In the Court of Appeal of New Zealand **CA 163/07**

between

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

Appellants

and

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

First Respondents

and

Minister of Fisheries

Second Resopndent

and

The Chief Executive of the Ministry of Fisheries

Third Respondent

Submissions of First Respondents

Dated: 15 February 2008

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The Art of Law

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I N D E X

May it please the Court:

Overview

1. These proceedings were first initiated by the first respondents as a test case seeking directions as to the nature and extent of the public's recreational fishing rights when setting the total allowable catch (TAC's) and the total allowable commercial catch (TACC's) under the quota management scheme (QMS) for the kahawai fish species.

2. The first respondents (the "recreational fishers") are two established incorporated societies who both act as representative organisations on behalf of a number of other recreational fishing and marine related interests.

3. Recreational fishing, in all its aspects, is a popular and highly valued activity in New Zealand. Surveys indicate that up to 20% of the population engage in recreational marine fishing annually:

   - Briefing for the Ministry of Fisheries, 5 March 2004, p 66 [Vol IV, p 14-30].

4. These proceedings take place against a background of proposed policy and/or legislative reform. The Minister has indicated that further decision making will occur on the outcome of the present proceedings.

5. It is not solely the final outcome in terms of the quantum of kahawai allowed for which is important to the recreational fishers, but the legal principles to be applied by the Ministry when advising the Minister for decision making in respect of other fish stocks where there is a significant recreational component to the catch.

6. The recreational fishers support the decision and findings of Harrison J (CIV-2005-404-4495) that:

   a. The Minister of Fisheries fixed the TACCs in 2004 and 2005 for all kahawai stocks without having proper regard to the social, economic and cultural wellbeing of the people (paragraphs [54] – [83]).

   b. The Minister of Fisheries failed to take any or proper account of sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH 1 (paragraphs [75] – [83]).

7. Central to the first respondents case is the finding by the High Court that the Ministry's policy preference of allowing for recreational interests and allocating quota based on "catch history", and "proportionality", as accepted by the Minister as the exclusive basis on which to set the TACs

and TACCs, failed to apply the statutory significance accorded in the purpose of the Act to people's social, economic and cultural wellbeing: *Judgement:* para's 67, 69.

8. In respect of the cross appeal, it is submitted that the High Court's reasoning [at para 76] that the Hauraki Gulf Marine Park Act 2000 ((HGMPA) is relevant only to setting sustainability measures appears to overlook the effect of s.13 HGMPA – which applies to all persons exercising powers for the Hauraki Gulf and therefore the HGMPA is relevant to TACC setting also. Because of the High Court's findings on the TACC's the effect of this oversight did not effect the substantive outcome of the High Court's decision.

9. The Second and Third Respondents have filed submissions in the Court responsibly accepting the High Court judge's conclusions referred to in para 6(a) above and the correctness of the statutory interpretation issue raised in the First Respondent's cross-appeal referred to in para 7 above. It is difficult to see that the Appellant's challenge to the High Court judgment on the validity issues can go anywhere given the Minister/Ministry's position. However in the event that the appeal proceeds these submissions do deal with the substance of these issues along with the remaining challenge to the Judge's reasoning based on the Hauraki Gulf Marine Park Act.

Significance of this Case

10. The vast majority of near shore fish stocks with a recreational component have already entered the QMS. The kahawai species is one of the last to enter the QMS.

11. There are relatively few fisheries in which recreational participation is substantial - snapper, blue cod, kahawai, rock lobster, paua and scallops. The estimated recreational catch across all species is 25,000 tonnes.

    - Briefing for the Minister of Fisheries, 5 March 2004, [Vol IV, p1410, at p 1430].

12. By comparison, 130 species are fished commercially of which 43 are commercially significant as a target species, with an annual commercial take of 750,000 tonnes. The deepwater species (hoki, hake, ling, orange roughy, oreo dories, squid, and silver warehou) as well as spiny red lobster, paua, greenshell mussels, and snapper dominate the commercial fishing industry:

    - Briefing for the Minister of Fisheries, 5 March 2004, Vol IV,p1410, at p 1428-1429

13. The best estimate of the dollar value of the industry kahawai catch in the papers before the Court is approximately $3.2 million of which $2.5 million represents the take by the Sanford purse seine fleet operating out of Tauranga, being some 10-15% of the value of the purse seine catch. 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:

- Mace & Company Ltd submission re introduction of kahawai into the Quota management System, Submission on Behalf of Sanford Limited, Exhibit to affidavit of Wilkinson, [Vol V, p 1484, p 14870-1488]

14. A large percentage of the purse seine catch is exported. The evidence from the recreational witnesses is that much of the end use of exported product is for purposes such as fish bait, and pet food.

- Affidavit of K Ingram, para 32 [Vol II, tab 14, p 190]

15. Kahawai has a special value for recreational fishers. The Minister's 2004 decision describes kahawai as the "people's fish". The South Australian Centre for Economic Studies (SACES) analysis concluded that the recreational fishers valued kahawai between 11 and 16 times higher than the commercial sector.

- Affidavit of K Ingram paras 29-30 [Vol II, tab 45, p 696-697]

16. 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 very poor catch rates in some areas such that in these areas (including the Hauraki Gulf Mark Park, an area of declared national importance) the allocation by the Minister based exclusively on existing catch history and then reduced proportionality did not meet the statutory purpose of providing for people's wellbeing.

17. In 2004, 7 out of 8 boats surveyed by NIWA, from boat ramp surveys in the Hauraki Gulf did not catch a single kahawai. There is evidence of declining catch rates in the Hauraki Gulf.

- Affidavit of J C Holdsworth, para 23.14-23.15 [Vol II, tab 17, p 314-315].

18. The High Court was correct to find that "*a self contained inquiry was necessary by express reference to the wellbeing factors relating to people in the gulf*" [para 82]. What reference there was in the Ministry's advice papers fell short of satisfying the Minister's statutory obligations under HGMPA: *Judgement* para 81.

19. In *Snapper* the Court of Appeal pointed to the absence of any legislative requirement to make proportional changes between the fishing sectors,

and the ability to make increases in recreational allowance to provide for population increase (Court of Appeal in *Snapper* p 7-18). There has never been a change in the recreational allowance for *any* fish species not proportional with a change for the commercial sector, nor any population adjustment despite the QMS having been in operation for 20 years.

- Affidavit of K.L. Ingram, para 36, p 7 [Vol II, tab 14, p 190]

20. It follows that the outcome of this case is important not just to kahawai but to other fish stocks with a recreational component.

Relevant Facts

21. The summary at para 9-14 of the submissions for the Commercial Fishers is generally accepted.

22. In relation to para 12 of the Commercial Fishers submissions referring to voluntary closure, it is acknowledged that voluntary closure has occurred but the recreational fishers believe that this has largely been a symbolic gesture, involving areas too shallow for purse nets:

- Submission of New Zealand Recreational Fishing Council, 16 April 2004, [Vol IV, p 1443]

23. Prior to the imposition of commercial catch limits in 1991 on the purse seine catch, the purse seine targeting of kahawai had grown significantly. The commercial catch had grown from a few hundred tonnes in the early 1970's, to reaching a peak of approximately 9,600 tonnes per annum by the late 1980's. There was a lack of scientific evidence to show whether catch levels were sustainable. Commercial fishers faced a statutory incentive to catch fish in order to build catch history records prior to introduction of kahawai to the quota management system.

- Affidavit of K.A.R. Walshe, paras 5.6, 6.1-6.2, 6.10 [Vol II, tab 16, p 219, 221-223]

24. Before the introduction of the commercial catch limits in 1990-1991, there was little information known about the level of non-commercial catch:

- Affidavit of K.A.R. Walshe, para 6.20 [Vol II, p 225].

25. The rapid increase in purse seine catches of kahawai led to increasing protests from non-commercial fishers of a lack of availability and decrease in recreational catch rates:

- Affidavit of J.A. Romeril, para 21-38 [Vol II, tab 15, p 206-211]
- Affidavit of K.L. Ingram, para 49-50 [Vol II, tab 14, p 193-195].

26. There is a Maori dimension to recreational fishing, who fish not only as "customary" fishers but also as "recreational" fishers:

- Affidavit of Raniera TeiTinga (Sonny) Tau [Vol II, tab 13].

27. The Minister's 2004 and 2005 decisions are "catch-history" decisions for both setting *initial* TAC's, and allocating the TAC's to the commercial and non-commercial and commercial sectors

28. The Minister's 2004 decisions (allowing for recreational interests, Maori customary fishers, and setting the TACC) were based solely on current use (catch history). As the Minister stated in his 2004 decision (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."

29. The Minister cut the allowance to the recreational sector and the commercial allocation by 15% in 2004 compared to their recent catch history or, "current use", and a further cut of 10% in 2005.

- [Vol III, 2004 decision, p 785]

30. The Minister's 2005 decisions were based on the 2004 decisions as the "starting point".

The Fisheries Act 1996: Scheme of the Act

31. 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.

32. 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.

33. The then Minister of Fisheries (Hon Doug Kidd) when introducing the Fisheries Bill, following the report back of the Primary Production Committee's report cited the principal changes to the 1995 Bill as follows: (*Hansard,* volume 557, p 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.

34. The "religious bits" as referred to by the Minister include the environmental principles (s.9) and the information principles (s.10) which apply to all person exercising or performing functions, duties or powers under the Act, in relation to the utilisation of the fisheries resources or ensuring sustainability.

35. The 1996 Act left unaffected the legislative scheme that non-commercial interests are to be allowed *before* any provision for the commercial fishing sector. The1983 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. The 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

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

37. Consistent with this, the 1996 Act provided a discretion by the Minister to set the TACC at, or to, zero: s.20(3).

38. As a result the legislation is structured so that non-commercial fishing interests are allowed for before any TACC, if any, and then after providing for other fishing related mortality, the TACC forms the balance.

39. 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).

40. 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 includes providing for people's social, economic and cultural wellbeing through fishing.

41. The Minister must consult before doing anything under s.11 and s.13(1), and also under s.21(1): see s.12 and s.21(2). 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 is presented to the Minister to make a decision.

42. Within Part 4 - 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).

43. 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].

44. The High Court judgment correctly reflects the scheme of the Act.

TAC Setting

45. The issues in this case are not about whether the Minister has favoured one sector over the other, or shown any preference or priority. The issues are about the application of the purpose provisions to the "machinery" provisions when setting TAC's, TACC's and allowing for recreational interests.

46. Contrary to the Commercial Fishers' submissions (paras 46-57), the High Court clearly recognised that a TAC *necessarily incorporates the utilisation objective* [para 46] and that the Minister's statutory obligation *is to exercise his powers for two complimentary purposes: Judgment* [para 44].

47. While necessarily incorporating a utilisation component, decisions under s.13 to set a TAC are primarily for the purpose of ensuring sustainability. That is consistent with the literal text of the Act, specifically:

- the heading to Part 3 of the Act;
- the definition of "sustainability measure" in s.2; and
- the separate definition of "ensuring sustainability" in s.8(2) of the Act.

48. It is submitted that nothing turns on the reference to "restoring the stock" to the level of maximum sustainable yield. It is evident that s.13(3) applies when considering the way in which, or the rate at which, a stock is moved towards MSY (whether above or below that level) [para 49 of Judgment]. There was no target MSY level for kahawai as the status of each stock was unknown:

- See Affidavit of the Ministry's Chief Scientist Dr K.J. Sullivan, para 26-28 [Vol II, tab 30, p 477-479].

49. By way of comparison to the *Snapper* case, the evidence was that the Hauraki Gulf/Bay of Plenty sub-stock for snapper was "*about half the* B_{MSY}," and that both recreational and commercial catches were declining (High Court in *Snapper* case, p 26 onwards). In that case there was a definitive MSY target to aim for. Not so for kahawai.

50. In the absence of a target level and uncertainty about the state of kahawai stocks, the Minister's 2004 and 2005 TAC decisions were intended to "*at least maintain, if not improve, current biomass"*:

- 2004 decision letter, para 6, para 19 [Vol III, tab 46, p 783-784]: 2005 decision letter [Vol III, tab 48, p 973-974].

51. The Court recognised that s.13(3) related to moving a stock "*to or above a level*" that could produce a maximum sustainable yield: *Judgment,* para 53.

52. It is submitted that the High Court Judge was correct to conclude as he did that:

a. The *social, cultural, and economic factors* [compare s.8(2) social, economic and cultural wellbeing] are a qualified subjective discretion by the addition of the words "*as he or she considers relevant*": *Judgment*, para 50; [1]

b. Only arise for discretionary consideration when determining the manner or speed of restoring the stock to the level of MSY, not in setting the level of the TAC itself: *Judgment*, paras 49 and 50.

53. Given that there is no appeal in respect of the TAC decisions, the High Court's decision in respect of the TAC setting process is not at the heart

[1] See "Subjective Language" in Wade & Forsyth, *Administrative Law*, 9th Edition, Oxford University Press, 2004, pp 419-429.

of this case, save for the Court's decision on TAC setting for the Hauraki Gulf.

TACC

54. In response to the submissions of the Commercial Fishers (F3 paras 58-70), it is submitted:

    a. That the Judgment of the High Court as to the relationship between s.21 and the purpose in s.8 is correct, and consistent with the purposive approach to interpretation, which is mandatory;

    b. The High Court decision is not inconsistent with the Court of Appeal's decision in the *Snapper* case;

    c. That the decision of the High Court as to the consideration of the commercial sector when allowing for recreational interests was correct.

Relationship between Sections 8 and 21

55. It is fundamental that powers must be used to promote the policy and objects of the empowering enactment. It is an administrative law truism that "*the decision-maker must understand correctly the law that regulates his decision–making power and must give effect to it*": per Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 410 (HL).

56. Any discretion conferred in legislation *"should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the legislation as a whole ..."*. A remedy will lie if a discretion is used *"to thwart or run counter to the policy and objects of the Act…"* per Lord Reid in *Padfield v Minister of Agriculture, Fisheries and Food and Ors* [1968] 1 ALL ER 694, 699 (at line C, and line D).

57. The High Court's findings that *"the Minister did not have a wide discretion on what factors he took into account when determining allocations; he was bound to consider social, economic and cultural wellbeing when allowing for recreational interests in the stock"* [para 67] is a correct conclusion that the discretion had to be exercised within the policy and purpose of the Act, including that particularly expressed in section 8.

58. The High Court was correct to hold that the Minister was obliged to look beyond s.21 itself to the policy and purpose of the Act when applying the legislation. The purposive approach is mandated for all legislation: section 5(1) Interpretation Act 1999.

59. As recently observed by the Supreme Court in *Commerce Commission* v *Fonterra Co–Operative Group Ltd* [2007] 3 NZLR 767, 776, at para 21, Tipping J, giving judgment for the Court, said:

> "It is necessary to bear in mind that s.5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment [2] must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment."

60. It is further submitted that the High Court was correct in finding that the exercise of powers under s.21 is principally a *utilisation* decision.

61. Since decisions under s.21 are not a "sustainability measure", they are not primarily concerned with "ensuring sustainability" (compare s.13). It is submitted that the statutory purpose in section 8 of conserving, using, etc, fisheries resources to enable people to provide for their social, economic, and cultural wellbeing recognises:

a. An enabling purpose i.e. of enabling people to provide for their wellbeing;

b. Economic wellbeing is not the dominant or sole policy. Social, economic and cultural wellbeing are on a par;

c. Reference to social, economic and cultural wellbeing mirrors the utilitarian purpose in other significant environmental legislation e.g. s.5(2) Resource Management Act 1991, and s.5(b) Hazardous Substances and New Organisms Act 1996, No. 30.

d. The concept of "wellbeing" on a plain and ordinary interpretation conveys the state of being healthy or happy, a distinctly utilitarian philosophy.[3] The Shorter Oxford Dictionary (5th Edition 2002) describes *"well-being" as*

> "healthy, contented or prosperous condition; moral or physical welfare of a person or community); [*transf*]. satisfactory condition (of a thing)"

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[2] "Enactment" means "the whole or a portion of an Act or regulations" (see s 29 of the Interpretation Act)

[3] As famously noted by Jeremy Bentham "*The greatest happiness of the greatest number is the foundation of morals and legislation":* 'Extracts from Bentham's Commonplace Book' The Works of Jeremy Bentham, published under the superintendence of ... John Bowring, 11 vols., (Edinburgh: Tait, 1843) vol. x., p 142; from University College of London "Bentham Project" website http://www.ucl.ac.uk/Bentham-Project/Faqs/fquote.htm.

e. The statutory purpose must be applied in the New Zealand social, economic and cultural context. For example, Northland Maori leader, Mr Sonny Tau deposes as to the significance of kahawai catch to Northland Maori, and the significance attributed to the concept of manaakitanga and giving to visitors/manuhiri. These values do not easily fall into a simple measure of existing catch.

- Affidavit of Raniera TeiTinga (Sonny) Tau [Vol II, tab 13].

f. There is a deliberate openness in the reference to recreational "*interests*" and to "*wellbeing*". The legislation does not use the more narrow formula of recreational "catch"

62. The High Court was referred extensively to both the High Court decision of McGechan J, and the decision of the Court of Appeal in the S*napper* case.

63. Both the High Court and the Court of Appeal in the *Snapper* case recognised that the way in which the legislation was structured meant that the recreational interests were to be allowed for *before* setting the TACC. The Court of Appeal in *Snapper* described the nature of the Minister's task under s.21 (p 17 (emphasis added)):

> "It is important to recognise that what is allowed for by the Minister in respect of the interest for which he must allow **before setting the TACC** is not a quota as such… He must make such allowances as he thinks appropriate for the other interests **before** he fixes the TACC. That is how the legislation is structured.

64. Consistent with this Harrison J in the judgment under appeal recognised at para [58]:

> When setting a TACC the **statutory starting point** is to identify and make an appropriate allowance for recreational interests by reference to the social, economic and cultural value of the resource to their wellbeing. The components of 'wellbeing' are both quantative – 'economic' 'and qualitative' 'social and cultural'. The qualitative component defies an objective or tangible measure. It requires consideration of a range of factors. While the result of the TACC in allowances evaluation will necessarily be expressed in quantative or volumetric terms, the process requires a qualitative or non-quantative assessment of the types suited to the Minister's exercise of judgment."

65. The High Court then proceeded to recognise some qualitative factors applying to kahawai: *Judgment* para 59.

66. It is submitted that the Ministerial task is to allow for the interests *in that stock* [referring to the quota management area]. The starting point is therefore to ascertain the nature and extent of the interest in that stock. Similarly in the *Snapper case*, McGechan J, p 146, when considering provision for Maori customary interests said:

> "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"

67. Allowing for recreational interests therefore necessarily involves:

a. Making a qualitative and quantitative evaluation of the nature and extent of those interests, in that stock.

b. Using the "best" information s.11. It is submitted that information is best if it will further the statutory purpose (see opening words to s.10). Information that measures recreational wellbeing in any meaningful way may be different from information measuring commercial wellbeing (e.g. tonnages). In a recreational fishing context information may include how readily kahawai can be caught, their size (recognising recreational fishers value size of fish) and that recreational methods vary considerably from commercial methods of fishing, being either shore based or boat based, and includes fishers who fish for sustenance i.e. for food:

- Affidavit of K.L. Ingram, para 18-19 [Vol II, tab 14, p 188]; and
- Affidavit of R.O. Boyd, para 25- [Vol II, tab 18, p328].

> "recreational fishing interests are much more complex the simple volume of catch ... The Minister's policy preference for using current use (i.e., catch) as a basis for allocation does not recognise that catch on its own may not be a meaningful measure of the recreational interest in a fishery".

68. The appellants refer (para 64, submissions Commercial Fishers) to the Court of Appeal's decision in *Snapper*, noting at p 17:

> 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.

69. With respect, it cannot have been intended by the Court in *Snapper* that the "allowance" is simply to be reduced to some mathematical formula based on an estimate of recreational catch. This would confine the Minister's discretion and flout the section 8 imperatives. The legislation does not use the more narrow formula of recreational "catch". In addition estimates of recreational catch will always be variable. This statement by

the Court in *Snapper* is in any event *obiter*, as the issue on appeal before the Court of Appeal was whether there was any sector priority.

70. At the time of the Minister's 2004 decision, this was an "*initial allocation"*. Although there was an existing commercial fishery, there were no property rights in the form of ITQ.

71. The High Court's recognition [as the statutory starting point] of first identifying, and making appropriate allowance for recreational interests by reference to their wellbeing, recognised, in effect, that recreational fishing interests are a pre-existing common law legal right.

72. At common law there is a recognised public right of fisheries, subject only to express statutory limitation: *Judgement* para 59(3). And see: *Attorney-General (British Columbia)* v *Attorney- General (Canada)* [1914] AC153, 169 (PC), per Viscount Haldane[4]; *Halsbury's Laws of England* (4th edition), Volume 18: Fisheries p 258, para 609; and *Waipapakura v Hampton* (1914) Vol 33 NZLR 1065, 1071, per Stout CJ.

73. It is submitted there is nothing in the statutory scheme to indicate these rights are expunged.

74. The Commercial Fishers submit that the High Court made an error by disregarding commercial interests (para 56, 67, 68 submissions of Commercial Fishers) when setting the TACC. This is not correct. In fact the High Court recognised "*..it is appropriate, indeed necessary, when allocating an TAC by fixing a TACC and [recreational] allowance to take account of commercial interests to the extent that they provide for people's wellbeing*…" *Judgment* para 57, and see paras 60, 72-74.

75. If a purposive approach is to be applied to the exercise of the discretion in s.21, then, it must also be accepted that the statutory purpose cannot be solely confined to recreational wellbeing. To that extent a broader consideration of people's social economic and cultural wellbeing is

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4 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.

necessary and appropriate. However the "..*statutory starting point is to identify and make an appropriate allowance from recreational interests by reference to the social, economic and cultural value of the resource to their wellbeing": Judgement para 58.* The application of the utilisation purpose of the Act is to the forefront of the decision maker's exercise of powers under s.21. The High Court did not misconstrue this fundamental relationship between s.21(1) and s.8.

Consideration of Qualitative Factors Affecting Recreational Fishers

76. The error was not that the Minister was not advised by the Ministry as to the qualitative concerns by recreational fishers (para 71 onwards of the Commercial Fishers submissions).

77. Rather, the application of the Ministry's policy preferences to making decisions based (exclusively) on catch history and allocations proportionally (in proportion to each sectors "share" of existing catch), shut-out application of the utilisation approach (which recognises people social, cultural and economic wellbeing), the very approach mandated by the Act. The Second and Third Respondent's submissions now properly accept this error.

78. The Ministry was transparent in its policy preference for catch history, and the Ministry's policy preference to "allocate" the TAC proportionally between the fishing sectors.

- 2004 FAP, para 73 [Volume III, p 678-679] – "there is information available for both catch history (current utilisation) and for utility value. In shared fisheries MFish has a policy preference in favour of the catch history allocation model in the absence of clear information to the contrary. While the utility based model is not discounted altogether its application to kahawai is problematic as the information is uncertain."
- 2004 FAP, para 338(d) [Vol III, p 752 & 770] – "MFish has a preference for the allowances and TACCs within the lower of the TACs proposed to be determined in proportion to the current use of recreational and commercial sectors…"
- 2004 FAP, para 129(d) [Vol III, p 721].
- 2004 FAP, table 12 – final proposal to set TACs, allowances and TACCs for kahawai [Vol III, p 751].
- 2005 FAP, para 149, p 433 [Vol II, p 933].
- 2005 FAP, para 66, p 68 [Vol II, p 858] – "MFish favours the adoption of a proportional policy as a default approach when adjusting the TAC".
- 2005 FAP, para 27, p 407 [Vol II, p 907].

79. As the High Court found "*MFish's reliance on catch history, rather than utilisation, [formed]..the exclusive basis for advising allocation of the TAC*

and thus fixing the recreational fishers' interest in the Kahawai stocks." *Judgment* para 69. Accordingly the TAC, allowances for recreational fishing, and TACC's were each calculated solely from the (uncertain) recreational catch history information, and then proportionally reduced.

80. As the High Court noted at para 70-71, the Minister adopted catch history as the sole criterion for the basis of allocation, in both 2004 and 2005 in reliance on MFish's advice. The Minister's 2004 letter stated:

> 21 There are a number of competing demands for the available yield from kahawai stocks. This was clearly apparent from submissions. I recognise that there will be socio-economic impacts from making allowances and setting TACCs. I have noted in particular the potential of catch reductions on commercial operations that rely on kahawai as an integral component of their annual catch mix. I have carefully considered these impacts in coming to a decision. I have examined options for increasing the value to society from allocation decisions. However, in the case of kahawai, given the uncertainty in the available information 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. My decisions on allowances for kahawai are outlined in the Table 1 below.

81. And see: 2004 FAP para 183 [Vol III, p 730] and 2005 FAP para 160 [Vol III, p 934, 2005 decision letter [Vol III, p 974].

82. Underpinning the Ministry's policy preference was the Ministry's concern about the risk of litigation by the commercial fishing sector – that any non-proportional allocation or what the industry calls "re-allocation", in preference to the recreational fishing sector would result in litigation by the commercial sector. This was advised to the Minister at the outset in the 2004 FAP and again in FAP 2005.

- 2004 FAP, para 66, p 17 [Volume II, p 667-668] – under heading "Allocation of TAC" – "…the introduction process allocates ITQ to commercial fishers as a property right. Any subsequent redistribution of the commercial allocation of the fishery to another sector may be subject to payment of compensation. (No compensation is payable where measures are taken to ensure sustainability).."
- 2005 FAP, para 68, p 15 [Vol II, p 805].

83. Subsequently, when a further potential reduction was proposed in 2005, the commercial fishing sector made submissions that any such "re-allocation" was a derogation of their property rights, giving rise to claims to compensation not protected by section 308 of the Fisheries Act 1996.

- 2005 FAP, para 1, p 55 [Vol II, p 845].
- 2005 FAP, para 3, p 55 [Vol II, p 845] – SeaFIC (New Zealand Seafood Industry Council) submits "that if preferential allocation options are retained in the FAP, the Ministry must be informed of the risks to sustainability and economic efficiency, and of the significant Crown liability for compensation."

- 2005 FAP, para 15, p 57 [Vol II, p 847] – "Sanford… believe any non-proportional reduction amounts to reallocation from the commercial to recreational sectors and raises the issue of compensation for lost property rights."
- 2005 FAP, para 72 – 89, p 69 – p 72 [Vol II, p 859 – 862].

84. Declarations were then sought by the Commercial Fishers in these proceedings that section 308 of the Act did not protect the Crown against claims of compensation - although this claim was not pursued.

85. The recreational fishers expressed concern that the Ministry's policy preferences of catch history and proportional allocation were based on the Ministry's concern to minimise the risk of litigation from commercial fishers.

- Affidavit of K L Ingram, para 36, p 7 [Vol II, tab 14, p 190].
- Affidavit in reply of P D L Barnes, para 8 – 9 [Vol II, tab 35, p 531 – 532]; and Ministry document "*Proportionality in Allocation of the TAC*", Exhibit "A" to Affidavit of P D L Barnes, dated 23/08/05 [Vol IV, p 1846 – 1848] (not contested).

86. It is accepted (para 87 submissions of Commercial Fishers) that the Ministry's policy preferences did not "fetter" the exercise of the Minister's discretion. At least in its 2005 FAP the Ministry was careful to couch its advice to the Minister in terms which were non-binding.

87. However, the only options presented to the Minister in the Ministry's recommendations were based on this advice, which was to allocate exclusively based on catch history and apportion any reduction in proportion to existing utilisation.

- Judgement: para 69
- 2004 FAP – final recommendations, p 534 – 536 [Vol III, p 770-772].
- 2005 FAP – final recommendations, para 269, p 450 – 452 [Vol III, p 950 – 952].

88. The practical effect of the Ministry's policy preference is to read down the provision for "recreational interests", to read simply "recreational catch". The effect of the Ministry's policy preferences was to influence the Minister to exclude even the limited information he had as to the non-commercial sectors' "social, economic and cultural well-being", e.g. the SACES analysis, and other 'anecdotal' information from actually being applied in the TACC decisions.

89. Accordingly, the Ministry, and as a consequence the Minister, treated consideration of "people's social, economic and cultural well-being" and the HGMPA as incidental matters to policy preferences for catch history and proportionality.

- Judgement: para 67-69

- Evaluation of social, cultural, and economic factors in 2004 FAP p 47-48, paras 126-130 [Vol II, p 696-697] (exactly the same dismissive comments could have been made about catch history from 1999/2000 and 2000/2001)
- 2004 FAP p 81-83, paras 184-200 [Vol II, p 730-732]
- 2004 decision letter, p 4, para. 21 [Vol II, p 785]
- "Social and Cultural Implications"-in FAP 2005 p 432-433, paras 143-148 [Vol II, p 932-933] – Para 148…"*MFish agrees it needs to improve its ability to gather and analyse social and cultural information*".

90. As to the quality of the information used, the High Court noted that MFish actually recognised the recreational fishers' qualitative argument for preference based upon comparative values in terms of social or cultural wellbeing, but then discarded it on the ground of subjectivity - the very quality it possesses.; *Judgment* para 67 and 68.

91. The High Court was correct to find that "a policy preference for catch history cannot take precedence over a mandatory requirement to adopt a utilisation approach": Judgment: para 67.

92. The Commercial Fishers (para 75-70) criticise the High Court's decision in respect of this finding on the use of catch history. This criticism is not warranted. The High Court correctly identified that catch history, like the utility information based on an assessment of marginal willingness to pay in the SAECES report, should simply have been one factor in the overall mix for the Minister's proper assessment. Referring to the qualitative factors applicable to kahawai, the Court said: *[t]he Minister must weigh these factors in the mix*: para 60. And also, *[t]he marginal willingness to pay test may have provided some guidance but it could never be determinative; para 64.* The High Court said that catch history fell into the same category:

> [73] Adoption of financial modelling to assess the qualitative factors of cultural and social wellbeing, such as the hypothetical marginal willingness of a recreational fisher to pay for the stock, might provide assistance as a reference point but it is neither exclusive nor determinative. An analysis of catch history falls into the same category, especially where there is evidence that current levels of use do not satisfy need. Self-evidently, the characteristic availability and value of the particular species will be very material; the approach to setting the TACCs and allowances for kahawai will differ from another species. There are no truly reliable objective criteria. Whether the results of the Minister's review are the same as, similar to or materially different from the current TACCs and allowances will depend upon the Minister's subjective evaluation of all relevant factors.

93. It is submitted that the High Court judgment is correct in this respect and in its conclusion that the Minister's decisions based solely on catch history were invalid, findings that are now accepted by the Second and Third Respondents.

Reply to Claim that Recreational Fishers got the Allowances Asked for

94. The third alleged error (para 91-96) for the Commercial Fishers claims that the High Court:

> "lost sight of the fact that in terms of s.21(1) the Minister did "allow for" recreational interests almost to the extent the recreational fishers had asked for." (para 91)

95. This claim is incorrect. In volumetric terms, the first named respondent, New Zealand Recreational Fishing Council submitted in 2004 that:

- "A rebuild of the kahawai fishery is required urgently;
- Commercial limits should be capped at [for KAH1] 330 tonne;
- Await a [further] nationwide survey to establish actual recreational catch and then make cuts etc as necessary…"

From Submission of New Zealand Recreational Fishing Council [volume IV, p 1437-1448, at p 1448]

96. No specific numeric value was specified in the submission for the New Zealand Recreational Fishing Council, although by implication non-commercials would get the balance after setting the TAC, to allow rebuild.

97. The New Zealand Big Game Fishing Council submission (jointly with option 4 and the NZ Angling & Casting Association) [Volume IV, p 1449-1483, at p 1482] sought specific tonnages for KAH1 as follows:

Table 1. Distribution of the kahawai TAC by quota management area.

QMA	Tonnage to allow for Customary	Tonnage to allow for Recreational	Tonnage to allow for Other Mortality	Commercial Allowance TACC	Total TAC
KAH1	1000	2000	22	430	3452

98. Allowing for the customary fishers, the proposed non-commercial allowance sought in KAH1 is a ratio of some 6:1 to the commercial catch.

99. The submissions of both of the first respondents also need to be read in context with their other submissions which broadly:

- Attribute poor catch rates experienced by non commercial fishers to the effects of purse seine targeting of kahawai;
- Expressly seek a re-build of the kahawai fishery;
- Seek the removal of target purse seine fishing from commercial catch rate history when considering the TACC.

- Oppose the use of catch history as the sole determinant of recreational allowances, as is recognised at para 88 of the Appellants' submissions.

100. The submissions by New Zealand Big Game Fishing Council (but not New Zealand Recreational Fishing Council) do support use of the later recreational harvest estimates from the year 2000 and 2001 recreational surveys [volume IV, p 1481], but otherwise reject allocation between the fishing sectors based on catch history.

101. Apart from submissions on behalf of the first respondents, the Ministry also received submissions from a large number of recreational groups and individuals, and many more emails and form petitions: see FAP 2004, paras 5-10, [Vol II, p 698-700]. The first respondents were by no means the sole recreational voice.

Hauraki Gulf Marine Park Act 2000- TAC and TACC

102. There is no disagreement with the statement of law at paragraph 99 of the Commercial Fishers submissions that:

- Before setting any sustainability measure the Minister "*shall have regard to any provisions of … 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*: s.11(2)(c)."

- That section 13 of the Hauraki Gulf Marine Park Act 2000 provides that persons exercising powers for the Hauraki Gulf (including the Fisheries Act 1996, and the Fisheries Act 1983) must have "*particular regard to the provisions of sections 7 and 8 of this Act*".

103. As submitted in para 8 above the High Court judgment incorrectly states that the HGMPA applies only to the setting sustainability measures when section 13 makes it clear that it is relevant to all decisions affecting the Hauraki Gulf Marine Park – see also the Second and Third Respondent's submissions, paras 3.4 and 20.

104. What remains at issue on this appeal is whether the High Court judge was correct in also founding his decision on invalidity on the Minister's failure to have sufficient regard to the HGMPA. The First Respondent supports the Judge's reasoning on this issue – the Appellants assert that the Minister had sufficient regard to the provisions of the HGMPA. The Second and Third Respondents assert that the Minister had regard to the HGMPA..

105. The Hauraki Gulf legislation has a lengthy preamble. The stated purpose of the HGMPA is contained in s.3:

> "The purpose of this Act is to—
>
> (a) integrate the management of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:
>
> (b) establish the Hauraki Gulf Marine Park:
>
> (c) establish objectives for the management of the Hauraki Gulf, its islands, and catchments:
>
> (d)…."

106. The obligation in both cases is to have regard/particular regard to "*the provisions*" of sections 7 and 8 of the HGMPA.

107. Neither FAP 2004 nor FAP 2005 cite the provisions to the Minister.

108. It was submitted that there was a totally inadequate recognition or appreciation by the Ministry when advising the Minister of the protective regime towards management of the Hauraki Gulf, namely:

- "*The protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf…*:":s.8(a) HGMPA.
- "*The protection, and where appropriate, the enhancement of the natural…and physical resources of the Hauraki Gulf…*":s.8(b)
- "*The maintenance, and where appropriate, the enhancement of the natural…resources of the Hauraki Gulf…and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf in New Zealand*": s.8(e) HGMPA
- "*The maintenance, and where appropriate, the enhancement of the natural… and physical resources of the Hauraki Gulf…which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.*":s.8(f).

Hauraki Gulf Marine Park Act 2000- TAC

109. Decisions under s.13 of the Fisheries Act when setting a TAC are made in respect of the quota management area relating to each quota management stock.

110. The effect of section 11(2)(c) is to impose a mandatory obligation for the Minister "to have regard to" a specific geographic locality [the Hauraki Gulf Marine Park] within the quota management area relating to the quota management stock [KAH1] before setting any sustainability measures as *apply to the coastal marine area and are considered by the Minister to be relevant*.

111. In the FAP 2004, there is no reference to the Hauraki Gulf Marine Park Act in the generic *Statutory Obligations and Policy Guidelines* part of the

advice paper [Vol III, p 653-672]. However at para 65(i) in the IPP part of the advice, under the heading "Statutory Considerations" the Ministry advise the Minister that when evaluating the management options the following statutory considerations have been taken into account:

> "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 or plan under the Conservation Act 1987, that are relevant to setting TACs for kahawai at this time (as required by ss 11(2)(a) and (b)). MFish is also aware of the provisions of the Hauraki Gulf Marine Park Act. 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."**
>
> [FAP 2004, para 65(i), Vol III, p 683-684] (emphasis added)

112. At the time of the IPP the Ministry was recommending no change to current utilisation.

113. The bland statements that "*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*" treats the HGMPA provisions as synonymous with the quota management system. The management scheme for the Hauraki imposes positive legal duties on decision-makers, as indicated by the words: protection, maintenance, enhancement. Clearly both the HGMPA and the Fisheries Act 1996 must work together, but the terms of the HGMPA convey no passive formulae.

114. The Minister 2004 decision letter was silent as to consideration of the Hauraki Gulf, as was the 2005 letter.

115. Although regard to the HGMPA in the TAC setting context is qualified by a subjective discretion, the Minister should be properly directed in law. In addition there should be no mistake of fact i.e:

> "the relevant considerations which the Minister was bound to take into account included such facts obviously material to the mandatory statutory considerations as were or ought to have been known to himself or the Ministry. That is to say, the duty to consider statutory criteria extends to facts obviously material to the mandatory criteria which extends to facts so plainly relevant to those criteria that Parliament would have intended them to be taken into account and a reasonable Minister would not fail to do so.

New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries [1998] 1 NZLR 544, 522 per Cooke P.

116. A consequence of the Ministry's policy preference to setting allowances based on catch history is that in those areas which had poor recreational catch, or which had been depleted by commercial fishing, any future allocation would be based on existing catch, i.e. what is caught at the moment, is what you will always get. Information which the Ministry did have concerning poor catch rates in the Hauraki Gulf, was trivialised, in favour of an outcome to accord with the Ministry's policy preferences.

117. For example, following submissions to the 2004 IPP, the Ministry records as Annex 1 to the FAP (other sources of information [Vol III, p 755, 756]), the submission of NZ Angling Limited (a tourist guiding business for salt water fly-fishers, and fly-fishing tournament promoter) who state that "*declining kahawai numbers has resulted in the cessation of the "Saltwater Sundays" programme in the Hauraki Gulf*. (inter alia). The Ministry when advising the Minister on recreational catch per unit of effort (CPUE) in 2004 refer to landing rate data but in terms which are dismissive, saying:

> "While reported catch rates are low a range of factors including variations in the times spent targeting other species can explain this. Targeting kahawai can involve great amounts of time searching for the highly mobile species of fish".
>
> FAP 2004, para 350, p 112 [Vol III, p 761].

118. In fact the Ministry had contracted NIWA to conduct interviews of boats returning to boat ramps in the Hauraki Gulf (the boat ramp surveys). Data was available for 1999, 1994, 1996 and since 2001, but other than the dismissive comments in FAP 2004, para 350 [Vol III, p 761] the Ministry do not refer the Minister to the data at all in 2004 .

- Affidavit of Holdsworth para 23.13 – 23.15 [Vol II, tab 17, p 314 & 315].

119. As Holdsworth describes in 2003, 3415 boats were interviewed. The results were that one kahawai was caught per 3.9 fishing trips ie. nearly 3 out of 4 boats were unsuccessful at catching even one kahawai. In 2004, 6304 fishing parties were interviewed over some months between December 2003 and April 2004. Just 764 kahawai were measured which is less then 1 kahawai per 8 fishing trips ie: 7 out of 8 boats didn't catch a single kahawai:

120. Accordingly it is submitted that the High Court was correct to conclude as it did that the Minister's decisions in 2004 failed to take account of sections 7 and 8 HGMPA when fixing the TAC for KAH1: *Judgement* para 83.

Hauraki Gulf Marine Park Act 2000- TACC

121. There is no express recognition in the Ministry advice of the Minister's obligation to *have particular regard to* the provisions of sections 7 & 8 of the HGMPA when allocating the TAC and allowing for recreational interests: s.13 HGMPA.

122. Nor is there is no appreciation in the Ministry advice in 2004 or 2005 that the requirement to have '*particular regard'* to the Hauraki Gulf when setting TACC's and recreational allowances for KAH1 could lead to the Minister doing anything different, i.e. being more conservative, or having a non-proportional cut, such as by cutting commercial catch only. Presumably this lack of advice on alternatives was influenced by the Ministry view that existing catch was an appropriate measure of recreational interests, and that "*MFish considers that the setting of sustainability measures for kahawai will better meet the purpose of the Act*"

123. In respect of setting the TACC in 2004, the Minister's decision has particular regard to the potential of catch reductions "*on commercial operations that rely on kahawai as an integral component of their annual catch mix*". [Minister's decision letter 2004, para 21, Vol III, p 785]

124. The 2005 decisions were "better" (the Ministry was on notice as to the likelihood of challenge) in the sense that there is recognition given to the Hauraki Gulf in the Ministry's advice to the Minister in the 2005 FAP. In particular:

- The Ministry corroborate recreational claims of declining catch per trip in the Hauraki Gulf in recent years.
- Prior to decision-making the Minister had called for presentation of options to him for area constraints in the Hauraki Gulf [Vol V, *letter from Ministry of Fisheries – kahawai – review of 2004 decisions on catch limits and allowances*, p 1746-1751, Minister's handwritten notes at p 1751; and see advice to Minister dated 6 July 2005 *kahawai-proposal to review management measures in Vol V,* [p 1769 – 1777].

125. However the Minister's 2005 decision letter still contains no reference in his reasons to the Hauraki Gulf, nor has any particular regard to the Hauraki Gulf when determining to set the TAC. The same response i.e. status quo and/or a notion 10% further reduction is proposed by the Ministry in the FAP 2005 ie the same response is proposed in Southland, as it is in the Hauraki Gulf. Of interest the 2005 decision letter makes no

reference to the mandatory Hauraki considerations for other relevant fish stocks either.

126. Contrary to the submissions of the commercial fishers, the recreational fishing sector does not have the Hauraki Gulf to themselves. The Ministry advise the Minister that:

> "Recreational kahawai catches for the Hauraki Gulf appear to have declined from about 180 tonnes in 2002. This value is highly uncertain [relating to diary survey estimates] to a summer time catch of 30.5 tonnes [from boat ramp surveys] in 2004 – 2005. More significantly boat ramp sampling suggests a decline in recreational catch per unit of effort in the area."
>
> [Vol V, p 1776]

127. In comparison commercial catches from statistical areas 005, 006, and 007 (the areas incorporating the inner Hauraki Gulf and the Firth of Thames) ranged between 118 to 168 tonnes during the past five years: *Letter from Ministry of Fisheries dated 6 July 2005 – kahawai – proposal to review management measures*, [Vol V, p 1774]. Within the Hauraki Gulf, most of the commercial catch is taken from statistical area 007 [Vol V, p 1775].

128. There is an absence of any advice in the FAP 2005 that recognises or refers to the "provisions" of sections 7 and 8 of the Hauraki Gulf Marine Park Act, and instead the repetition of the (earlier) assumption that setting the TAC, TACCs and allowances will meet the objectives of the Hauraki Gulf Marine Park Act.

129. When coupled with the Ministry's policy preference for catch history and proportionality there is no meaningful consideration of any option apart from the status-quo or an arbitrary (and national) 10% reduction to both fishing sectors, i.e. no consideration of options towards a more conservative reduction, or a cut to the TACC only in the Hauraki Gulf. The later option would have run counter to the Ministry's policy for proportional allocation.

130. Contrary to the Ministry's submission, paras 88-96, the Ministry/Minister's consideration of the mandatory considerations under the HGMP Act were inadequate.

> 2004 - FAP p 34, para. 65(i); 2004 FAP p 98, para. 303; nothing in decision letter, [Vol III, p 782-787]; 2005 FAP p 390 [Vol III, p 684], para, (k) 2005 [Vol III, p 973-974]; [Vol III, p 747]; 2005 FAP p 446, paras 241-244 [Vol III, p 946]; nothing in decision letter

131. Despite, for example:

a. The NIWA boat ramp surveys indicated the lowest catch rates of kahawai in the Hauraki Gulf since 1991 (1 in 8 boat trips, 1 in 100 hours, juvenile fish).

- Affidavit of Holdsworth, para 23.12-23.29 [Vol II, tab 17, p 313-318]
- Length and age compositions of recreational landings of Kawahi in KAH1 in January to April 2003-04 and 2003-05, p 8 [Vol V, p 1940].

b. The fact that both plaintiff organisations had been making submissions to the Ministry/Minister since 1990/91 about the degradation of the kahawai fishery.

- Affidavit of Romeril, para. 24-NZBGFC since August 1990 [Vol II, tab 15, p 207-208]
- Affidavit of Ingram, para. 49 NZRFC since August 1991 [Vol II, tab 14, p 193-194]

c. A continuing commercial take of 130/140 tonnes in the Hauraki Gulf.

d. The loss of ubiquitous schools of kahawai and accompanying kahawai birds working the surface of the Hauraki Gulf.

- Affidavit of Romeril, para. 17 [Vol II, tab 15, p 203-204]
- Affidavit of Rintoul, para. 1.5-1.6 [Vol II, tab 33, p 488-489]

no critical consideration was given to the statutory obligations under the HGMP Act;

- 2004 FAP, p98, para. 303 [Vol III, p 892], referring back to 2004 IPP, p 4, para. 65(i) [Vol III p 684], and the discussion in the 2005 FAP; p 446, paras 241-244 [Vol III, p 946], relating back to 2005 IPP, p 90, para. 104(k) and (n) [Vol III, p 892].

132. There is no apparent recognition of the physical boundaries of the Hauraki Gulf Marine Park when advising the Minister as to the potential for area constraints [see Map 1 and Map 2 depicting statistical areas 005, 006, and 007 of the Hauraki Gulf in *letter from the Ministry of Fisheries dated 6 July 2005 "kahawai – proposal to review management measures*", [Vol IV, p 1769 – 1777, at p 1771-1772].

133. There is no recognition of the positive duty towards enhancing, maintaining, and protecting the recreational well being of people and communities who (in terms of the preamble) uses the Gulf for recreation and for sustenance.

134. For these reasons the First Respondents support the conclusion in the High Court judgment that a further reason for the invalidity of the 2004 and 2005 decisions fixing the TAC for KAHI was the failure to have proper

regard to the provisions of the HGMPA and that same conclusion should apply to the fixing of the TACCs. .

Alleged failure to implement measures to monitor recreational catch

135. The First Respondents have read the submissions for the Minister/Ministry, and support those submissions in relation to the Commercial Fishers claims that the Minister acted irrationally by not implementing measures to monitor recreational fishing catch (para 103 onwards – Submission of Commercial Fishers). In addition the following submissions are made.

136. The counterclaim relief (para 94.6, 94.9 of the counterclaim) seeks mandatory declarations or directions, involving the exercise of the Executive's regulatory power. Even if such relief were appropriate (being denied) any such remedy would be a discretionary one.

137. It is submitted that given the work the Ministry is doing to monitor recreational catch there is nothing approaching an error or irrationality in this case, nor any need for orders of this kind.

a. As the High Court recognised "*The bottom line is sustainability. That must be the Minister's ultimate objective. Without it, there will eventually be no utilisation"* Judgment: para 17. As noted above para 51 in the absence of a target level and uncertainty about the state of the kahawai stocks, the Minister's decisions were intended to "*at least maintain, if not improve, current biomass"*. The evidence from the commercial witness, Mr Starr, is that stocks are not in need of urgent sustainability attention likely to be above BMSY:

- Affidavit of Starr [Vol II, tab 23, para 63.5, p 346-67].

b. In Snapper the court rejected commercial criticism that the Minister's decision was flawed because he had not taken steps to contain the recreational fishery (p 18). The Court however said that *"the Minister must act reasonably to seek to stop the saving resulting from TACC reductions being lost to recreational fishing"* (p 18). Here there is a different factual context. There is no evidence that sustainability is imperilled by the recreational catch, unlike *Snapper*, where there was evidence of increasing recreational catch, and a stock at least half of the level required to maintain sustainable stocks [see above para 49].

c. There is no evidence to suggest that recreational catch is exceeding current allowances.

d. Because the public right of fishing is an open access right, and the conditions suitable to near shore recreational fishing vary (concentrated in time i.e. predominantly summer, concentrated in location, and subject to weather, and limited in fishing method) it is likely that there will always be variation in estimates of recreational catch, and variation in actual catch. It is difficult to avoid the conclusion that the system has to be managed to accommodate this variability for the (relatively) small number of stocks that are sought after by the non-commercial fishers. After all, recreational fishers are exercising a longstanding public right, albeit one that is subject to bag limit and other method restrictions.

138. The Appellants seek to define the need for monitoring of the recreational catch as a significant public policy issue, with the claim that the (alleged) failure to do so undermines the quota management system. This overstates the case. In simple volumetric terms the overall quantum of recreational take (for all species) is small, some 25,000 tonnes, compared with commercial fishing industry's overall take of 750,000 tonnes:

- Ministerial Briefing Paper 2004.

139. There are other pressing sustainability and environmental issues. In recent years, serious problems have arisen with some major species (hoki, orange roughy) due to inadequate information as to the sustainable levels for these major commercial stocks. This has coincided with a review by the Auditor-General : see "*Ministry of Fisheries : Follow-up report on information requirements for the sustainable management of fisheries"* : Office of the Controller and Auditor-General, June 2005. In 1999, the Auditor-General concluded that the Ministry was managing most fish stocks without being sure if management was sustainable. In his 2005 Report the Auditor-General commends the Ministry for the progress it is making, though comments:

> "The Ministry is focusing increasingly on the work needed to protect the marine environment from the effects of fishing. I agree with the direction the Ministry is taking, but I am concerned about the time being taken to complete the work on environmental standards. This work needs to be completed as soon as possible".

140. The issues raised by the counterclaim relief involve questions of public expenditure, the direction of the Ministry's scarce resources, and (in respect of issues of licensing) matters with a high policy content. Even if

there were an error (being denied) these matters are not suitable for judicial review : *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 197-198*,* where Richardson J said *:*

> "Finally, it is important to remember as Lord Wilberforce reminds us, [referring to *Wednesbury*], that there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. The willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power. Thus the larger the policy content and the more the decision-making is within the customary sphere of elected representatives the less well-equipped the Courts are to weigh the considerations involved and the less inclined they must be to intervene".

List of Authorities to be cited:

Hansard, volume 557, p 14022 31 July 1996

Kellian v Minister of Fisheries CA 150/02

Commerce Commission v *Fonterra Co–Operative Group Ltd* [2007] 3 NZLR 767

Attorney-General (British Columbia) v *Attorney- General (Canada)* [1914] AC153

Halsbury's Laws of England (4th edition), Volume 18: Fisheries p 258, para 609

Waipapakura v Hampton (1914) Vol 33 NZLR 1065

New Zealand Fishing Industry Association v Minister of Agriculture and Fisheries [1998] 1 NZLR 544

Dated at Auckland 15th February 2008

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AR Galbraith QC/ SJ Ryan

Counsel for the First Respondents

To: The Registrar of the Court of Appeal

And To: The Appellants, by their solicitor

And To: The Second and Third Respondents, by their solicitor