In the High Court of New Zealand
Auckland Registry

CIV 2005-404-4495

under: Part I of the Judicature Amendment Act 1972

in the matter of: an application for review

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

Memorandum of counsel for third respondents as to grounds of appeal

Dated: 9 July 2007

Before: Harrison J

Chapman Tripp *Barristers & Solicitors*

1-13 Grey St
PO Box 993
Wellington NZ

Tel +64 4 499 5999
Fax +64 4 472 7111
DX SP20204

Reference: B A Scott/G T Carter

Purpose

1 In light of matters discussed at the hearing of the stay application on 3 July 2007, the purpose of this memorandum is to describe in more detail, and where appropriate narrow, the grounds for appeal to be advanced by the commercial fishers. The reason for doing so is to demonstrate that the grounds for the appeal are arguable.

Preliminary points

2 It is important to restate two preliminary points made at the hearing on 3 July 2007:

2.1 First, while a number of High Court decisions have looked in detail at the merits of an appeal when considering any application for stay (or for a continuation of interim orders pending an appeal), the Court of Appeal has consistently held that this inquiry is only to confirm that the appeal is genuine and not frivolous in nature (see quotation from Court of Appeal at para 5.6 of counsel's written submissions). Neither the Crown nor the recreational fishers have argued that the appeal raises anything other than genuine issues. The recreational fishers submissions also correctly acknowledge that there is a genuine public interest in these proceedings (para 21);

2.2 Second, the only grounds of appeal that are relevant for present purposes are those relating to the declarations made by the Court on the recreational fishers' claim. This application for a stay has been made because of the order for a reconsideration of the decisions arising out of the recreational fishers' claim. Accordingly, any assessment of the merits of the appeal should be confined to that the grounds relied on for that part of the appeal.

3 As discussed at the hearing, counsel has not had the opportunity to discuss this memorandum in any detail with the various commercial fishers that have a direct interest in these proceedings.

4 However, having made these preliminary observations, this memorandum attempts to explain and refine the grounds for appeal.

Recreational fishers' proceedings

5 The commercial fishers' grounds for appeal against the findings in favour of recreational fishers can be reduced from eight to five points. The first three essentially turn on questions of statutory

interpretation. They go to the question of the correct legal approach that should be adopted by the Minister when exercising his discretion.

(i) TAC/TACC distinction drawn not valid

6 The first ground for appeal (para 3.1(a) grounds for appeal) contends that the distinction drawn in the judgment between the application of section 8 to TAC setting on the one hand and TACC setting on the other, is not correct as a matter of law.

7 This is not a distinction that was advanced by any of the parties at the hearing.

8 The short point contended for by the commercial fishers is that:

8.1 all TAC decisions have a key utilisation component (as well as a sustainability one);

8.2 the requirement in section 13(3) to have specific regard to social, cultural and economic factors when setting a TAC that will alter a stock size, does not negate the continuing relevance and application of section 8 to that decision.

9 While the correct setting of a TAC ensures long term sustainability (and is unquestionably a sustainability measure), its immediate purpose is to authorise the total level of catch that can occur in that fishing year. The decision to allow a particular *total* level of harvest in any year (a TAC) is as much a utilisation decision for the purpose of section 8 as is the decision to allow *part* of that total to be harvested by commercial sector in the form of a TACC set under section 21.

10 Nearly every TAC decision will alter the stock size and move it up or down the biomass spectrum (depending on whether the levels of removals are greater or less than the annual yield produced at that stock size). Therefore section 13(3) will nearly always be in play as a mandatory consideration. But even if that is not so (for example where annual catch and yield are exactly the same), section 8 applies as any decision to allow any particular level of harvest is also a decision to allow a certain level of utilisation in that year.

(ii) Nature of commercial interest – definition of the "peoples" wellbeing

11 This ground of appeal consolidates paragraphs 3.1(b), (c) and (f) of the points on appeal.

12 When analysing the requirement under section 8 to have regard to the need to enable "people" to provide for their "social, economic and cultural wellbeing", the judgment (paras 56, 57,71 and 72) finds that :

12.1 commercial considerations are limited to the well-being of *consumers* of fish caught by commercial operators and to the well-being of *employees* of those operators, rather than the commercial operators themselves;

12.2 the Minister was therefore wrong to have "*placed considerable weight, when setting the TACCs, on the potential effect of catch reductions on commercial operations, which is not the correct statutory test*" (para 71).

13 The commercial fishers will argue on appeal that these findings:

13.1 are inconsistent with the Court of Appeal's previous finding in the *Snapper* case, where the Court held (pg 16) "*Of course, if the Minister is considering any reduction in TACC with a consequential reduction in quota, he must carefully weigh the economic impact of what he proposes to do on both individual quota holders and the QMS generally. That is a given...*";

13.2 fail to appreciate that section 8 is just one of the factors to be taken into account when the Minister is exercising his discretion to set a TACC under section 21. In focusing on the requirements of section 8, the judgment has lost sight of the fact that what the Minister is setting is a *commercial* catch limit and that the Minister must (as stated by the Court of Appeal) have regard to the effect the decision will have on commercial operators and quota owners.

(iii) Nature of the recreational interest

14 This ground of appeal relates to paragraph 3.1(e) of the points on appeal.

15 The judgment (para 24) compares the nature of a TACC decision an allowance for recreational fishers, and agrees with the proposition that the TACC can be set at zero, but not the allowance for recreational fishers. "*In that sense non-commercial interests, both Maori and recreational, must be provided for where they exist. The same does not apply for commercial interests*".

16 The commercial fishers will contend on appeal that this proposition is not correct and is not consistent with the Court of Appeal's findings in the *Snapper* case. There, the Court said:

> 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, it is not a quota as such. Take recreational fishers as an example, the "allowance" is simply the Minister's best estimate of what they will catch during the year, they being subject to the controls which the Minister decides to impose upon them e.g. bag limits and minimum lawful sizes. Having set the TAC the Minister in effect apportions it between the relevant interests. He must make such allowances as he thinks appropriate for the other interests before he fixes the TACC.

17 The extent to which recreational catch exists in a fishery is a matter for the Minister as it is the Minister who determines the nature and extent of the controls on their catch.

18 To take an extreme example to test the proposition, assume the Minister issued a closure notice in an area to all recreational fishing, either because of a sustainability concern, or perhaps to give complete preference to Maori. With the closure notice in place the Minister would not make any allowance for recreational fishers in that area as, given the statutory controls in place, they will not lawfully be taking any fish from the area.

(iv) Minister's use of catch history and qualitative/quantitative factors

19 This ground of appeal incorporates paragraphs 3.1(d) and (g) of the points on appeal.

20 The commercial fishers will contend that the Ministry and Minister were entitled to have a policy preference for the use of catch history as a measure of utilisation and in any event did take into account both quantitative and qualitative factors when allowing for recreational interests.

21 The argument of the commercial fishers is shortly summarised by the Court at paragraph 42 of the judgment. Allied to this, commercial fishers will contend that too much is made of the distinction between qualitative and quantitative factors, and that the Court's view of what constitutes qualitative factors is not correct.

22 In terms of kahawai, recreational fishers want qualitative factors to be taken into account in a quantitative way by the exclusion of commercial fishers (either completely or allowing a by-catch fishery only) and a higher biomass with larger fish with higher catch rates.

The Minister was fully aware of this and weighed the factors put forward by the recreational fishers when making his decisions.

(v) Hauraki Gulf Marine Park Act

23 The finding in the judgment that the Minister failed to have regard to the Hauraki Gulf Marine Park Act (paras 81-83) did not address one of the key components of the commercial fishers' submission:

23.1 The Minister was acutely conscious of the importance of the Hauraki Gulf to recreational fishers and had sought separate advice on what more he could do to improve recreational fishing in the area, with an express request on options to close areas to commercial fishing (see advice papers dated 6 June and 6 July 2005: VW-1 pg 636 and 642);

23.2 Official's advice confirmed that most of the Hauraki Gulf Marine Park area was already closed to purse seining through voluntary agreement, and any form of commercial fishing was prohibited in a substantial part. It demonstrated that as a consequence there was very little fish caught by commercial operators as a consequence and the Minister did not proceed with the proposal.

Commercial fishers' proceedings

24 Following the hearing on 3 April 2007, counsel for the Crown and commercial fishers have been in discussion over whether it is still necessary for the commercial fishers to pursue most of the grounds of appeal relating to their counterclaim.

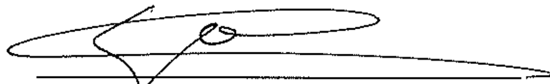
25 This is because the Minister will, in due course, need to reconsider his bag limit decision. In that context the Minister is likely to see it as being important to do this at the same time as he reviews the TACs, TACCs and allowances. In the course of that process new information will be available to him which he will need to consider. Specifically, there is the new stock assessment and the new recreational catch estimates from the 2003/4 aerial survey for KAH 1, both of which have been reviewed and reported on in the 2007 Plenary report.

26 Most of the commercial fishers' complaints over the setting of existing TACs, TACCs and allowances may be able to be considered in that process, in light of the new information. This has the potential to avoid the need to pursue the appeal on all but one of the grounds. It is however going to take at least few weeks to work through these issues.

Remaining issue

27 The one remaining issue concerns the finding that the Court had no jurisdiction to make declarations concerning the need to monitor and control the recreation catch (para 140). Based on the principles set out in the *Right to Life* case (see para 200 of High Court submissions) the commercial fishers wish to argue on appeal that the Court had jurisdiction to make the order sought and should, on the facts, have done so.

Dated 9 July 2007



B A Scott / G T Carter
Counsel for third respondents

To: The Registrar

And to: The applicants by their solicitors

The first and second respondents by their solicitors