IN THE COURT OF APPEAL OF NEW ZEALAND CA163/07

BETWEEN SANFORD LIMITED & ORS

Appellants

AND THE NEW ZEALAND RECREATIONAL FISHING COUNCIL INC & ORS

First Respondents

AND MINISTER OF FISHERIES

Second Respondent

AND THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES

Third Respondent

SUBMISSIONS OF SECOND AND THIRD RESPONDENTS

CROWN LAW
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Counsel Acting:
P McCarthy

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Issue: Principles for future decisions

1. As indicated in section A2 of the submissions for the appellant commercial fishers, it has been agreed that the Minister/Ministry will review the kahawai TACs, TACCs and allowances as well as the recreational bag limit decisions in light of the judgments of the High Court and Court of Appeal.

2. The focus of this appeal (including the cross-appeal by recreational fishers) is therefore narrowed to the issues outlined in paragraph 8 of the submissions for the commercial fishers, namely:

   2.1 Matters to be taken into account when setting/varying TACCs and allowances (especially issues relating to the nature of the recreational fishing interest);

   2.2 What consideration is required of the Hauraki Gulf Marine Park Act 2000 when setting the TAC for KAH1;

   2.3 What regard must be had to the Hauraki Gulf Marine Park Act when setting the TACC for KAH1 (recreational fishers' cross-appeal);

   2.4 Whether the High Court properly refused to grant a declaration on the commercial fishers' counterclaim concerning the Crown's failure to implement measures to monitor recreational catch of kahawai.

Summary of argument

3. The Minister/Ministry's argument is as follows-

   3.1 When setting the TACCS and allowances, the Minister had sufficient information regarding the social, economic and cultural wellbeing of the people, but was wrongly advised that recreational catch history was an adequate measure of the recreational interests in the kahawai fishery with the result that those factors were not taken into account in the decisions. The High Court judgment is supported.[1]

   3.2 The Minister complied with his obligations to take into account the relevant provisions of the Hauraki Gulf Marine Park Act 2000 with

[1] Submissions paras 7-17

regard to the KAH1 TAC setting. The High Court judgment is not supported.[2]

3.3 With regard to the KAH1 TACC and allowances setting, the Minister had the information regarding the HGMPA but fell into the same error as with social, economic and cultural wellbeing factors, by wrongly adopting catch history as the measure of all the recreational interests.[3]

3.4 Sections 7 and 8 Hauraki Gulf Marine Park Act 2000 apply equally to TACC setting as to TAC setting. The High Court judgment is not supported.[4]

3.5 The Minister/Ministry have not failed to discharge any obligation to monitor recreational catch. The High Court judgment is supported.[5]

Relevant Background Facts

4. The summary at paragraphs 9-14 of the submissions for the commercial fishers is generally accepted. See also the summary in the decision of the High Court.[6]

5. Issue is, however, taken with the statement that for commercial fishers kahawai is now primarily a by-catch species.[7] This statement can be contrasted with the later statements that "kahawai forms an integral part of the annual catch mix of the purse seine fishery"[8] and the statement that "kahawai is the 'predominant budget smoked fish available in most supermarkets'."[9]

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[2] Submissions paras 18-25

[3] Submissions paras 18-25

[4] Submissions para 20

[5] Submissions paras 26-53

[6] Judgment [8]-[13], [25]-[36], COA 1/110, tab 9.

[7] Submissions for commercial fishers para 10.

[8] Submissions of commercial fishers para 90.1(a); see also Wilkinson affidavit paras 10-11 COA 2/353-354, which confirms that purse seine target fishing continues in KAH1 and KAH2.

[9] Submissions of commercial fishers para 90.1(b).

6. According to the latest Fishery Assessment Working Group report on kahawai stocks:[10]

> Before the 2002-03 fishing year a high proportion of the purse seine catch was targeted, but in recent years approximately half of the landed catch has been reported as a by-catch in the other purse seine fisheries . . . .

Substantive submissions

Setting TACCs – regard to social, economic and cultural well-being **[commercial submissions paras 41-57]**

7. As background to their submissions on the TACC decisions, the commercial fishers criticise the High Court's reasoning in relation to the TAC decisions. They say that the Judge did not recognise that matters relating to "utilisation" are relevant to the Minister's decision to set/vary a TAC under s 13.[11]

8. This reading of the judgment is incorrect. The Judge clearly recognised the relevance of s 8 to TAC setting decisions, namely that the Minister must undertake a "balancing exercise," which is a "uniquely judgemental," which requires an evaluation of present and potential stock availability against total demands of those wishing to use the resource at the time when the decision is made, and which incorporates a "utilisation objective".[12]

9. The reasoning in the judgment is consistent with the commercial fishers' submission that "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".[13] The Minister and Ministry agree that a consideration of social, cultural or economic needs may properly persuade the Minister to endeavour to move a fishstock to a level that is greater than B_{MSY}.

10. The High Court judgment is more complicated than necessary because the Judge makes a distinction between consideration of "social, cultural and

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[10] Fishery assessment plenary May 2007, page 394. Information updating position since High Court hearing.

[11] Submissions of commercial fishers, especially paras 46-57.

[12] Judgment [44]-[46], COA 1/128-129.

[13] Submissions of commercial fishers para 47.

economic factors" where required by s 13 and consideration of "utilisation" in accordance with the purpose provision (s 8).[14] That distinction is not necessary: both provisions incorporate substantially the same concepts of social, economic and cultural well-being.[15]

11. In the event, any error in the Judge's reasoning made no difference to the outcome. The Judge was satisfied that the Minister had directed his mind to "socio-economic impacts on non-commercial fishers", the "perception that recreational fishers value the fishery more highly than the commercial sector", and "the socio-economic benefits associated with harvesting [when imposing] management steps that will at least maintain, if not improve, current biomass."[16]

12. The commercial fishers' argument assumes that there is an inconsistency in the Judge's recognition that the Minister had proper regard to recreational interests in his TAC decisions, but did not have regard to those interests in his TACC decisions. There is in fact no inconsistency. While the Minister was aware of these matters and took them into account in making his TAC decisions, and whilst intending to take those matters into account in his TACC setting, he erroneously failed to do so when he adopted a "claims based" approach, ie catch history.[17]

13. A detailed analysis of this aspect of the judgment therefore does not support the submissions for the commercial fishers on TACC setting.

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[14] Judgment [49]-[50], COA 1/130.

[15] Section 8 provides that the purpose of the Act is "to provide for utilisation of fishery resources while ensuring sustainability," then defines "utilisation" in terms including a goal of increasing "social, economic and cultural well-being" (subject of course to the over-riding imperative of sustainable management).

[16] Judgment [51] COA 1/131.

[17] 2004 FAP para 183, COA 3/730, decision letter para 21, page 785; compounded by 2005 FAP advising proportional reduction para 160 COA 3/934, decision letter COA 3/974

An aside: TAC decisions were intended to restore kahawai stocks

14. The High Court judgment described the Minister's TAC decisions as "designed to result in the stock being restored to or above a level that could produce the maximum sustainable yield"[18].

15. The commercial fishers submit the Judge was wrong to say this,[19] but the Court was right:

15.1 In both 2004 and 2005 the Minister was advised that current catches might not be sustainable and that the status of kahawai stocks was uncertain[20]

15.2 In both 2004 and 2005 the decision letters explained that the Minister noted uncertainty about the current state of kahawai stocks and sought a greater level of certainty that they would be maintained at, or moved to, a level at or above the level that would support the maximum sustainable yield.[21]

Setting TACCs **[response to commercial submissions paragraphs 58-96]**

16. The Minister and Ministry did not appeal the judgment of the High Court setting aside the kahawai TACCs because they ultimately accepted that the Judge's decision on this point was correct.

17. In response to the range of issues raised by the submissions for the commercial fishers:

Correct interpretation of ss 8 and 21 – understanding the "recreational interests" **[commercial submissions paras 63-70]**

17.1 The commercial fishers say that the Judge erred in the way he applied s 8 to decisions under s 21, ie finding that the Minister must have

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[18] Judgment [53] COA 1/131

[19] Submissions of commercial fishers paras 52-54

[20] 2004 FAP para 125 COA 3/720; para 152 COA 3/725; 2005 FAP para 52 COA 3/919; para 97 COA 3/926; para 117 COA 3/929.

[21] 2004 decision letter: paras 6 and 19, COA 3/783-784; 2005 decision letter: COA 3/973-974.

regard to the social, economic and cultural well-being of recreational fishers when allocating a fishery between commercial and recreational interests. The commercial fishers (a) contrast the general nature of s 8 and the specific nature of s 21, and (b) emphasise the breadth of the Minister's discretion under s 21 (relying on the *Snapper Case*).[22]

17.2 In response: the Judge was correct in holding that s 8(2) applied to decisions under s 21 as to TACCs and allowances. Section 8 states the purpose of the Fisheries Act and so applies to all decisions under it.

17.3 The conclusion that the Judge reached can be achieved more directly, by recognising that the Minister must properly take into account the nature of the "recreational interests" referred to in s 21 that is to be reflected in his allowance decision.

17.4 On reflection the Minister and Ministry accepted that there was a "qualitative" element in the recreational interests that was not captured by a strictly catch history or "claims based" analysis. That qualitative aspect of the recreational interests could not be disregarded on the basis of a contrary "policy preference" for a more objective catch history based assessment.

17.5 The *Snapper Case* that the commercial fishers rely on does not become relevant until the next step in the process, namely the Minister's decision as to the amount of the recreational allowance. The decision does not address the nature of the underlying "recreational interests" and the matters that the Minister must take into account in order to gain a reasonable understanding of that interest.

17.6 In the course of this part of the submissions for the commercial fishers, it is argued that the Minister must be able to have regard to the effect of any TACC change on commercial interests.[23] The Minister and Ministry agree that the Minister may have regard to commercial interests (indeed, must do so). Yet the High Court

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[22] *New Zealand Fishing Industry Association v Minister of Fisheries* 22 July 1997, CA82/97.

[23] Submissions of commercial fishers paras 66 - 69

judgment does not prevent this. The decision expressly recognises the relevance of commercial fishing interests as both a source of food for those who do not fish and as the livelihood of commercial fishers.[24]

Minister's actual understanding of qualitative factors **[commercial submissions paras 71-90]**

17.7 The commercial fishers next say that as the Minister was clearly well informed about recreational fishing matters the Judge erred in holding that he did not properly consider the social, economic and cultural well-being of recreational fishers when setting/varying TACCs and recreational allowances.[25]

17.8 In response: the Minister was very fully informed about matters relating to recreational fishing and the interests of recreational fishers. If he had been advised to make an allowance for recreational interests based on the totality of that information, and had in fact done so, there could be no criticism of his decisions on this ground. The discussion in the FAP of the SACES report, for example, gave the Minister a very clear idea of the relative importance of kahawai to recreational fishers.[26]

17.9 In the event, however, the Minister was advised that he could assess the "recreational interests" solely on the basis of the "claims based" or catch history approach, and did so.[27] Notwithstanding the detailed information that the Minister had about the recreational interests, his decisions were flawed because that information was excluded from

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[24] Judgment [55]-[57], COA 1/132

[25] Submissions of commercial fishers paras 73-74.

[26] The High Court Judge erred in characterising this as a "micro analysis" at para [64] COA 1/135, perhaps because the report itself not in evidence. Rather it was an attempt to provide a common unit of measurement – ie "willingness to pay" in dollars - for assessing the relative importance of kahawai to recreational and commercial sectors. The report was not put forward as relieving the Minister from the obligation to understand recreational and commercial interests more broadly if he preferred a "utility value" approach. See the discussion in the 2004 IPP paras 126-130 COA 3/696-697; 2004 FAP paras 184, 191-192 COA 3/730-731.

[27] 2004 FAP para 183, COA 3/730, decision letter para 21, page 785; compounded by 2005 FAP advising proportional reduction para 160 COA 3/934, decision letter COA 3/974.

the decision-making process. A mandatory consideration was therefore not properly taken into account.

Outcome – TACs and allowances within 8% of those sought by recreational fishers **[commercial submissions paras 91-96]**

17.10 The commercial fishers finally say that there was no material error in the Minister's decision as the TACs and recreational allowances were not much different from those proposed by recreational fishing interests (ie they were within about 8% of the proposed levels).[28]

17.11 In response: if the Minister had been correctly advised about the legal nature of the recreational interests that he must take into account, he may well have made TAC and allocation decisions that were similar or even the same. On the other hand, he may have made different decisions. The outcome of the Minister's decision therefore does not cure the flaw in the decision-making process (although it can properly be taken into account in formulating appropriate relief).

Hauraki Gulf Marine Park Act 2000 **[commercial submissions paras 97-102; recreational submissions]**

Positions of the parties

18. The High Court held that the Minister was required to "have particular regard" to ss 7 and 8 Hauraki Gulf Marine Park Act 2000 when setting/varying the TAC for KAH1 (which includes the area of the Gulf). The Judge then concluded that the Minister did not have sufficient regard to those provisions.[29] He further concluded that the Minister was not required to have regard to those provisions when setting/varying a TACC and recreational allowances.[30]

19. The submissions for the commercial fishers take issue with the precise threshold adopted by the High Court (ie "regard" to such matters as the Minister considers relevant as opposed to "particular regard"); and go on to

[28] Submissions of commercial fishers para 94.

[29] Judgment [76], [81]-[83]

[30] Judgment [76]

submit that the Minister in fact had sufficient regard to the relevant matters.[31] The Minister and Ministry support those submissions.

20. The recreational fishers have also filed brief submissions to the effect that ss 7 and 8 Hauraki Gulf Marine Park Act must be taken into account when the Minister makes TACC and allowances decisions for KAH1. The Minister and Ministry accept that this is correct.

21. The central issue is therefore whether the advice to the Minister was sufficient to inform him of the matters required by ss 7 and 8, and whether he considered them sufficiently.

Information in fact provided to Minister sufficient

22. In the discussion of the application of this Act to the KAH1 TAC, the High Court rejected a submission for the Minister that "it is difficult to identify what the HGMPA adds materially to the Fisheries Act provisions."[32] The Court explained that the effect of ss 7 and 8 Hauraki Gulf Marine Park Act was to import what would otherwise be a utilisation concept into a sustainability measure (ie the TAC). Yet this aspect of the judgment is inconsistent with the previous discussion in paras [44]-[46], in which the Judge acknowledged that "A TAC necessarily incorporates the utilisation objective . . . ."[33]

23. It is submitted that Judgment [44]-[46] is correct, and that the High Court approached the significance of the Hauraki Gulf Marine Park Act from an incorrect starting point. Likely as a result of this error the Judge held that the legislation required a discrete discussion of the Hauraki Gulf Marine Park Act in the FAP.[34] It was not sufficient that the Minister was in fact made aware of the matters relevant to ss 7 and 8 of the Act.

24. The Minister was correctly advised on, and considered, the provisions of the Act, both in relation to the TAC, TACC and allowances for KAH1:

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[31] Submissions of commercial fishers paras 98-102.

[32] Judgment [78] COA 1/141.

[33] Judgment [46], COA 1/129.

[34] Judgment [82], COA 1/142.

24.1 The Minister considered the Act in the 2004 IPP para 65(i).[35] This was in respect of all issues. In the 2004 FAP the Minister was reminded of the need to take the Act into account in setting both the TAC and the allowances.[36]

24.2 In 2005 the Act was addressed in the IPP at para (k)[37] and in the FAP at paras 241-244.[38] He set deemed values in KAH1 at $0.66 and in other KAHs at $0.61 2004.[39]

24.3 The Minister in his affidavit at para 11 refers to his consideration of the Act in his 2004 decision-making,[40] and in respect of 2005 at paras 105-106 described his consideration of Hauraki Gulf Marine Park issues.[41]

24.4 Given the considerable amount of information the Minister had regarding the Hauraki Gulf, the issues arising in the Gulf were well understood by him.

24.5 In June 2005 he was briefed at his request on new research on the level of recreational catch the Hauraki Gulf,[42] and he gave this some deliberation, requesting as a result *Please present me with options for area constraints in Hauraki Gulf*.[43]

24.6 These options were provided in a very detailed briefing in July 2005,[44] a briefing which was attached to the draft IPP which he approved at the same time, so both this briefing paper and the IPP were considered by him together.

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35 COA 3/684.

36 2004 FAP, para 303 COA 3/747.

37 COA 3/892.

38 COA 3/946.

39 Decision letter COA 3/786.

40 COA 2/495-496.

41 COA 2/524.

42 COA 5/1748.

43 COA 5/1751.

44 COA 5/1769.

24.7 In a speech to the Recreational Fishing Council AGM on 8 July 2005 the Minister expressly referred to his continued monitoring of the Hauraki Gulf situation and the initial findings he had received.[45]

25. It is submitted that the Minister was adequately informed of the matters that he was required to have regard to. His error with regard to the TACC and allowances setting was in being advised to adopt, and adopting catch history as the measure of all the recreational interests.

Alleged failure to monitor the recreational catch **[commercial submissions paras 103-116]**

26. The relevant pleading by the commercial fishers is their counterclaim, paras 57.3, 58.5 and 86.[46]

27. The specific measures the commercial fishers allege the Minister must implement are not set out in the counterclaim. Nor are they described in the commercial fishers' submissions, except as "reasonable measures" for monitoring and assessment of the recreational kahawai catch.

28. The issue before the High Court was whether the Minister/Ministry had failed to discharge a statutory duty. The High Court held they not failed. If this Court were to find the contrary, and were to consider making a mandatory direction, a direction containing the word "reasonable" is of no assistance to the Minister/Ministry. If the word "reasonable" is meant in its administrative law sense, then it adds nothing, and if it is meant in its ordinary sense, then it tells the Minister/Ministry nothing about what the Court requires and what measures will suffice.

Section 11 and s 298 Regulations

29. Regulations under s298 Fisheries Act are made by the Governor-General in Council on the recommendation of the Minister of Fisheries pursuant to s11. Such regulations are limited to sustainability measures within Part 3. They do not include licensing, registration or reporting (refer s11(4)), especially when the specific regulation making powers of s297 exist.

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[45] COA 5/1810.

[46] COA 1/72 and 1/79-80.

Section 89 and s 297 Regulations

30. Regulations can also be made for various matters under s 297, but there is no power to make regulations for the licensing of recreational fishing. In their submissions the commercial fishers have stepped back from the indication in the evidence that they seek a licensing regime,[47] but the point remains relevant because of the evidence that a mandatory reporting regime, which may still be advocated by the commercial fishers, cannot work in the absence of a corresponding licensing regime.

Licensing: exemption of recreational fishing from fishing permit regime

31. Recreational fishers have a common law right to fish. The common law right of access to fisheries can only be restricted by legislation:

- *Waipapakura v Hempton* (1914) 33 NZLR 1065, 1071 (SC);
- *Halsbury's Laws of England* Vol 18 para 609.

32. Commercial fishing is now subject to a statutory permitting regime (and a number of other restrictions). Recreational fishers still have common law rights in the kahawai fishery which are confined only to the extent that the Fisheries Act contains provisions which allow recreational catch to be constrained.

33. It is submitted that the Fisheries Act 1996 does not empower the Minister to impose a licensing or permitting regime. Section 89 sets out the requirements for permitting. Subsection (1) provides that

> (1) No person shall take any fish, aquatic life, or seaweed by any method unless the person does so under the authority of and in accordance with a current fishing permit.

34. Pursuant to subsection (2), subsection (1) does not apply to the taking of

> "(a) fish, aquatic life, or seaweed by any natural person otherwise than for the purpose of sale and in accordance with any amateur fishing regulations made under, and any other requirements imposed by, this Act; ..."

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[47] The possibility of licensing is promoted by Mr Wilkinson affidavit, paras 279-280. COA 2/422-423.

35. Recreational fishing is, therefore, expressly excluded from the requirement to fish under a fishing permit.

36. Section 297(1)(a) states that regulations can be made for:

> "(a) Regulating or controlling fishing and the possession, processing, and disposal of fish, aquatic life, or seaweed ..."

37. S 297(1)(a) provides a general power to regulate fishing, but it does not confer an unfettered power and it does not confer a power to prohibit and then impose a licensing regime on recreational fishers.

38. Any regulations made under this subsection must be within the overall scheme and contemplation of the Act. If the empowering section and the overall scheme of the Act show a high degree of specificity and detail, any general provisions must be limited to an extent under both the purposive and *ejusdem generis* approaches to construction. This is especially applicable here, given the absence of a provision in the legislation to confine recreational catch.

39. As previously stated, s 89 provides an express exclusion from the permitting requirements for recreational fishing. Such an express exclusion cannot be negated by imposing a permitting regime under the general regulation-making powers. Instead, it is submitted, an express regulatory power to make regulations which impose a permitting regime on recreational fishing is required.

40. Furthermore, it is submitted that s 297(1)(a) does not provide a power to prohibit fishing completely. The ability to make regulations to regulate, authorise or prohibit the taking of fish is restricted to different stock or species, a particular area or waters, a period of time, the size of fish, or fish with specified conditions or physical characteristics. There is no ability to prohibit fishing in general. A licensing or permitting regime requires there to be the ability to prohibit fishing and create a corresponding offence. Section 297(1)(a) does not provide the ability to impose such a regime.

Comparison: regime for Licensed Fish Receivers

41. By way of comparison, pursuant to s192(5) Fisheries Act, all persons are prohibited from receiving fish for sale unless licensed.

42. Section 297(1)(c) provides a specific regulation making power for the licensing of fish receivers. That subsection states that regulations may be made:

> "(c) Providing for the issue, refusal, renewal, suspension, revocation, surrender, or modification of licences to receive fish, aquatic life, or seaweed by the chief executive, and the imposing of conditions on such licences, whether by the chief executive or otherwise, for persons who wish to act as fish receivers and to purchase or otherwise acquire or be in possession, in prescribed circumstances, of fish, aquatic life, or seaweed taken for the purpose of sale".

43. The Fisheries (Licensed Fish Receivers) Regulations 1997 are those regulations.

Reporting

44. There is power under both s189 and s297(1)(h) Fisheries Act to make reporting regulations for recreational fishing.

45. However, there is expert opinion that a reporting regime could not be made enforceable or effective without a statutory licensing/registration regime.

- Todd para 28[48]
- Lyle paras 6-7[49]
- Zacharin para 11[50]

46. In those circumstances, it is submitted there can be no unlawfulness in not making regulations for the reporting of recreational catch.

47. In respect of charter boat operators, the Cabinet Paper for the Shared Fisheries Discussion Paper has addressed the charter boat operators at para 26:[51]

> *Fisheries for which management would be improved by charter reporting are relatively small components of the overall amateur sector. However, charter effort tends to be concentrated on hot-spots that are high value. Reporting would provide information to*

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[48] COA 2/456-457, tab 27.

[49] COA 2/483, tab 31.

[50] COA 2/438, tab 25.

[51] COA 5/1975.

monitor pressure on specific popular sites and, if necessary, take management action to protect local populations of vulnerable species such as groper.

48. Having undertaken further consultation, the Government intends to require reporting by charter vessels: 2007 Cabinet Paper.[52]

Research And Information Gathering Activities

49. The commercial fishers also criticise the relevant research into recreational kahawai fishing as inadequate.[53] Yet there has been ongoing research and information gathering on a reasonably consistent basis for many years.

50. It must be recognised that kahawai is but one of many species required to be administered by the Minister and the Ministry, and that funding is determined not by them but by the Government, which itself must order priorities for the inevitably limited funding of all New Zealand activities. The funding for the Ministry of Fisheries must be prioritised and allocated from year to year among a large number of demands.

50.1 Scheduled to Dr Todd's affidavit (exhibit A) is a schedule Chronology of Research 1997/98 to 2005/06 Non-Commercial Fisheries.[54]

50.2 1991 – three regional telephone/diary surveys.[55]

50.3 1996 – the first national telephone/diary survey.[56]

50.4 South Australian Centre for Economic Studies survey of the Value of New Zealand Recreational Fishing.

50.5 1999/2000 – the second national telephone/diary survey.[57]

50.6 2000/2001 – further work on the second national telephone/diary survey.[58]

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[52] Information updating position since High Court hearing.

[53] Submissions for commercial fishers para 107

[54] COA 5/1820.

[55] Todd affidavit para 9 COA 2/451.

[56] Todd affidavit para 9 COA 2/451.

[57] Todd affidavit para 9 COA 2/451.

50.7 2002 – an independent review by Prof Kearney (University of Canberra) of the two national diary surveys.[59]

50.8 2003 – Dr Todd convened a workshop following the Kearney report and this led to various Working Group activities reviewing the two national surveys and the estimates derived from them.[60]

50.9 2004 – additional funding for recreational fishing research was obtained for spending over a four-year period,[61]

50.10 2004 and 2005 – combined aerial overflight/boat ramp surveys primarily focused on snapper also provided kahawai harvest estimate information: Hauraki Gulf in 2004, KAH1 in 2005.[62]

50.11 2005 – the Working Group processes have been used on an ongoing basis throughout, and a copy of the Medium Term Research Plan for 2005-2008 developed by the Marine Recreational Fisheries Research Planning Group (MRFRPG) is exhibit E to Dr Todd's affidavit.[63]

50.12 2007 Stock Assessment - There was a further stock assessment under way which was expected in 2007,[64] This was completed, and will be considered in the next TAC/TACC/allowances decisions.

50.13 2006 – The Shared Fisheries Paper (Anderton affidavit) sets out the Government's proposals for consultation with an intention to introduce legislation in mid 2007. It sets out further clear proposals with significant additional funding, involving increased research and monitoring of amateur catch; reporting requirements for charter boat

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[58] Todd para 9, COA 2/451.

[59] Todd affidavit paras 10-14,[59] exhibit B, COA 4/1252.

[60] Todd affidavit paras 15-18 COA 2/452-453.

[61] Todd affidavit paras 19-20 COA 2/453-454; Benson Pope affidavit para 5 COA 2/493

[62] 2007 Plenary Report

[63] 2005 FAP para 51 COA 5/1759.

[64] 2005 FAP para 51COA 3/919, Benson Pope para 83COA 2/516

operators; and estimating relative value of commercial and amateur fishing.[65]

50.14 2007 – the latest Cabinet Paper confirms the Government's intention to fund an amateur fishing trust and require charter vessel reporting.[66]

Relative Amounts Spent On Research

51. Mr Wilkinson's suggestion that the amount the Government spends on recreational research is grossly out of proportion to the amount spent on commercial fisheries research is misleading (Wilkinson reply para 13.4).[67]

51.1 First, the figures set out in Mr Wilkinson's table at para 13.4 is for all fisheries, not merely kahawai, of course.

51.2 Secondly, there are relatively few fisheries in which recreational participation is substantial, ie snapper, blue cod, kahawai, rock lobster, paua and scallops (2004 Briefing for Minister of Fisheries).[68]

51.3 By comparison, 130 species are fished commercially of which 43 are commercially significant as target species. (2004 Briefing for Minister of Fisheries).[69]

51.4 Some 750,000 tonnes of fish are taken annually by commercial fishers (2004 Briefing for Minister of Fisheries).[70]

51.5 A very substantial part of the commercial catch is exported. Export values vary in accordance with the exchange rate, but from 1996 to 2003 were in excess of $1 billion (2004 Briefing for Minister of Fisheries)[71]

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[65] Especially at COA 5/2019-2020.

[66] Information updating position since High Court hearing.

[67] COA 2/564.

[68] COA 4/1430.

[69] COA 4/1428.

[70] COA 4/1429.

[71] COA 4/1429.

Commercial Involvement In Recreational Research Planning

52. The Ministry has set up and operated since 1990 the Marine Recreational Technical Working Group (MRTWG), its role being to plan research on recreational fisheries and review the research results (Todd paras 4, 6).[72] The planning role has been taken over by the Marine Recreational Fisheries Research Planning Group (MRFRPG) (Todd para 23).[73] Both groups have essentially the same composition, ie representatives of commercial, recreational, customary and environmental sectors (Todd paras 4 and 23).[74]

53. It is submitted there is no failure on the part of the Ministry or the Minister in seeking information from time to time on the kahawai fishery such as to support an allegation of unlawfulness.

Proposed outcome of appeal

54. The judgment in the High Court[75] comprised declarations that the Minister fixed the TACCs[76] for all areas without having proper regard to the social, economic and cultural wellbeing of the people[77]; failed to take ss 7 and 8 Hauraki Gulf Marine Park Act into account when setting the TAC for KAH1; and failed without giving reasons to consider advice from Mfish to review recreational bag limits.

55. The Court then made a direction the Minister reconsider or review the 2005 decisions in the light of the declarations.

56. The commercial fishers' first ground is a challenge to the first declaration in the High Court judgment [p145] (1)(a), and if successful, that declaration would be set aside by this Court.

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[72] COA 2/450, tab 27.

[73] COA 2/455.

[74] COA 2/450 and 455.

[75] Judgment [145] COA vol 1 tab 9

[76] Clearly the declaration was intended to read "TACCs and allowances"; Judgment [54]-[74]

[77] S 8 Fisheries Act

57. The commercial fishers' second ground is a challenge to the second declaration at judgment [145](1)(b), and similarly if successful that declaration would be set aside.

58. The commercial fishers' third ground is against the High Court's rejection of the allegation that the Crown has failed to discharge obligations to impose reasonable measures to monitor the recreational catch of kahawai. If this ground is successful, then either or both a finding and a declaration in terms this Court approves might follow. As set out above, the Minister/Ministry have severe reservations as to the use of the word "reasonable" as sought by the commercial fishers.[78]

59. The recreational fishers' ground is that ss 7 and 8 HGMPA apply to the setting of the KAH1 TACC as well as to the TAC. If this is successful, then the words "and TACC" would be added after "TAC" in the High Court declaration at [145](1)(b).

60. As indicated, the Minister and Ministry already propose to undertake a review of the TACs, TACCs and allowances for all areas.

12 February 2008

Alan Ivory/Peter McCarthy/Sara Ritchie
Counsel for the Second and Third Respondents

TO: The Registrar of the Court of Appeal of New Zealand.
AND TO: The Appellants and to the First Respondents

[78] See above para 28

List of authorities to be cited by Second and Third Respondents

Statutes

1. Fisheries Act 1996, ss 8, 11, 13, 21, 89, 189, 297, 298

2. Hauraki Gulf Marine Park Act 2000, ss 7, 8

Cases

3. *New Zealand Fishing Industry Association v Minister of Fisheries* 22 July 1997, CA82/97, the *"Snapper Case"*

4. *Waipapakura v Hempton* (1914) 33 NZLR 1065, 1071 (SC).

Texts

5. *Halsbury's Laws of England* Vol 18 para 609.