In the High Court of New Zealand
Auckland Registry **CIV2005-404-4495**

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

Plaintiffs

and

Minister of Fisheries

First Defendant

and

The Chief Executive of the Ministry of Fisheries

Second Defendant

and

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

Third Defendant

Plaintiffs Reply

Dated this 11th day of December 2006

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KAHAWAI REPLY/ag

1. Context

1.1 The best estimate of the dollar value of the industry kahawai catch in the papers before the Court is $3.2 million of which $2.5 million represents the take by the Sanford purse seine fleet operating out of Tauranga.

1.2 80% of Sanford's catch is exported mainly as bait/petfood.

Wilkinson, para 19

1.3 The balance of the commercial catch is by smaller fishers using less intensive methods such as set-netting. Most of the relatively small volume which goes through supermarkets as smoked fish comes from the smaller fishers because their catch method is more discriminating.

1.4 There are relatively few fisheries in which recreational participation is substantial – snapper, blue cod, kahawai, rock lobster, paua and scallops. By comparison, 130 species are fished commercially of which 43 are commercially significant as a target species, with an annual commercial take of 750,000 tonnes.

Benson-Pope, ex p.19-20

Crown subs, paras 178.2-178.5

1.5 Kahawai has a special value for recreational fishers. The South Australian Centre for Economic Studies analysis concluded that the recreational fishers valued kahawai between 11 and 16 times higher than the commercial sector.

Ingram paras 29-30.

IPP 2004, p 48, para 129.

1.6 It is evident from the Shared Fisheries Policy Review announced in December 2005 and a Ministerial Press Release of 7 December 2006 that the statute is to be amended to ensure that sustainability is the first priority, that the Ministry's approach to the challenged kahawai quota allocations is out of step with current policy, inappropriately narrowly focused on questionable quantitative information and unduly influential in respect to the 2004 decision on an inexperienced Minister.

2. Big Picture

2.1 The two principal errors of law were the failure of the Ministry/Minister to:

(a) Adequately consider and apply qualitative considerations of social, economic and cultural well-being.

Ss8, 13(4), 21.

(b) Adequately consider and apply ss7 and 8 of the HGMP Act.

Cf Minister's Statement of Issues 1 and 2 – allegation is of errors of law although may also be errors of fact

2.2 The issue with the Ministry advice/Minister's decisions is not that the information is uncertain – the plaintiffs agree with the Minister's submission which emphasizes the uncertainty of much of the quantitative/"scientific" information and also agree that the Minister was entitled to (and the plaintiffs say must) use all available sources of information. Nor is the issue that there was no reference to recreational interests or the Hauraki Gulf Marine Park Act.

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

2004 IPP pages 47-48, paras 126-130 (exactly the same dismissive comments could have been made about catch history from 1999/2000 and 2000/2001)

2004 FAP pages 81-83, paras 184-200

2004 decision letter, page 4, para. 21

2005 FAP pages 432-433, paras 143-148 – "MFish agrees it needs to improve its ability to gather and analyse social and cultural information"

2.4 (a) Accordingly the TAC, allowances for recreational fishing, and TACC's were each calculated solely from the uncertain recreational catch history information, described as "scientific" by the Ministry, and then proportionally reduced.

(b) The effect of the Ministry's policy preferences was to influence the Minister to exclude even the limited information he had as to the non-commercial sectors'

"social, economic and cultural well-being", e.g. the SACES analysis, from actually being applied in the decision. That was an improper application of policy because by solely applying catch history the commercial sector's well-being was directly recognised but it would be accidental – and contrary to the non-commercial submissions and evidence from 1990 on – if it coincided with recreational and Maori well-being or with an appropriately cautious approach to sustainability.

Wilkinson
7.3(5)
17.2 - 17.5
18.3 - 18.5
18.14 - 18.17
19.17 - 19.25
3 5 mm
Ten

See Submissions by Non-commercial Fishers, Wilkinson, exhibits pages 516-556

(c) Similarly, it is unjustifiable for the Ministry to direct the Minister to a preference for so-called "scientific information on stock status" – see FAP2005, page 421, para. 66. Apart from the inconsistency of the Ministry rejecting the 1996 stock assessment and the evident uncertainty of all so-called "scientific" information in respect to kahawai there is no hierarchy in either the section 8 purposes and statutory considerations or in the section 10 information sources. It is an error of law for the Ministry to direct the Minister to such a preference. The Minister's obligation is to make a decision in terms of the statute on each occasion with and about the information relevant to that particular decision. What weight is to be given to any particular information must be decided in the individual context of the particular decision.

cf Minister's submissions relying on Kellian misconceived, para 19

(d) Similarly the adoption of the Ministry's policy preference for proportional reduction failed to make any real attempt to consider the effect on the non-commercial sector's "social, economic and cultural well-being". Advice of the allocative implications of decisions on individual recreational fishers was not given to the Minister at the time decisions were being made. There was, for example, no consideration at the time of making the principal decisions in 2004, or later, of the effect that a reduction in bag limits from 20 to 6 or 3 might have on Maori or non-Maori social or cultural well-being, no comparison with bag limits of 9-15 for snapper, 5 for hapuka or 3 for kingfish, no consideration of the negative implications on people's interest in catching kahawai etc. Compare Holdsworth, 26 August 2005, appendix pages 46 – 48 (uncontested). Equally perversely the Ministry recognise the limitation of the proportional approach (cf FAP 205 para. 168) but then justified it on the basis that "the harvest of recreational catches as

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measured by diary surveys has never been greater" (para. 169) – a position which neither the recreational fishers, industry or Minister believe.

(e) The result was a Minister not fully or objectively informed (i.e. the way the Minister was referred to that information "screwed the scrum") so that:

(i) The true scope and content of the hands-on available information relevant to those two issues (e.g. boat ramp, anecdotal, perception, social) and its significance was minimised.

(ii) And the possibility of the option of a reduced TAC and limiting TACCs to by-catch (which an earlier minister had mused upon) excluded.

Boyd reply, para. 27

(f) The consequence was that the common sense conclusion that there was a problem which required some explicit action was avoided.

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

2004 – IPP page 34, para. 65(i); FAP page 98, para. 303; nothing in decision letter, 2005 IPP page 390, para. (k), FAP page 446, paras 241-244; nothing in decision letter

2.6 Despite, for example:

(a) The 2005 kahawai Plenary Report stating that the boat ramp surveys indicated the lowest catch rates of kahawai in the Hauraki Gulf since 1991 (1 in 8 boat trips, 1 in 100 hours, juvenile fish).

Starr, para. 30

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

Romeril, para. 24-NZBGFC since August 1990

Ingram, para. 49 NZRFC since August 1991

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

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

no critical consideration was given to the statutory obligations under the HGMP Act – e.g. 2004 FAP, p98, para. 303, referring back to 2004 IPP, p.34, para. 65(i), and the discussion in the 2005 FAP; page 445, paras 241-244, relating back to 2005 IPP, p.390, para. 104(j) and (k).

2.7 The Minister's submissions rely on the 1996 assumption of kahawai as a national stock. The evidence is that there is uncertainty as to that assumption but even if the Minister is able to proceed generally on that assumption he cannot ignore evidence of regional differences relating to separate QMA's: Ss.11(1), 21.

eg KAH 1/HG, KAH 8

2.8 The Ministry and consequently the Minister adopted an unduly restrictive approach to exercises of the statutory power of determining quota allocation.

Rangitoto Island Bach Assn v D-G of Conservation [2006] NZRMA 376 at 394, paras 63 and 64, 397 paras 78, 79 and 81

3. Industry Challenge

3.1 One perverse consequence of the industry challenge would be the further degradation of the kahawai fishery because:

(a) The industry says Maori are not using their 1000 tonnes so that this allowance should be given to the industry.

(b) The industry says that the recreational fishers' catch history estimates are implausibly high so that the allowance to the recreational fishers should be reduced with the consequence that the industry should be given the amount of that reduction.

(c) Because of its better technology the industry will catch this extra tonnage which, on the industry's evidence, was not previously being taken, and so will further reduce the biomass of the kahawai fishery.

Holdsworth (1), para. 5.17, 18.16-18.17

(d) As well the industry says that recreational fishers bag limits should be reduced from 20 to 3 or 4, the consequence being that whatever the actual recreational fishing catch is at present will be further reduced.

(e) So that the next time the Minister comes to review catch history there will be a further reduction in the actual recreational fishers catch because of reduced bag limits and because they will be fishing into a reduced kahawai biomass.

(f) So that the industry can then claim to be allocated that tonnage which the recreational fishers are no longer catching.

(g) And so on.

3.2 Secondly, if the industry can persuade the Court, to confirm the Ministry's view, that so-called "scientific" evidence is to be preferred then it is a short step to excluding any qualitative assessment, fixing quota on the basis of historical catch volume, potentially leveraging the type of downwards pressure referred to in 3.1 above, and when and if a Minister acts to redress the imbalance to claim compensation.

3.3 It is submitted that the Court should be wary of the arithmetic logic arguments of the industry. The evidence, even of the scientists, is that the quantitative evidence is uncertain. At best it is indicative and even the evidence of Dr Sullivan, the Ministry's chief scientist, is prepared to assert a back of the envelope relevance. Accordingly, spending a week re-calculating uncertain numbers to produce an uncertain answer to compare to another set of uncertain numbers is to pursue a spurious certainty – no doubt the reason that Mr Starr was not interested in doing so in respect to a re-calculation of the 1996 stock assessment simulation. The Court should avoid sending the Minister down that false path. However, the Court should note how the Ministry blows hot and cold on preferring so-called "scientific" information when it suits for other purposes.

3.4 The plaintiffs adopt the Minister's submission supporting his decision not to impose reduced bag limits – but point out that inconsistently with the justification for adopting a proportional reduction the Minister here accepts that the recreational sector is not catching its allowance. As the recreational sector, the industry and the Minister generally agree on that position it would have been irrational – and hence indefensible in review proceedings – for the Minister to have imposed a lower bag limit.

4. Compensation

4.1 The plaintiffs do not accept the Ministry's position that compensation is a relevant consideration.

4.2 Relevant considerations are determined by the purpose of the Act, which is broadly to manage fisheries for people's well-being. The Act specifically excludes compensation in certain circumstances – s.308. Whether compensation may be payable in other circumstances is a matter of law – see plaintiffs' submissions para. 14.1.

4.3 However, avoiding the risk of compensation (which underpins the Ministry's proportionality policy – Barnes, reply, para 8, exhibit A) is not a relevant justification for not making an appropriate decision under the Act To do so would be contrary to the purpose of the Act. As well, because compensation is only ever a possibility for the commercial sector, it would (as it has done in these decisions) bias the decision making process against non-commercial interests – again contrary to the purpose of the Act. For example there has never been an adjustment for recreational fishing recognising increased population nor has there ever been a non-proportional reallocation – Ingram, paras 35-36 (uncontested).

5. Priority

5.1 The Ministry's submission – paras 23-27 – that there is no priority for the recreational sector requires some qualification. It is correct that there is no specific statutory priority in the sense of conferring a statutory preference over other interests. However, a TACC cannot be set under section 21 without first allowing for non-commercial interests. A TACC can be set at zero. An allowance for non-commercial interests, where such interest exists, cannot be set at zero because that would not be an allowance. To that extent non-commercial interests, both recreational and Maori, have to be provided for where they exist, whereas commercial interests do not. Whether or not that is described as a priority it is the consequence of the statutory regime. As the Court of Appeal said *He must make such allowance as he thinks appropriate for the other interests before he fixes the TACC. That is how the legislation is structured* – NZ Fishing Industry Association v Minister of Fisheries (unreported, CA 82/97, 22 July 1997) at page 17.

6. Relief

6.1 If the Court is persuaded that there was an error of law in the Minister's 2005 decision, either specific to that decision or as a consequence of a carry over from the 2004 decision, then the appropriate relief would be a direction that the Minister reconsider the decision/s within, say, three months.

6.2 The plaintiffs submit it would be appropriate for Your Honour to give directions under s 4(5) JAA that:

(a) The Minister must consider "people's social, economic and cultural well-being" in any utilisation decision, which will include qualitative as well as quantitative consideration;

(b) There is no statutory hierarchy of values (social, economic and cultural);

(c) The Minister cannot adopt policy preferences to exclude section 8 considerations or information relevant to those statutory considerations;

(d) There is no hierarchy of information in section 10.

(e) The statutory considerations must be applied to the relevant information particular to the occasion of the exercise of the decision making obligation.

(f) Consideration must be given to any particular circumstances of separate QMAs.

(g) Critical consideration must be given to the imperatives of the HGMP Act including recognition that the objectives of sections 7 and 8 are of national significance.

(h) The possibility of a legal entitlement to compensation is not a relevant consideration in weighting prescribed statutory values or considerations.

(i) The Minister's decision should explain what statutory considerations have been taken account of and how.