.

13.9 In any event there is doubt as to whether the recreational sector is taking its "allowance" in each QMA, even after cuts of 15% and 10% underpinned by uncertainty as to the recreational harvest estimates:

- Holdsworth (reply).
- Boyd (reply).

13.10 There are other implications. If Kahawai is predominantly a by-catch species for the recreational fishers, then adjustment of the catch rates has the potential to affect other fisheries.

14. Compensation

14.1 It is anticipated that the commercial fishers declaration sought in respect of s.308 of the Act is primarily a matter affecting the Crown. However, the recreational sector has an interest in this outcome, as it relates to the "proportional" policy being applied by MFish and is relevant to recreational fishing "rights" that co-exist with commercial rights. The plaintiffs are opposed to the declarations sought. It is submitted that:

a. When establishing the QMS, creating statutory entitlements, the legislature recognised pre-existing rights or "interests", including Maori fishing interests (see *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, and subsequent line of case law recognising Maori fishing interests), and public fishing rights (as above).

b. When a statute purports to take away rights the "Courts will not adopt a construction that takes away existing property rights more than the Act and its proper purpose require":

- *Burrows,* Statute *Law in New Zealand*, (Third Edition) Wellington: Lexis Nexis, 2003, 222, citing *Stewart Investments v Invercargill City Corporations* [1976] 2 NZLR 362, 370.

c. However, it is necessary to consider the nature of the rights created by the Act.

d. In *Snapper 1,* the commercial fishers submitted to the Court of Appeal that the Minster's decisions had not maintained the "integrity of the QMS", nor afforded proper respect to the property rights of those holding quota. It was submitted that the Minister's decision had afforded a preference to recreational fishers that involved an immediate and future "reallocation" of the catch from commercial to recreational fishers.

e. The Court said (page 15):

> "While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such a reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned".

f. The nature of the QMS rights are subject to variation by s.13, 20 and 21 of the Act, including such a variation as may favour the recreational

fishing sector. It is submitted that there is no "reallocation" or "taking" and a decision made favouring recreational interests is simply a recognition of pre-existing rights and the public right to fish, consistent with the purpose of the Act.

g. The Act does not create QMS rights as some "superior" right to prevail over all other interests. There was a clear realignment of the statutory objectives and purposes of the fisheries legislation in 1996 to align with those of other environmental legislation:

- Second reading speech of the Minister of Fisheries (Hon Doug Kidd), *Hansard.*

h. The principle that for a statute to be interpreted as imputing an intention to take away a legal right this must be expressed in clear and unambiguous terms is a rule of construction only, dependant on the wording and purpose of the particular statute:

- *Falkner v Gisborne District Council* [1995] 3 NZLR 622, 633 line 8, and line 27, per Barker J.
- For discussion on the constitutional background to takings written from a New Zealand perspective, see: P A Joseph, *The Environment, Property Rights, and Public Choice Theory* [2003] 20 NZULR 408, and see p 425 - 426 distinguishing "regulatory takings" as not being compensatable and drawing an analogy with planning legislation.

15. Relief

15.1 The Amendment Statement of Claim seeks orders quashing the 2004 an 2005 decisions, reconsideration of these decisions, and declarations as to the appropriate legal principles to be applied.

A Galbraith QC / S J Ryan

Counsel for the Plaintiffs

6 November 2006