

*under:* Part I of the Judicature Amendment Act 1972

*in the matter of:* an application for review

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

*and:* **Minister of Fisheries**  
*First Respondent*

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

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

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Affidavit of Vaughan Wilkinson in support of the third  
respondents' application for stay pending determination of  
appeal

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Dated: June 2007

Next Event date:

Judicial Officer: Harrison J

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*Reference:* B A Scott/G T Carter

I, **Vaughan Hilton Wilkinson**, of Auckland, Business Development, swear:

- 1 I am the Business Development Manager of Sanford Limited (**Sanford**), one of the third respondents (the **Commercial Fishers**). I have previously sworn two affidavits in these proceedings.
  - 2 I am aware that the first and second respondents (the **Crown**) have applied for a stay pending determination of the appeal, and I have also read the affidavit of the Ministry of Fisheries' (the **Ministry**) Mr Chatterton dated 23 May 2007 filed in support of the Crown's application.
  - 3 I understand from Mr Chatterton's affidavit that unless a stay is granted, as a result of the decision of this Court's judgment dated 21 March 2007, the Ministry intends to include the reconsideration of kahawai stocks in the 2007 sustainability round for implementation in the 2007/08 fishing year, which commences on 1 October 2007.
  - 4 The purpose of this affidavit is to:
    - 4.1 explain what I consider to be the potential consequences on the Commercial Fishers, and rights holders in other commercial fisheries, in the event that a stay is not granted pending the determination of the appeal;
    - 4.2 explain why in my view, the applicants (the **Recreational Fishers**) will not be adversely affected if a stay is granted.
- Application for a stay pending appeal**
- 5 Following the filing of the Commercial Fishers' appeal and the Recreational Fishers' cross appeal, the Crown sought agreement from the parties to defer reconsideration until after determination of the appeal. The Commercial Fishers supported the Crown's proposal, whereas the Recreational Fishers did not.
  - 6 If the Crown had advised the parties it was not intending to apply for a stay, the Commercial Fishers would have made their application for a stay at that point.

**Sustainability round process**

- 7 I agree with the description of the sustainability round process in Mr Chatterton's affidavit, and in particular agree with his comments that the process is extremely resource intensive, both from the Ministry's perspective and that of stakeholders such as the third respondents.
- 8 As set out in my first affidavit, Sanford devoted considerable resources to its submissions as part of the consultation rounds for the Minister's 2004 and 2005 kahawai decisions. The same can be said of other commercial stakeholders, as well as non-commercial stakeholders such as the Recreational Fishers.
- 9 If a stay is not granted and the appeal by the third respondents is upheld, Ministry and stakeholder efforts in relation to the 2007 sustainability round process for kahawai will have been wasted, and the decisions will likely need to be reconsidered again.
- 10 I have read a copy of the affidavit of Mr K Walshe dated 6 June 2007, filed in support of the Recreational Fishers' opposition to the Crown's application for a stay. I note that at paragraph 6, Mr Walshe considers that the Ministry should have sufficient resources for this year's sustainability decisions due to a saving of resources because:
- 10.1 the Ministry has recently consulted with stakeholders in relation to the possible introduction of albacore and skipjack tuna into the QMS;
- 10.2 at his speech to the Seafood Industry Council on 24 May 2007, the Minister announced that he would not introduce albacore and skipjack tuna into the QMS this year.
- 11 Mr Walshe is confused. The Ministry's consultations in relation to albacore and skipjack tuna commenced with an IPP in June 2004 (not recently), and the Minister announced at the Seafood Industry Council conference in May 2006 (not 2007) that these stocks would not be introduced into the QMS. The speech annexed by Mr Walshe as exhibit "B" is from the May 2006 conference (I refer to and annex a copy of the Minister's May 2007 Seafood Industry conference speech later in this affidavit).

**Consequences for third respondents**

12 Any reconsideration by the Minister of TACCs for kahawai as part of the 2007 sustainability round, having regard to this Court's decision under appeal, may result in larger non-commercial allowances and/or reductions in the TACC, thereby adversely affecting the rights of the Commercial Fishers. This may be a consequence of this Court's view in the decision under appeal that:

12.1 the Minister previously failed to have proper regard to recreational fishers "well-being" when setting TACCs; and

12.2 the Minister must set allowances for recreational fishers before setting the TACC, and cannot take into account the potential effect of TACC reductions on commercial fishers.

13 As I explained in my first affidavit, recreational fishers have been allocated the majority of the kahawai TACs, and kahawai TACCs have been heavily reduced. As a result of these reductions, kahawai is essentially no longer targeted, because Sanford's kahawai quota is needed to cover bycatch in its purse seine operations.

14 Any further reduction of TACCs is likely to have severe consequences for the viability of Sanford's purse seine operation in Tauranga (refer paras 243-249 of my first affidavit in relation to the effect of the Minister's 25% reductions to date). Catch plans are set at the beginning of the year based on the TACC. The available quota must be spread through the year to meet demand and vessel requirements.

15 If a stay is not granted and the Minister reduces kahawai TACCs based on the decision under appeal, the Commercial Fishers' appeal will largely be rendered pointless, at least for the 2007/08 fishing year.

**Consequences for wider commercial rights holders**

16 Given this Court's decision, there may also be significant ramifications for the wider commercial industry in the event a stay is not granted pending determination of the appeal.

17 This was recently emphasised by the Minister of Fisheries in his formal address to the commercial seafood industry at the May 2007 Seafood Industry conference, entitled "*Straight Talking to the fishing industry*". I attach a copy of the Minister's speech as exhibit "**VW3-A**".

18 The Minister's speech included the statement:

Those who thought they would be clever by trying to torpedo the Shared Fisheries project got a rude shock when Justice Harrison handed down his findings on the kahawai case. The judgment has profound implications for the commercial sector.

If the shared fisheries process now fails we will be falling back on the existing legislation – and if the Court of Appeal upholds the findings of Justice Harrison, then I, and future Ministers, will be providing for the social, cultural and economic well-being of recreational fishers without much guidance or certainty. We will be making such decisions before we turn to the TACC. The Court have (sic) not provided me with guidance on how we take into account commercial rights and values and settlement rights.

19 As part of the annual sustainability round, the Ministry provides the Minister with generic advice in relation to his obligations under Part 1 and Part 2 of the Fisheries Act 1996 (the **Act**), including his obligations when taking into account the purpose of the Act, setting TACs and allocating catch between sectors pursuant to section 21.

20 This generic advice relating to the interpretation of sections 8, 13 and 21 of the Act will presumably need to be revised as a result of this Court's decision, particularly in relation to the Minister's role when allowing for non-commercial fishing and setting TACCs.

21 It follows that this Court's decision will also affect the Minister's consideration of sustainability decisions for fish stocks other than kahawai, which have significant non-commercial components. Based on Mr Chatterton's affidavit, aside from kahawai, this year these stocks are tarakihi (TAR1), flatfish (flounder, sole, brill and turbot) (FLA3), and to a lesser degree school sharks (SCH1) and red cod (RCO3).

22 It follows that the rights of commercial fishers in these fish stocks may also be effected unless a stay is granted. If the appeal is upheld, these decisions may also be subject to challenge if they are based on advice relating to the interpretation of the Act and role of the Minister which the Court of Appeal subsequently determines was wrong. It is also possible that following the release of this year's sustainability measures IPP, commercial rights holders in these fisheries may seek to challenge the advice based on the grounds raised on the Commercial Fishers appeal.

**Recreational fishers not materially prejudiced by a stay**

23 In the event a stay is granted, I do not believe that the Recreational Fishers will be prejudiced.

- 24 The recently released 2006 draft plenary report for kahawai (the **Kahawai Plenary Report**) has reviewed the status of kahawai stocks and the new 2007 KAH 1 stock assessment. This new stock assessment replaces the 1997 nation-wide assessment. I attach a copy of the draft Kahawai Plenary Report as exhibit "VW3-B".
- 25 In relation to the 2007 stock assessment for KAH 1, the Kahawai Plenary Report states that:
- 25.1 under all the scenarios examined, it is likely that the current spawning biomass is above  $B_{MSY}$  (with most estimates well above  $B_{MSY}$ ), although it is uncertain how far above  $B_{MSY}$ ;
- 25.2 current assumed removals are lower than almost all estimates of the maximum sustainable yield;
- 25.3 it is unlikely that the stock will decline below  $B_{MSY}$  at current assumed catch levels.
- 26 In relation to recreational catch, the Kahawai Plenary Report states that for KAH 1:
- 26.1 The 2000/01 harvest estimates for kahawai (which were used by the Minister to set recreational and customary allowances) are:
- (a) possibly overestimates for those years (and according to some members of the working group implausibly high);
- (b) implausibly high if considered as a long term average of recreational catch;
- (c) likely represent the upper limit of the recreational harvest that may have occurred in any year since the 1990s;
- 26.2 The earlier diary survey estimates (the 1991-1994 regional surveys and the 1996 survey), although biased, are likely to be at plausible levels for those years but are still uncertain.
- 27 It follows that a stay pending the determination of the appeal will not disadvantage the Recreational Fishers in relation to KAH 1 (which formed the focus of their claim), because current catches are

sustainable and the recreational allowance is well in excess of recreational catch.

Sworn at Auckland )  
on June 2007 )  
before me: ) \_\_\_\_\_  
Vaughan Hilton Wilkinson

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A Solicitor of the High Court of New Zealand