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 Respondent

and: **The Chief Executive of the Ministry of Fisheries**
Third Respondent

Submissions for appellants (Commercial Fishers)

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(A) NARROWING OF ISSUES

(A1) Background

1 This is an appeal brought by the appellants (the **Commercial Fishers**) in relation to aspects of the judgment of Harrison J delivered on 21 March 2007 in the High Court at Auckland: *notice of appeal* [**Vol I/Tab 1**]; *Judgment* [**Vol 1/Tab 9**].

2 The first respondents (the **Recreational Fishers**) have cross-appealed in relation to a single aspect of the High Court's decision: *notice of cross-appeal* [**Vol I/Tab 2**].

3 The judgment under appeal related to challenges by the Recreational Fishers and the Commercial Fishers to decisions under the Fisheries Act 1996 (the **Act**) by the Minister of Fisheries (the **Minister**) in relation to total allowable catches (**TACs**), total allowable commercial catches (**TACCs**) and recreational allowances for kahawai fishstocks in the 2004/05 and 2005/06 fishing years.

(A2) Agreement resulting in narrowed issues on appeal

4 As foreshadowed in counsel's High Court memorandum of 9 July 2007 filed in the context of a stay application (*see paras 24-26* [**Vol I/Tab 11**, p170]), the appellants have reached an agreement with the second and third respondents (the **Crown**) which has substantially narrowed the issues that need to be determined on this appeal.

5 In the High Court the Commercial Fishers successfully obtained a declaration that the Minister acted unlawfully (irrationally and with pre-determination) in failing, without giving any or proper reasons, to consider advice from the Ministry concerning the need for reductions in kahawai bag limits for recreational fishers. The High Court ordered that the Minister reconsider his 2005 decision: *Judgment para 145(1)(c)*.

6 The Crown has agreed with the Commercial Fishers that the Minister/Ministry will review the kahawai TACs, TACCs and allowances as well as the bag limit decisions, in light of directions made by the High Court and Court of Appeal and important new information which has now become available.

7 As a consequence, Commercial Fishers have agreed with the Crown not to pursue the appeal on their counterclaim insofar as it relates to the 2004 and 2005 allocational decisions (TACs, TACCs and allowances), particularised in paragraphs 2.1, 2.2, 3.3 and 3.4 of the notice of appeal [**Vol I/Tab 1**].

(A3) Remaining issues

8 This leaves for determination by this Court:

8.1 The Commercial Fishers' appeal against the High Court's findings in favour of the Recreational Fishers that the Minister unlawfully set:

(a) all the TACCs without having regard to the social, economic and cultural well-being of the people; and

(b) the TAC for KAH1 without taking any or proper account of the Hauraki Gulf Marine Park Act 2000 (the **HGMPA**):

See the consolidated grounds of appeal identified by counsel in the course of the High Court stay application: *memorandum of counsel paras 6-23* [**Vol I/Tab 11**];

8.2 The Commercial Fishers' appeal against the High Court's refusal to grant a declaration on the Commercial Fishers' counterclaim concerning the Crown's failure to implement measures to monitor recreational catch of kahawai: *notice of appeal para 3.5* [**Vol I/Tab 1**];

8.3 The Recreational Fishers' cross appeal against the High Court's finding that the HGMPA is not applicable to the TACC decision in the quota management area (**QMA**) encompassing the Hauraki Gulf, namely KAH 1: *notice of cross appeal* [**Vol I/Tab 2**].

(B) BRIEF NARRATIVE OF RELEVANT FACTS

9 Kahawai is one of the most frequently caught and popular recreational species. Estimates of the recreational catch of kahawai are uncertain, but the non-commercial sector has been allocated 60% of the TAC.

10 Kahawai is (now) primarily caught by commercial fishers as a bycatch species, as part of the mixed species purse seine fishery. Kahawai is also taken commercially in smaller quantities as trawl bycatch and in set nets.

11 Until the introduction of kahawai into the quota management system (**QMS**) in 2004, the commercial catch was restricted by the following purse seining catch limits (*see Judgment para 12* [**Vol I/Tab 9**, p116]):

QMA	1990/01	1993/94	1995/96
QMA 1 & 9	1,666	1,200	1,200
QMA 2	851	851	851
QMA 3	2,339	2,339	1,500
Total	4,856	4,390	3,551

12 Through the 1990s, large inshore areas in QMA 1, QMA 2 and QMA 3 were voluntarily closed to purse seining by commercial fishers to provide spatial separation from recreational fishers: *Wilkinson paras 83-4, 112* [**Vol II/Tab 24**, p369-370, 376];

13 Kahawai was introduced into the QMS with effect from 1 October 2004, and the Ministry consulted on TACs, TACCs and allowances for kahawai stocks in early 2004. The Minister set TACs, TACCs and allowances with effect from 1 October 2004, based on an arbitrary 15% reduction to the Ministry's estimates of current recreational and commercial utilisation:

FMA	TAC	Rec	Cust	Other	TACC
KAH 1	3,685	1,865	550	75	1,195
KAH 2	1,705	680	205	35	785
KAH 3	1,035	435	125	20	455
KAH 4	16	5	1	0	10
KAH 8	1,155	425	125	25	580
KAH 10	16	5	1	0	10
Total	7,612	3,415	1,007	155	3,035

14 In 2005, at the Minister's direction, the Ministry consulted on TACs, TACCs and allowances for kahawai stocks. The Minister subsequently set TACs, TACCs and allowances with effect from 1 October 2005 based on a further arbitrary 10% reduction:

FMA	TAC	Rec	Cust	Other	TACC
KAH 1	3,315	1,680	495	65	1,075
KAH 2	1,530	610	185	30	705
KAH 3	935	390	115	20	410
KAH 4	14	4	1	0	9
KAH 8	1,040	385	115	25	520
KAH 10	14	4	1	0	9
Total	6,848	3,073	912	140	2,728

(C) SUMMARY OF COMMERCIAL FISHERS' ARGUMENT

(C1) Decisions heavily favour non-commercial sector

15 The High Court found that the Minister failed to take into account qualitative matters relevant to Recreational Fishers when fixing the TACCs and allowances, and therefore failed to have proper regard to the social, economic and cultural well-being of the people (for the purposes of sections 8(2)).

16 However, the Minister's 2004 and 2005 decisions heavily favoured the non-commercial sector, and the outcomes achieved by recreational fishers are only explicable on the basis that the Minister was well aware of their qualitative aspirations as well as relevant quantitative factors (*refer analysis in section (E) below*):

16.1 The non-commercial sector was allocated the lion's share (60%) of the fishery and the Minister essentially set the TACs and allowances which recreational fishers asked for;

16.2 The fishery was likely to have been above the biomass size that will produce the maximum sustainable yield ($\mathbf{B_{MSY}}$), but in response to recreational concerns and desire for a higher stock size, the Minister cut the TACs and TACCs by 25% over the two years;

16.3 The Minister's TACC reductions completed the progressive shutdown of the target kahawai purse seine fishery, so that it is now effectively a by-catch species only.

(C2) Total Allowable Catches

17 While the High Court's ultimate reason for upholding the Minister's TAC decisions was correct (the Court found that the Minister *did* have regard to social, cultural and economical factors relevant to recreational fishery and essentially set the TACs they asked for), some of the Court's legal reasoning was incorrect. In particular, the High Court did not appreciate that [*refer analysis in sections (F1) to (F2)*]:

17.1 While TAC decisions are sustainability measures, they also have an important utilisation component;

17.2 The utilisation objective in the general purpose of the Act (section 8) is therefore as applicable to section 13 (TAC) decisions as it is to section 21 (TACC) decisions;

17.3 The requirement in section 13(3) to have regard to relevant social, economic and cultural factors is an important consideration in most (if not all) TAC decisions for shared fisheries and was relevant to the current decisions;

17.4 The Minister's decision to reduce the TACs was not intended to "restore" the stock size to or above B_{MSY}, it was intended to maintain or increase the stock size.

(C3) Total Allowable Commercial Catches

18 Unlike the finding in relation to the TACs, the High Court held for two reasons that the Minister failed to have proper regard to the social,

economic and cultural wellbeing of recreational fishers when fixing allowances and TACCs.

19 First, the High Court found that the Ministry failed to correctly advise the Minister as to the meaning and effect of the section 8(2) "*criterion*", which requires a mandatory analysis of qualitative factors relevant to the people's (not including commercial fishers') well-being. According to the Court this could not be overridden by the Minister's "policy preference" for allocations based on catch history.

20 The Commercial Fishers submit that the High Court's focus on, and interpretation of, section 8 was incorrect [*refer analysis in section (F3) paras 63 - 70*]:

20.1 Section 21(1) governs the setting of TACCs and the need to "allow for" non-commercial interests. It provides a broad discretion to weigh the competing demands of *all* sectors when allocating the TAC between them. The Minister does not need to allocate any particular amount or share of the TAC to recreational interest;

20.2 Section 8 is a general purpose section. It is a relevant consideration but does not narrow the range of matters that need to be considered under section 21 or prevent the interests of commercial fishers being considered.

21 Second, the High Court held that the Ministry and Minister proceeded on the basis that *quantitative* measures provided an exhaustive measure of intangible or qualitative factors, and therefore did not consider other qualitative factors relevant to the people's well-being. The Commercial Fishers submit that this finding was also incorrect [*see analysis in section (F3) at paras 71-89*]:

21.1 The Recreational Fishers expressly asked the Minister to use their catch history (the results of the most recent Recreational Harvest Surveys) as the basis on which their allowance should be set;

21.2 The Ministry undertook an economic assessment of the utility value of recreational catch in order to give the Minister a means of *comparing* the value (in dollar terms) attributed to the fishery by the different sectors. The Ministry was required by the Act to consider any uncertainty in that information, and was entitled to express a policy preference for the use of catch history;

21.3 The Ministry expressly advised the Minister that recreational fishers favoured a *qualitative* assessment of value, based on their view that the fishery was more valuable to them. The Ministry also told the

Minister that the different approaches (catch history and utility value) were only analytical tools to assist in the Minister's decision and were not intended to fetter his ultimate discretion;

21.4 The Ministry's advice papers discussed at length the (subjective) submissions of the recreational fishers as to qualitative factors (i.e. the importance of the fishery to them, their perceptions as to the state of the fishery, their desire for a higher biomass to give bigger fish and higher catch rates, their survey and CPUE data and their view that the target purse seine fishery should be shut down);

21.5 The Minister was therefore well aware of the recreational fishers' views and expressly took them into account when he made his 2004 and 2005 TAC and TACC reductions totalling 25%.

22 The Commercial Fishers submit that the High Court lost sight of the fact that the Minister's decisions essentially gave the recreational fishers what they had sought, both in terms of the TACs and their own allowances. The Minister therefore "allowed for" their interests under section 21(1). As such, it is neither legally (nor logically) open to the recreational fishers to now challenge the remaining TACCs [*see analysis at paras 91 to 96*].

(C4) Hauraki Gulf Marine Park Act 2000

23 The Recreational Fishers' appeal on the basis of the HGMPA should be dismissed. The Minister was made aware of, and took into account, the provisions of the HGMPA when making both his TAC and TACC decisions. The decisions were consistent with the purpose of the HGMPA. Virtually no commercial fishing is allowed in the Hauraki Gulf, with purse seining and trawling having been excluded for about the last 15 years: [*See analysis sections (G1) and (G2)*].

(C5) Failure to implement measures to monitor recreational catch

24 The Commercial Fishers say that in circumstances where the Minister stated that it was "*crucial*" (in 2004) and "*a matter of priority*" (in 2005) to monitor recreational catch of kahawai to assess the effect of the reduced allowances, it was incumbent on him to put in place reasonable measures to ensure this occurred [*see analysis section (H)*]. Nothing was in place or even planned at the time of the Minister's decisions.

25 The High Court acknowledged that the Minister must do everything possible, within resource constraints, to monitor recreational catches of kahawai and that the Minister had said as much himself. However, the Court said it could only assume that since the Minister's decisions the Ministry had made considerable progress, and was not prepared to go further without identification of the measures to be implemented, their utility, and the Ministry's resources.

26 The Commercial Fishers submit that the evidence before the High Court demonstrates that the Court's assumption was incorrect – very little if any progress on assessing recreational kahawai catch has been made. The recreational kahawai fishery (the majority of the TAC) remains essentially unmanaged and unmonitored.

27 The Minister has a range of tools available to implement recreational catch monitoring but has not used them. It is not for Commercial Fishers to direct the Minister how to exercise those discretionary powers, but it is the proper role of the Court to declare that the Minister is not performing his statutory role.

(D) LEGISLATIVE STRUCTURE AND KEY DOCUMENTS

(D1) Fisheries Act 1996

28 The following provisions within the overall statutory scheme of the Act are relevant to the appeal [**Authorities: Tab 1**]):

- section 8 (purpose provision)
- section 10 (information principles)
- section 11 (sustainability measures)
- section 13 (total allowable catch)
- section 20 (setting and variation of total allowable commercial catch)
- section 21 (matters to be taken into account in setting or varying any total allowable commercial catch)

(D2) Key documents

29 The key decision-making papers are set out in **Volume III** of the Case on Appeal, and consist of:

- 2004 Initial Position Paper (**2004 IPP**) [**Vol III**, p673-697];
- 2004 Final Advice (**2004 FAP**) [**Vol III**, p649-671, p698-770]
- 2004 Letter to Stakeholders in relation to Final Decision (**2004 Decision Letter**) [**Vol III**, p782]
- 2005 Initial Position Paper (**2005 IPP**) [**Vol III**, p873-908]
- 2005 Final Advice (**2004 FAP**) [**Vol III**, p788-872, p909-968]
- 2005 Letter to Stakeholders in relation to Final Decision (**2005 Decision Letter**) [**Vol III**, p973-975]

(E) CONTEXT - OVERVIEW OF EFFECT OF DECISIONS

30 At its heart, the Recreational Fishers' claim in the High Court proceedings was that the Minister's decisions in relation to kahawai TACs, TACCs and allowances failed to have proper regard for *qualitative* values relating to recreational interests – focusing instead on a *quantitative* assessment of catch histories (current utilisation).

31 However, when one stands back and looks at the decisions, the Commercial Fishers submit that it is not open to Recreational Fishers to claim that the Minister did not weigh and take into account their interests. The outcomes achieved by the recreational sector are so heavily weighted in their favour that they are only explicable on the basis that the Minister was well aware of the recreational sector's qualitative and quantitative needs and aspirations.

32 ***TACs essentially those Recreational Fishers asked for:*** The Recreational Fishers' desire for lower TACs has been substantially met by the Minister's reductions (15% in 2004 and 10% in 2005) to the overall level of estimated utilisation. The Recreational Fishers sought combined TACs within 10% of the TACs ultimately set by the Minister in 2004 (TAC of 7,612 t, as against 6,900 t sought), and in the important KAH 1 fishery, within 7%. In 2005, the Recreational Fishers sought combined TACs within 3% of those set (6,848 t TAC set compared to 6,628 t sought): *2004 FAP Table 5* [**Vol III**, p722]; *2005 FAP para 141* [**Vol III**, p932].

33 ***Recreational allowances essentially those asked for:*** The recreational allowances set by the Minister were also within 8% of the amount that the Recreational Fishers asked for, and using the catch history methodology they asked for (3,415 t set in 2004 as against 3,707 t sought): *2004 FAP Table 7* [**Vol III**, p735]. Despite this, the Recreational Fishers still maintain that the Minister did not "allow for" their interests under section 21(1).

34 ***They have 60% of the TACs:*** The overall non-commercial share of the combined TACs is approximately 60%, which is about 45% greater than the commercial share (TACCs). In the important KAH 1 fishery, the non-commercial share of the TAC is about 66%. The Minister's press release for his 2004 decisions described this as allocating the "*lion's-share*" of the catch to recreational fishers: *Press release 10 Aug 2004* [**Vol V**, p1577]; *2005 Decision Letter Table* [**Vol III**, p974].

35 ***TACs includes 900 t of phantom allocation:*** Over 900 t of the combined TACs has been allocated for customary take, based on an arbitrary 25% of estimated recreational utilisation. However, all the evidence suggests that Maori take kahawai within the recreational

allowance, rather than as separately authorised customary take. The customary allocation is therefore highly unlikely to be fished - the yield has effectively been 'shelved' by the decisions and will increase the stock size further: *Wilkinson paras 163-173* [**Vol II/Tab 24**, p392-395; *Wilkinson (R), paras 28-30* [**Vol II/Tab 39**, p574-575]; *Tau para 27-29* [**Vol II/Tab 13**, p182].

36 ***Kahawai stocks likely to be above B_{MSY}***: While the best available information is uncertain, kahawai stocks are likely to be above B_{MSY}. In 1996 the stock was conservatively estimated to be *three times* B_{MSY} (50% of the virgin biomass (B_0), with B_{MSY} being 16% of B_0): *2004 IPP, Table 9* [**Vol III**, p694]). Commercial catches had been restricted by purse seine catch limits since the early 1990s, and even the Recreational Fishers' expert acknowledges that as a consequence it is likely that kahawai biomass has increased: *Boyd (R) para 25* [**Vol II/Tab 36**, p543]; *Starr paras 40-43*: [**Vol II/Tab 23**, p346.58-9].

37 ***No target purse seine fishery left:*** The effect of the Minister's decisions, and those of earlier Ministers through purse seine catch limits, has been to bring an end to the kahawai target purse seine fishery:

37.1 The KAH 3 fishery was shut down in 1997 after a major purse seine catch limit reduction on top of voluntary closures: *Wilkinson para 115* [**Vol II/Tab 24**, p377];

37.2 The purse seine fishery in KAH 1 is in the Bay of Plenty, with the fleet based in Tauranga. As a direct consequence of the Minister's decisions, the purse seine fishery can no longer target kahawai: *Wilkinson paras 245-249* [**Vol II/Tab 24**, p412-413];

37.3 This has occurred notwithstanding the perception by purse seine Skippers that they are now encountering high levels of abundance: *Murray para 12* [**Vol II/Tab 20**, p346.4]; *Reid para 16* [**Vol II/Tab 21**, p346.10].

38 ***They have the Hauraki Gulf to themselves:*** As a result of the voluntary agreements negotiated in 1991, there has been no purse seining at all in the Hauraki Gulf for over 15 years, and most trawling and other commercial fishing has been banned through regulation. A number of closures were also negotiated in other areas in KAH 1 (and KAH 2 and KAH 3) to create spatial separation between commercial and recreational sectors: *Wilkinson para 81- 83, 112* [**Vol II/Tab 24**, p369-370, 376]; *Closure Maps* [**Vol V**, p1041, 1088, 1092]; *6 July 2005 Advice paper* [**Vol V**, p1769].

39 ***No bag limit reductions:*** The Minister's theoretical 25% reduction to recreational allowances as a consequence of the 2004 and 2005 decisions

has been of no practical consequence to the Recreational Fishers - the Minister decided not to reduce recreational bag limits. Contrast the position of Commercial Fishers, who have suffered a real 25% reduction through reduced TACCs.

40 Given the circumstances set out above, it is a mystery to Commercial Fishers why the Recreational Fishers ever brought the proceedings. The 2004 and 2005 decisions have served only to enhance their interests and continue the graduated exclusion of the commercial sector from the kahawai fishery, both in KAH 1 and in other QMAs. Viewed in the round, it is not credible to see the decisions as doing anything other than giving significant preference to the qualitative and quantitative values that Recreational Fishers wanted the Minister to take into account when making the decisions.

(F) TACC DECISIONS – SOCIAL, CULTURAL AND ECONOMIC WELL-BEING OF THE PEOPLE

(F1) Introduction

41 This part of the submission addresses the first three of the Commercial Fishers' revised grounds for appeal: *memorandum of counsel paras 6-22* [**Vol 1/Tab 11**, p167-170]. All three grounds relate to the High Court's declaration that the Minister's 2004 and 2005 TACC decisions were unlawful to the extent that the Minister "*fixed the TACCs for kahawai for all KAHs without having proper regard to the social, economic and cultural well-being of the people*".

42 While the High Court's reasons for finding that the TACCs were invalid are set out on paragraphs [54-76] of the Judgment, it is also necessary to analyse the Court's earlier reasoning on the TAC decisions (paras [43-53]), as the two issues are inter-linked. The High Court rejected the Recreational Fishers' challenge to the TAC decisions and the Recreational Fishers have not appealed this finding.

43 The Commercial Fishers contend that:

43.1 the Court was *right* in its core finding on the *TAC* decisions under section 13 of the Act - that the Minister *did* have "*regard to social, cultural and economic factors as he... consider[ed] relevant*" as they related to recreational fishing interests: *Judgment paras [51-53]*;

43.2 the Court was *wrong* in his core finding on the *TACC* decisions that the Minister *did not* have proper regard to the need under section 8(2) to "*enable people to provide for their social, economic and cultural well-being*" insofar as recreational interests were concerned: *Judgment paras [54-74].*

44 Given the High Court's core finding on the TACs, the Commercial Fishers submit that the same finding should have followed in respect of the TACC decisions, the inquiry in both cases being essentially the same. The Commercial Fishers say that the Court arrived at opposite conclusions due to a series of errors in its approach, *both* in terms of the TAC and TACC setting process. Accordingly, it is necessary to first identify the errors in the Court's reasoning on the TAC decisions, before dealing with the TACC decisions.

(F2) TACs - Analysis of errors in reasoning

High Court's reasoning

45 The High Court's reasoning on the TAC decisions was as follows:

45.1 The Court held that the TAC was a "*sustainability measure*", whereas a TACC is a "*mechanism for allocating a resource*", where "*utilisation principles have a direct bearing*": *paras [43] and [54]* [**Vol I/Tab 9**, p128,131];

45.2 Because the Court saw a TAC as a sustainability decision, the Court (wrongly) considered that:

(a) people's social, economic, and cultural well-being (section 8(2)) is not the "*mandatory statutory guideline*" when setting a TAC: *para [50]*;

(b) the Minister's discretion under section 13(3) (to have regard to the social, cultural and economic factors he considered relevant), was broad and would be difficult to successfully challenge by way of review: *paras [45, 46 and 50]*;

(c) the factors in section 13(3) were not relevant to "*setting the level*" of the TAC itself, but rather "*only arise for discretionary consideration when determining the manner and speed of restoring the stock*" to the biomass that produces the maximum sustainable yield: *para [49]*;

(d) the Minister's decisions to reduce the TACs were intended to result in kahawai fishstocks being "*restored to or above*" the biomass level that would produce the maximum sustainable yield: *para [49]*;

45.3 However, the Court ultimately (and correctly) found that:

(a) the Minister had been advised of the relevant section 13(3) factors (eg. the socio-economic impacts of a TAC reduction on

non-commercial fishers, recreational opposition to commercial fishing and perceptions of value): *para [51]*;

(b) this conclusion was supported by the "*marginal*" (10%) difference between the TACs the Recreational Fishers requested and the TACs set by the Minister: *para [52]*.

TAC decisions are also utilisation decisions

46 While it is undoubtedly correct that a TAC decision is a sustainability decision, it is also a key utilisation decision. One of the functions of a TAC is to *allocate* to all the extractive users (commercial and non-commercial) a portion of the total biomass or yield that can be taken collectively by them (it is the "total allowable catch"). A TAC is also an intergenerational utilisation mechanism – it allocates use between the current generation of extractive users and the reasonably foreseeable needs of future generations.

47 The decision to allow (or not allow) any particular total level of total harvest in a year (the TAC) is therefore as much a utilisation decision as is the decision to allow (or not to allow) *part* of that total to be harvested by the commercial sector (the TACC).

48 Section 13 does not require the Minister to set a TAC to achieve a specific biomass level. A fishery can be managed at any biomass level, provided it is at or above the biomass size that produces the maximum sustainable yield. Nearly every TAC decision has the potential to alter the biomass size, depending on whether the level of removals are greater or lesser than the annual yield produced at that stock size.

49 It therefore follows that the section 13(3) factors (social, economic and cultural) will almost always be in play. They are matters to which the Minister "*must have regard*" when considering the way in which and the rate at which the stock is moved towards or above MSY: *New Zealand Fishing Industry Association & Ors* v *Minister of Fisheries* (22 July 1997, CA 82/97) (the ***Snapper Case***) pg 14 [**Authorities: Tab 7**].

50 The Minister has a broad discretion in terms of section 13(3) factors, including the ability to take into account matters of wider public interest. This recognises that different levels of TAC have different potential social, cultural and economic impacts: *Snapper Case* pg 15.

51 While uncertain, B_{MSY} for kahawai was assessed in 1996 as 16% of the virgin biomass, with the actual biomass estimated to be about 50%: see *Starr para 40* [**Vol II/Tab 23**, p346.58] and *2004 IPP Table 9* [**Vol III**, p694]. The Minister therefore had a discretion as to where to sit on the

biomass spectrum, and section 13(3) factors were important considerations when setting the TACs.

Minister was not "restoring" stock to B_{MSY}

52 Contrary to the High Court's view, the Minister's TAC reductions made in 2004 and 2005 were not made for the purpose of "*restoring*" the stock to or above a level that would produce B_{MSY}.

53 While it was unclear exactly where the fishery was at in relation to B_{MSY} in 2004, it is likely to have been above it. Commercial catch had been heavily restricted by purse seine catch limits for nearly 15 years, and the stock assessment values in 1996 were considered conservative: *Starr paras 20-21* [**Vol II/Tab 23**, p346.53-4].

54 The purpose of the 2004 TAC reductions was not to "*restore*" a fishery that was perceived to be below B_{MSY}. Rather, the Minister said he wanted to "*at least maintain and hopefully improve current biomass*": *2004 Decision Letter* [**Vol III**, p784]. Similar reasons were given for the 2005 decisions: *2005 Decision Letter* [**Vol III**, p974].

Section 13(3) factors apply when biomass above and below B_{MSY}

55 The High Court was also incorrect in interpreting the factors in section 13(3) as arising for discretionary consideration only when a fishery needs to be restored to B_{MSY}: *Judgment para [49]* [**Vol I/Tab 9**, p130].

56 Section 13(3) enables a stock to be "moved" towards B_{MSY} and expressly applies to *both* section 13(2)(b) and (c). Section 13(2)(b) concerns situations where the fishery is *below* B_{MSY} and needs to be restored, and section 13(2)(c) concerns situations where the stock is *above* B_{MSY} and can be fished down towards B_{MSY}. The section 13(3) factors will therefore be relevant in most (if not all) TAC decisions.

Section 8 relevant to TAC setting

57 The general purpose of the Act set out in section 8, including the utilisation objective, applies as much to a decision to set a TAC under section 13 as it does to allocating the TAC under section 21. The definition of "utilisation" in section 8 is also consistent with, and operates in parallel to, the materially similar factors in section 13(3). For example, in order to meet people's social, cultural or economic needs, the Minister may decide that a target stock level greater than B_{MSY} is appropriate.

(F3) TACCs – Analysis of errors in reasoning

58 Notwithstanding that the High Court (correctly) concluded that the Minister expressly had "*regard to the social, cultural and economic factors as he... consider[ed] relevant*" as required by section 13(3) when making his *TAC* decisions, the Court held that the Minister had not, contrary to section 8(2),

had "*proper regard to the social, economic and cultural wellbeing of the people*" when setting the TACCs and allowances: *Judgment paras [145(1)(a) and 72]* [**Vol I/Tab 9**, p161].

59 The Commercial Fishers submit that the declaration made by the High Court at paragraph [145(1)(a)] of the Judgment should be set aside. While the utilisation objective of the Act set out in section 8 is clearly a mandatory relevant consideration when the Minister is setting TACCs and allowances under section 21, the Commercial Fishers submit that the High Court misinterpreted the:

59.1 obligations under sections 8(2) and 21(1), and in so doing ignored the well settled interpretation of section 21, as explained by the Court of Appeal in the *Snapper Case*;

59.2 advice given to the Minister and the reasons given by the Minister for the decisions, and was therefore wrong in its conclusion that the Minister failed to have proper regard to section 8(2).

High Court's reasoning

60 The High Court considered that the starting point was to set an allowance for recreational interests by reference to the well-being "*criterion*" of section 8(2), which has both quantitative and qualitative elements: *Judgment paras [55] and [58]*. The Court held that the Ministry and the Minister did not follow the necessary process of evaluating or taking account of both the qualitative and quantitative elements of people's well-being: *Judgment para [62]*.

61 The High Court considered that this failure arose due to two key errors by the Ministry (*Judgment para [63]*):

61.1 The Ministry failed to advise the Minister expressly on the meaning and effect of section 8(2) and its relevance in assessing recreational interests. In particular:

(a) the Ministry did not advise the Minister that he had a statutory obligation to take into account the section 8(2) utilisation principles and wrongly advised that he had a wide discretion on what factors to take into account when allowing for recreational interests: *paras [65-67]*;

(b) a policy preference for catch history cannot take precedence over a mandatory requirement to adopt a "*utilisation approach*": *para [67]*;

(c) the effect of TACC reductions on commercial operations was not relevant to the recreational allowances, and the "*people*" whose "*well-being*" needed to be considered were recreational fishers, consumers who purchase kahawai to eat and employees of commercial fishers (but not commercial fishers themselves): *see paras [55-57] and [69-72]*;

61.2 The Ministry and Minister wrongly proceeded on the premise that quantitative measures (such as catch history or an economic attempt to quantify the comparative values of the commercial and recreational fisheries) provided "*an exhaustive measure of intangible or qualitative factors*": *see paras [63] and [74 and 75]*.

62 The Commercial Fishers submit that the two alleged "errors" were not errors at all:

62.1 the High Court incorrectly applied sections 8 and 21;

62.2 the Minister had proper regard to qualitative as well as quantitative factors relating to recreational interests when allowing for their interests and setting the TACCs;

62.3 the Recreational Fishers essentially got the allowances they were seeking.

First Error - Correct interpretation of sections 8 and 21

63 Despite section 21 being the section under which the TACCs and allowances are set, it is hardly mentioned in the High Court's analysis. Nor is there mention of the Court of Appeal's analysis of section 21 in the *Snapper Case*. Rather, the High Court focussed solely on the interpretation and application of section 8(2).

64 Section 21(1) requires the Minister to "*allow for*" non-commercial interests in a stock when setting a TACC for that stock. It provides a broad discretion to weigh the competing demands at the sectors:

64.1 The Court of Appeal in the *Snapper Case* described the nature of the Minister's task under section 21 (pg 17 [**Authorities: Tab 7**]) (emphasis added):

> 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 can catch during the year, they being subject to the controls which the Minister decides to impose** upon them e.g. bag limits and minimum legal sizes. **Having set the TAC the Minister in effect apportions it between the relevant interests.** 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.

64.2 See also a similar discussion in the High Court judgment in the *Snapper Case* **[Authorities: Tab 6]**, where McGechan J also rejected the notion there was any "*priority*" for non-commercial interests (pgs 149-150):

> 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 commercial fishers. Parliament in 1986 was not operating with a clean slate. There was an established industry and a reduction in catches could have severe economic effects (this proceeding exemplifies). A recreational policy was being worked up. It postulated priorities in some popular sports, 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 part or whole".

64.3 As to the Minister's discretion in section 21 when setting a TACC and making allowances for non-commercial interests, the Court of Appeal in the *Snapper Case* said at pg 18 (emphasis added):

> 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 in covering it, subject always to his obligation to **carefully weigh all the competing demands** on the TAC before deciding how much should be allocated to each interest group... 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 factors.**

65 The Commercial Fishers therefore submit that the High Court's finding that "*the Minister did not have a wide discretion in which factors he took into account when determining allocations*" was incorrect: *Judgment para [67]*.

66 A TACC set under section 21(1) is a **commercial** catch limit. It would be extraordinary if the Minister, in allowing for non-commercial interests and setting a TACC, was not required to have regard to the effect of any TACC change on commercial interests potentially affected by that decision. This is what the Court of Appeal held in the *Snapper Case*:

> Of course, if the Minister is considering any reduction in the 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. That is a given...[pg 16]
>
> ...
>
> All we wish to say for the future is that the Minister would be wise to undertake a careful cost/benefit analysis of a range of options available to him in moving the fishery towards B_{MSY}. If the Minister ultimately thinks that a solution having major economic impact is immediately necessary, then those effected should be able to see, first, that all other reasonable possibilities have been carefully analysed, and, second why the solution adopted was considered the preferable one. [pg 23]

67 The Commercial Fishers therefore submit that the High Court's finding that the Minister was not entitled to consider the "*potential effect of catch*

reductions on commercial operators", and in particular the purse seine commercial fishery, was incorrect: *see Judgment paras [69-71]*.

68 Similarly, the High Court's implicit finding (made without any reasoning or explanation) that commercial fishers are not "*people*" whose social, economic and cultural "*well-being*" needs to be considered under section 8(2), is also incorrect: *see Judgment paras* [72 and 55-57]. This is contrary to the *Snapper Case* (as above), the plain wording of section 8(2) which refers to "*people*" generally, and the scheme of the Act as a whole.

69 The High Court's characterisation of section 8(2) as requiring a "*utilisation approach*" (para [67]) is also meaningless. All the information (including catch history, utility value and qualitative factors) considered by the Minister concerned the assessment of the *utilisation* needs and aspirations of recreational fishers.

70 In summary, the Commercial Fishers submit that:

70.1 Section 21(1) should have been the focus of the enquiry as to the nature of the Minister's discretion and the matters he should take into account when making allowances for non-commercial interests and setting TACCs. It provides a broad discretion to weigh the competing demands at the sectors;

70.2 The Minister does not need to allocate any particular amount or share of the TAC to recreational interests when "*allow[ing] for*" their interests;

70.3 Section 8, as a general purpose section, is a relevant consideration in any utilisation decision, such as the decisions made by the Minister under section 21(1). However, section 8(2) does not:

(a) confer a discretion as such, it is a general purpose statement only;

(b) narrow the wide range of matters that need to be considered by the Minister as part of the ordinary process of weighing the competing demands of sectoral interests under section 21(1), as explained in the *Snapper Case*;

(c) prevent the Minister from having regard to the interests of commercial fishers;

(d) give any priority or preference to recreational interests over commercial interests.

Second error - The Minister had regard to qualitative factors affecting recreational fishers

71 The second alleged error identified by the High Court was that the Minister proceeded "*on the premise that quantitative measures also served to provide an exhaustive measure of intangible or qualitative factors and that the Ministry's analysis of social and cultural well-being was solely a quantitative or economic exercise*": *Judgment para [63].*

72 Once it is understood that the Minister has a wide discretion under section 21(1) and that section 8(2) does not alter this (as discussed above), the remaining question comes down to whether the Minister had regard to the "*qualitative*" interests and aspirations of recreational fishers in the kahawai fishery.

Relevant parts of Advice papers and Decision letters

73 The following parts of the (lengthy) advice papers and decision letters refer to qualitative factors relating to recreational interests (refer advice papers in **Vol III** of the Bundle):

- **2004 IPP: Tab 45**, paras 2, 8, 20-22, 31-36, 65(c), (e) & (k), 97-102, 126-130;
- **2004 FAP: Tab 45**, paras 9, 10, 11(c), (h), (k), 17, 25, 28, 36, 38, 55-71, 112, 118, 138, 139, 142, 171, 173, 181-200, 213-223, 306-309, 318(f), 321-325 and Appendices 1-3;
- **2004 Decision Letter: Tab 46**, paras 6, 9, 10, 15,17, 19, 21, 25-28;
- **2005 IPP: Tab 47**, paras (c), (i), (n), 5-24, 58, 60, 123;
- **2005 FAP: Tab 47**: Generic: paras 87-98, 97-125, 151-154, Ex Summary: 5-10, 19, 23, 2-29; Final advice 6(d), (h), (k), (p), 24-36, 53, 58, 61-63, 67-69, 96-97, 139-142, 143-147, 151-158, 188, 353, 255, 258, 261-263 and Appendix 1;
- **2005 Decision Letter: Tab 48**, pages 975 and 976.

74 The Commercial Fishers submit that a review of these paragraphs demonstrates that the Minister was very well informed of the interests of recreational fishers in the kahawai fishery, their qualitative aspirations, and the decisions they wanted him to make.

Use of "catch history" and relevance of "uncertain" information

75 The High Court criticised the use of each sector's "catch history" as the basis for allocating the TAC. The criticism turns on the Court's view that (*Judgment paras [67-69]*):

75.1 catch history did not capture the qualitative interests of recreational fishers;

75.2 the Ministry wrongly advised the Minister to discount qualitative considerations on the basis that they were uncertain.

76 First, it is not open to the Recreational Fishers to dispute the use of catch history as a basis for allocation when they sought recreational allowances based on their most recent catch history data (Recreational Harvest Survey estimates): *Recreational Fishers' 2004 submission* [**Vol IV**, p1469, see also p1479-80]

> MFish do not have good estimates of non-commercial catch. We do know that the Minister is required to use the best available information. Therefore the Minister should use the 2000 National Recreational Harvest Survey results except for QMA 2, which should be based on the 2001 survey.

77 In any event, the High Court's characterisation of the Ministry's advice in relation to quantitative and qualitative factors is incorrect. Given that the Minister's task is to "*carefully weigh all the competing demands on the TACC before deciding how much should be allocated to each interest group*" (see *Snapper Case* pg 18), it was logical to consider how much each sector is in fact catching (their current level of utilisation). Catch history is commonly used by fisheries managers around the world as a basis for allocating rights in a fishery: *Wilkinson para 141* [**Vol 2/Tab 22**, p385].

78 Moreover, commercial catch history relating to kahawai inherently reflected the restrictions from purse seine catch limits and voluntary restrictions which had been in place for nearly 15 years, primarily as a consequence of recreational lobbying: *Wilkinson para 142* [**Vol 2/Tab 24**, p386]; *2004 FAP para 241* [**Vol III**, p738].

79 The Ministry also recognised that looking only at catch history (described as "claims based" allocation) was only one way of assessing competing demands for the kahawai resource, and therefore proposed an alternative method, based on the "*utility value*" of the fishery to the different sectors ("utility-based" allocation). This attempted to ascertain each sector's "*quantum of well-being*" in relation to of the fishery for comparative purposes: *see 2004 FAP para 181* [**Vol III**, p729]; generic description in *2005 FAP paras 87-98* [**Vol III**, p808-811]

80 The Ministry consulted on the utility value approach in 2004 and 2005. However, the advice noted that it was problematic to use this method for kahawai as information in terms of the relative quantitative values was uncertain: *2004 IPP paras 33, 97-102, 126-130*; *2004 FAP paras 193-200*; *2005 FAP paras 93-94*.

81 The High Court criticised the Ministry's use of the "*utility value*" approach, describing it as "*an exclusively economic exercise*" and "*a solely quantitative or economic measure as the index for assessing the requisite social and cultural value of kahawai to recreational fishers*": *see Judgment para [64]*. The Court said that the Minister had "*discarded*" the recreational fishers qualitative arguments "*on the grounds of subjectivity – the very quality it posses*": *see para [67]*. This criticism is unwarranted.

82 Given the Minister's task to "*weigh*" competing demands, it must be permissible (although not essential) to try and use a common currency (money) to assess the *relative* value of the resource to different sectors. This was expressly the purpose of providing what the Ministry called a "*comparative measure*" – in economic terms, recreational fishers' marginal willingness to pay: *2004 IPP para 128* [**Vol III**, p696].

83 The Ministry's view was that there was considerable "*uncertainty*" related to the "*quantitative assessment of value*": *2004 IPP paras 199 and 323* [**Vol III**, p732 and 750]. Decision makers are required by the Act to consider any uncertainty in information, and must be cautious when information is uncertain (section 10(b) and (c)). The High Court was therefore wrong to criticise the Ministry for expressing concern about uncertainty in the available quantitative (and qualitative) information relating to utility value.

84 Significantly, the Ministry did not ignore the *qualitative* assessment of *value* put forward by the recreational fishers. To the contrary, the advice expressly recognised that the Recreational Fishers did not like the Ministry's attempt to quantitatively assess value and stated (emphasis added) (*2004 FAP para 199* [**Vol III**, p732]):

> Most recreational submissions strongly favour preferential access for the recreational sector on the basis that kahawai is more highly valued by them. Much is made in the submission of the fact that kahawai caught commercially has a low value. Recreational groups favour a **qualitative** assessment of **utility** based on giving a preference to recreational fishers in a fishery that is **obviously "more valuable"** to them.

85 In the absence of any means of assessing relative values based on subjective considerations, the Ministry could do no more than ensure the Minister was aware of recreational views and the evidence submitted in support. The advice papers are replete with references to qualitative recreational concerns and aspirations, and the Ministry's views on the evidence.

86 The Ministry explained to the Minister its reason for having a "*policy preference*" for allocation based on catch history in relation to kahawai (it was more certain and reflected associations with the resource, including previous management decisions): *2004 FAP paras 183, 200* [**Vol III**, p730,732]. The Ministry was entitled to have such a policy preference: *Kellian v Minister of Fisheries* (CA150/02) [**Authorities/Tab 5**].

87 The Ministry also made it clear to the Minister that the use of catch history and utility value approaches was not intended to fetter the Minister's discretion (*2004 FAP para 321* [**Vol III**, p750]):

> The policy discussion on utility and claims based approaches is not intended to fetter your discretion, but rather provides policy guidance in order to provide a more robust framework when considering allowances.

Recreational Fishers' views on qualitative interests made clear

88 The Recreational Fishers' submissions and the Ministry's advice made it clear to the Minister that recreational fishers considered that allocation based on catch history would not meet their concerns over the management of the fishery, or the qualitative aspirations of those catching kahawai for recreational purposes. In particular, the advice papers:

88.1 identified the **importance** of kahawai to recreational fishers: *2004 IPP paras 2(e), 8, 20-22, 97-102, 126-130* [**Vol III**, p673]; *2004 FAP paras 221 and 306* [**Vol III**, p7365, 747;

88.2 discussed and responded to recreational fishers' **perceptions** that there had been a **decline** in the fishery: *2004 IPP paras 2(f), 20, 65(c) and (e) and 102; 2004 FAP paras 11(h) and (j), 65-71, 138, 142 and 306, 330-358; 2005 FAP paras 271-322*;

88.3 identified and discussed the **intangible benefits** to recreational fishers of managing the fishery at a **higher biomass**, giving bigger fish with higher catch rates: *2004 IPP para 21, 2004 FAP para 36, 220*; *2005 FAP para 96-97*;

88.4 in 2005 discussed a Government proposal (announced just prior to the release of the 2005 IPP) for a **formal policy** of managing shared fisheries such as kahawai at levels **above B_{MSY}**, in order to enhance the quality of recreational fishing:

- See Minister's speech announcing the proposal at the New Zealand Recreational Fishing Council Conference on 8 July 2005: [**Vol V**, p1817];
- 2005 IPP, para 97-126 [**Vol III**, p833-8]
- 2005 FAP, paras 7-36 [**Vol III**, p913-8]
- Minister's 2005 Decision Letter [**Vol V**, p973]

88.5 analysed at length other information which the Recreational Fishers said supported their view that the **quality** of their **fishing experience** was not as good as they wanted it to be: *2004 IPP para 102* [**Vol III**, p692-3]; *2005 FAP 65-70 and Appendix 1* [**Vol III**, p710, 755-61];

88.6 identified the Recreational Fishers' desire to have the target commercial **purse seine** fishery **shut down**: *2004 FAP para 222* [**Vol III**, p735]; *2005 FAP para 211* [**Vol 3**, p941].

Minister's decision

89 It is apparent from the written reasons given by the Minister following each of the decisions that he:

89.1 knew of the importance of the kahawai fishery to recreational fishers: *2004 Decision Letter paras 10, 17, 25, 27* [**Vol III**, p783-6]; *2005 Decision Letter* [**Vol III**, p973];

89.2 expressly took into account the perceptions of recreational fishers as to the state of the fishery: *2004 Decision Letter para 17* [**Vol III**, p784]; *2005 Decision Letter* [**Vol III**, p973-4];

89.3 reduced the TAC, TACC and allowances in both years in order to maintain or increase the biomass: *2004 Decision Letter paras 19-25* [**Vol III**, p785]; *2005 Decision Letter* [**Vol III**, p973-4].

Other errors in judgment

90 Some other errors in the High Court's judgment are briefly worth noting:

90.1 The finding that the commercial kahawai fishery had a low value to both the commercial sector and consumers who purchase fish was not supported by the evidence (*Judgment paras [59(2) and 60]*):

(a) As the Minister acknowledged in his 2004 decision, kahawai forms an integral part of the annual catch mix of the purse seine fishery. The reduced TACs and TACCs put Sanford's $18-25m Tauranga operation at risk: *Wilkinson paras 247-249* [**Vol II, Tab 24**, p412-3]; *2004 decision letter para 21* [**Vol III,** p785];

(b) Kahawai is one of the few fish species that is very cheap for consumers who cannot afford higher priced species, or cannot afford or choose not to go fishing (about two thirds of the population). On the Recreational Fishers' own evidence, kahawai is the "*predominant budget smoked fish available in most supermarkets*": *Wilkinson para 297*; *Ingram para 32* [**Vol II/Tab 14**, p190];

90.2 The High Court had no *evidence* to justify the (wrong) assertion that recreational fishers have progressively lost access to inshore fisheries such as snapper, or that people's well-being had suffered through high retail prices for some species (the same could be said for meat such as lamb and steak): *Judgment para [59(1)]*;

90.3 The High Court wrongly assumed that the historical common law right to fish in the sea (subject to statutory limitation) was a recreational right only: *see para [59(3)]*. The common law right, which has its origins in the Magna Carta, is not limited to people fishing for their own use, and applies equally to people fishing in order to sell their catch.

Third error - Recreational fishers essentially got the TACs and allowances they asked for

91 Finally, the High Court lost sight of the fact that in terms of section 21(1), the Minister did "allow for" recreational interests almost to the extent the Recreational Fishers had asked for.

92 In respect of the TAC decisions the High Court correctly recognised that there was only a marginal difference (less than 10%) between the tonnages of the TACs sought by the Recreational Fishers in their submissions and those set by the Minister in his decision. The Court therefore correctly held that a difference of such a small amount meant the recreational fishers did not "*approach the threshold in establishing an error of law by the Minister*": *Judgment para [52].*

93 However, the High Court did not ask if the same was true in respect of the allowances made by the Minister for recreational interests. The data in the following table sets out for KAH 1 and all QMAs combined the Ministry's initial recommendations in the 2004 IPP, the amount the Recreational Fishers sought in their submissions, and the amount the Minister allocated in his final decision: *see data in Table 7 of the 2004 FAP* [**Vol III**, p735]

Rec Allowances 2004	KAH 1	Total QMAs
IPP	1,580	2,780
Rec Fishers' submissions	2,000	3,707
Minister's decision	1,865	3,415

94 This demonstrates that there is a difference of less than **8%** between the allowances set by the Minister and the amounts sought by the Recreational Fishers, both in KAH 1 and across all areas combined.

95 Moreover, as a result of the 2004 consultation, the recreational fishers' allocation **increased** by approximately 23% in the combined allowances and 18% in KAH 1. This was primarily a result of the Recreational Fishers' submission that their allowances should be increased to reflect higher (albeit uncertain) catch history estimates: *Recreational Fishers' submission* [**Vol IV**, p1469]; *2004 FAP para 214* [**Vol III**, p734].

96 The Commercial Fishers submit that it is not tenable for the Recreational Fishers to contend that the Minister did not "*allow for*" their interests under section 21(1) when setting the TACCs – they essentially got the allowances they asked for.

(G) HAURAKI GULF MARINE PARK ACT 2000 – KAH 1 TAC AND TACC

97 The Commercial Fishers appeal against the High Court's declaration that the Minister failed to take any or proper account of sections 7 and 8 of the HGMPA [**Authorities: Tab 3**] when fixing the TAC for KAH 1: *Judgment para [145(1)(b)]*. The Recreational Fishers have cross appealed against the High Court's finding that the provisions are not applicable to the TACC decision for KAH 1, and say that the Minister failed to have particular regard to the provisions.

(G1) Failure to take into account HGMPA in KAH 1 TAC decision

98 The High Court found that the Minister "*failed to take any or proper account*" of sections 7 and 8 of the HGMPA when fixing the KAH 1: *see para [75-83]*. The Commercial Fishers submit that the High Court:

98.1 rightly identified that when setting a sustainability measure such as a TAC, section 11(2) provides that the Minister "*shall have regard to*" the provisions of sections 7 and 8 of the HGMPA, although did not acknowledge that this is qualified by the phrase "*as considered by the Minister to be relevant*": *see para [76]*;

98.2 wrongly interpreted these sections as placing an obligation on the Minister to "*pay particular regard to the social, economic, recreational and cultural wellbeing of the people of the Hauraki Gulf, and in particular to enhance its physical resources in the form of the kahawai stock*";

98.3 wrongly considered that the references to the HGMPA in the advice papers fell "*well short*" of the Minister's statutory obligations (which the Court suggested may have been best recognised by a new KAH QMA within the Gulf).

99 The Minister's obligation was to "*have regard to*" sections 7 and 8 of the HGMPA when setting a sustainability measure such as a TAC, not have "*particular regard to*" those provisions:

99.1 section 13 of the HGMPA provides that except as provided in section 9 to 12, in order to achieve the purpose of the HGMPA, persons exercising powers for the Hauraki Gulf under any Act specified in Schedule 1 (which includes the Fisheries Act 1996) must have "*particular regard*" to sections 7 and 8;

99.2 section 12 of the HGMPA is an exception to the section 13 obligation, and amends section 11(2)(b) of the Fisheries Act 1996 to require the Minister to include (and therefore have "*regard to*") sections 7 and 8

of the HGMPA: *Gulf District Plan Assn Inc v Auckland CC [2004] NZRMA 202* [**Authorities: Tab 4**];

99.3 "*have regard to*" simply means to consider or turn one's mind to: *Te Runanga o Raukawa Inc v Treaty of Waitangi Fisheries Commission* (CA 178/97) pg 8 [**Authorities: Tab 10**].

100 The Minister was made aware by the Ministry of the obligation to take into account sections 7 and 8 of the HGMPA:

100.1 The 2004 IPP listed sections 7 and 8 of the HGMPA as one of the statutory considerations that had been taken into account when evaluating management options, and noted the HGMPA's objectives and the Ministry's view that the setting of sustainability measures for kahawai will better meet the HGMPA's purpose: *2004 FAP para 65* [**Vol III**, p684];

100.2 The Recreational Fishers' 2004 submissions neither disputed this nor referred to the HGMPA, although emphasised the Hauraki Gulf as an area of importance;

100.3 Within the 2004 FAP the Minister was provided with the 2004 IPP and the Ministry's final advice. Under the heading "*Legal Obligations*", the final advice referred the Minister to the statutory considerations in the 2004 IPP at para 65 "*that must be taken into account*" when setting a TAC and allowances for kahawai, and noted that no additional information had come to hand relating to these considerations: *2005 FAP para 303* [**Vol III**, p747];

100.4 When making his decision to set the 2004 TACs based on a 15% reduction to current utilisation, the Minister was aware from the advice papers of his obligation to have regard to those provisions and the Ministry's view: *Minister's affidavit para 11* [**Vol II/Tab 34**, p495-6]. As discussed previously, the Minister essentially set the TAC for KAH 1 that the Recreational Fishers asked for (within 8%);

100.5 The Minister was acutely aware of recreational concerns relating to kahawai in the Hauraki Gulf. Due to a concern as to a possible decline in recreational catch rates in the area, the Minister requested advice on options for area constraints of commercial fishing for kahawai in the Gulf: *13 June 2005 Advice paper* [**Vol V**, p1751];

100.6 That advice concluded that given the extensive existing controls on commercial fishing in the Gulf (prohibitions on commercial fishing, trawling, pair trawling, Danish seine, purse seine, and set netting) and voluntary purse seine closures, further constraints would not

confer any sustainability benefits locally or for the KAH 1 stock as a whole: *6 July 2005 Advice paper* [**Vol V**, p1769-77];

100.7 The 2005 IPP (which had been approved for release by the Minister) again referred in its Statutory Considerations section to the Ministry's consideration of sections 7 and 8 of the HGMPA, and advised that the management measures proposed for KAH 1 met the purpose of the HGMPA: *2005 IPP para k)* [**Vol III**, p892];

100.8 The 2005 FAP identified as a key issue the Recreational Fishers' submissions that the Minister's 2004 decisions did not adequately protect the Hauraki Gulf Marine Park. The advice referred the Minister to his statutory obligations under the HGMPA, and considered that the proposed management measures for KAH 1 would meet the requirements, but that the reduction option (TACs, allowances and TACCs) would provide a more certain position in that regard: *2005 FAP paras h), 241-244* [**Vol III**, p911, 946];

100.9 The Minister's affidavit refers to the Ministry's advice about the Recreational Fishers' "*particularly strong*" concerns in relation to the Hauraki Gulf Marine Park area, the statutory obligations and that the reduction option would provide a more certain position. The Minister's 2005 decision for KAH 1 was to reduce the TACs, allowances and TACC by a further 10%: *Minister's affidavit para 105-106* [**Vol II/Tab 34**, p524].

101 The Commercial Fishers therefore submit that the Minister was advised of his statutory obligations under the HGMPA and took them into account when making his decisions in 2004 and 2005. He was well aware of recreational concerns in relation to the Gulf, and had sought specific advice in relation to constraining commercial fishing for kahawai in the area.

(G2) Failure to take into account HGMPA in KAH 1 TACC decision

102 The High Court found that the Minister was not bound to take into account sections 7 and 8 of the HGMPA when fixing a TACC, as there was no provision comparable to section 11(2). The Commercial Fishers submit that even if the Minister was required to take into account (or have "*particular regard*" to) sections 7 and 8 of the HGMPA when setting the KAH 1 TACC, and he in fact did so:

102.1 the 2004 and 2005 advice papers (summarised above) advised the Minister that he was required to take into account sections 7 and 8 of the HGMPA in making his 2004 and 2005 decisions relating to TACs, allowances *and* TACCs, and advised him of the Ministry's view that the proposals were consistent with the purpose of the HGMPA;

102.2 the Minister was acutely aware of, and had particular regard to, issues relating to the Gulf. The Minister's decisions were entirely consistent with the purpose of the HGMPA and sections 7 and 8.

(H) FAILURE TO IMPLEMENT MEASURES TO MONITOR RECREATIONAL CATCH

103 This ground of appeal concerns the Commercial Fishers' contention that, just as the Minister was found to have acted irrationally by failing to consider Ministry advice to review recreational bag limits to give effect to his decision to reduce recreational allowance by a total of 25%, the Minister also acted irrationally by not implementing any measures to monitor or evaluate the amount of kahawai being caught by recreational fishers: *Judgment paras [108-126]* [**Vol I/Tab 9**] concerning the bag limit decision; *paras [133-141]* concerning the catch monitoring decision.

104 The Commercial Fishers' short point is that the Minister stated that it was "*crucial*" and a "*matter of priority*" that recreational catch of kahawai be monitored in order to "*ensure positive effects of the TAC reductions are not compromised*", yet did not put in place any measures to ensure that this occurred.

105 The Minister and Ministry repeatedly acknowledged that information on the recreational harvest of kahawai was uncertain and needed to be improved as a priority:

105.1 The Minister's 2004 decision letter stated: [**Vol III**, p786]:

> The recreational sector holds the majority share of the fisheries. Improved information from the fishery is crucial for gauging the success or otherwise of management measures.

105.2 The 2005 FAP acknowledged improved information and management of recreational take was needed generally, as well as specifically in relation to kahawai: *2005 FAP paras 42-45, 240-1 and 267* [**Vol III**, p824, 945-6, 950];

105.3 When providing reasons for the 2005 decisions the (new) Minister stated [**Vol III**, p974]:

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

106 The High Court acknowledged that the Minister must do everything possible, within resource constraints, to monitor recreational catches of

kahawai and that the Minister had said so himself on two occasions. However, the High Court assumed that "*in the period since 2005 MFish has made considerable progress in this respect*": *Judgment para [141].* To the contrary, the evidence demonstrates that very little (if any) progress has been made.

107 While the Ministry has listed kahawai as a "*high priority*" for stock estimation research in their Marine Research Planning documentation, no catch monitoring or estimation system was in place (or even planned) at the time the decisions were made. Even 15 months later, at the time of the High Court hearing, the updating material adduced by the Ministry confirmed that no monitoring or survey work had been approved. The evidence demonstrates that:

107.1 In May 2004 the Minister announced that he had secured $1m a year for 4 years to start on "*really focused*" research on recreational catch generally: *Transcript of radio interview* [**Vol IV**, p1548-9

107.2 In 2003 and 2004 a catch estimation project had occurred in the Hauraki Gulf (which represents approximately 17% of KAH 1), which was then extended across all of KAH 1 in 2005. The results of the monitoring became available in 2006/07;

107.3 Since 2005, no new monitoring or survey work has been approved for recreational kahawai harvest. A project to design a new national recreational survey has been proposed, but even assuming this occurs, results are not expected until 2010 at the earliest.

- Wilkinson (reply) paras 18.4 and 18.5 [**Vol II/Tab 39**, p569-70]
- 1 November 2004 Ministry Advice Paper, paras 6-8 and 15-19 of the Appendix [**Vol IV**, p1598-1601]
- July 2005 Ministry Marine Recreational Fisheries Draft Medium Term Research Plan – 2005-2008, pg 8 [**Vol V**, p1759]
- Research Plan produced by Todd in updating affidavit at the High Court hearing [**Vol V**, p2302-6]

108 The Commercial Fishers submit that the monitoring failures in respect of kahawai are a microcosm of a more general failure by successive Governments to monitor and manage growing recreational catch in shared fisheries. The Minister has a statutory obligation to manage the "***total allowable catch***", not just that part of it caught by commercial fishers (the TACC). In a number of shared fisheries non-commercial fishers are now allocated a significant portion of the TAC (eg. 60% for kahawai).

109 Parliament did not give the Minister the discretion to ignore the need for sustainable management of the "*lion's share*" of the TAC just because he could not muster the political will to do so in the face of lobbying by recreational fishing interests.

110 Successive Governments, including the present Government in its December 2005 "*Shared Fisheries Policy*" discussion paper, have emphasised that accurate and reliable information is fundamental to effective fisheries management of recreational fishers, and that the information currently being obtained is inadequate: *Wilkinson (reply) paras 15-16* [**Vol II/Tab 39**, p564-70]

111 Despite this, the Minister (and Ministry) continue to fail to take reasonable measures to improve the quality of information. There is a broad suite of regulatory tools available to the Minister, including powers to require reporting: sections 11, 189(g)-(h), 297(1)(h) and 298. It is anomalous that the Government continues to put recreational fishing in the "too hard" basket yet, for a number of years, authorisation and reporting requirements have been in place for customary fishers through the Fisheries (Customary Fishing) Regulations 1989: [**Authorities Tab 2**].

112 It is telling that the expert opinions of Dr G Morishima (Canada) and Ross Winstanley (Australia) are that the recreational kahawai fishery is effectively unmanaged at present, there being no reliable information on current catch levels and how they are changing over time*: Morishima para 39* [**Vol II/Tab 42**, p618]; *Winstanley paras 33-34* [**Vol II/Tab 22**, p346.24-5].

113 The High Court considered that the relief sought was not available as it was "*barren without identification of the measures*", their utility was disputed by the Crown and the Court had insufficient knowledge of Ministry resources: *Judgment para [139]*. However, it is not for the Commercial Fishers to tell the Minister *how* to exercise his discretionary powers to manage and monitor recreational fishing - Parliament assigned the task to the Minister. However, the Commercial Fishers' evidence provided case studies from other countries to demonstrate that it is entirely feasible: *Winstanely* [**Vol II/Tab 22**]; *Morishima* [**Vol II/Tab 42**].

114 The Court has a proper role and jurisdiction, applying ordinary *Padfield* principles, to determine if the exercise (or lack thereof) by the Minister's of those powers has been rational and whether he is carrying out the statutory obligations that rest with him under the Act: *Right to Life New Zealand Inc v Rothwell* [2006] 1 NZLR 531 at para [6] [**Authorities Tab 8**].

115 The Minister's failure to put in place reasonable measures to assess changes in the level the recreational kahawai catch over time was not

rational in the face of his own statement that this information was "*crucial*" and a "*priority*". In *Taveli & Ors v Minister of Immigration, Local Government and Ethic Affairs* (1999) 6 ALR 435 at 453 (FCA) [**Authorities Tab 9**], the Court considered that decisions are most often found unreasonable when "*the challenger can demonstrate an illogicality in, or misapplication of, the reasoning adopted by the decision-maker; so that the factual result is perverse, by the decision-maker's own criteria*".

116 The Commercial Fishers confine the relief sought to the declaration and order referred to at para 137(1) and (2) of the Judgment, but with the word "*regulatory*" in each case replaced with the word "*reasonable*":

116.1 A declaration that when making the 2004 and 2005 decisions the Minister failed to put in place reasonable measures to ensure that the level of recreational catch of kahawai was monitored and assessed;

116.2 An order that the Minister ought to reconsider what reasonable measures are necessary to ensure that the level of recreational catch of kahawai is monitored and assessed.

(I) LIST OF AUTHORITIES TO BE CITED

Gulf District Plan Assn Inc v Auckland CC [2004] NZRMA 202

Kellian v Minister of Fisheries (CA150/02, 26/9/02)

New Zealand Federation of Commercial Fishing & Ors v Minister of Fisheries (CP237/95, 24/4/97, McGechan J)

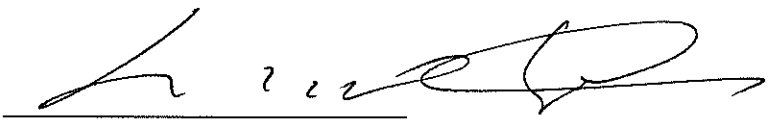
New Zealand Fishing Industry Association & Ors v Minister of Fisheries (CA82/97, 22/07/97)

Right to Life New Zealand Inc v Rothwell [2006] 1 NZLR 531

Taveli & Ors v Minister of Immigration, Local Government and Ethic Affairs (1999) 6 ALR 435 (FCA)

Te Runanga o Raukawa Inc v Treaty of Waitangi Fisheries Commission (CA178/97, 14/10/97)

Dated 31 January 2008



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