

From Bruce Galloway

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Subject **Kahawai judicial review - what the recent High Court decision means for the future management of New Zealand's fisheries**

## Introduction

- 1 Initial commentary is that the recent (21 March 2007) High Court decision of Harrison J on the application for judicial review widely known as the Kahawai challenge<sup>1</sup> is a test case win and 'relief' for recreational fishers.
- 2 In his judgment Harrison J clearly and succinctly explains the scheme of the Fisheries Act 1996 ("the Act"), in particular:
  - a. sustainability is *the bottom line* in fisheries management without which *there will eventually be no utilisation*: para. [17];
  - b. how the Minister of Fisheries<sup>1</sup> ("the Minister") must allow for non-commercial fishing interests when he or she sets or varies the TACC: para. [53] et seq.
3. The decision is likely to be of some relief to non-commercial fishers in that it confirms every New Zealanders' non-commercial right to fish as a *well settled common law right, subject only to express statutory limitation to fish and provide for his or her needs where that right has particular value in a country where easy proximity to the sea in a temperate climate contributes to the popularity of fishing as a recreational pastime*: para. [59(3)].  
  
*[emphasis added]*
4. In the time available today I will concentrate on the Court's decision and comments on:
  - a. the broad scheme or sustainable utilisation purpose of the Act;
  - b. the total allowable catch (TAC) as a sustainability measure; and
  - c. the Minister's mandatory obligation to allow for non-commercial interests in setting or varying the TACC.

## Purpose of the Act – section 8, Part 2

5. The purpose of the Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
6. *Ensuring sustainability* has two parts:

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CIV-2005-404-44495 heard on 6, 7 and 9 November, and 11 December 2006.

- a. maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
  - b. avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment.
7. *Utilisation* means conserving, using, enhancing and developing fisheries resources to enable people to provide for their social, economic and cultural wellbeing.
8. In addition, *conservation* is defined in section 2 to mean ... *the maintenance or restoration of fisheries resources for their future use.*
9. As noted above, the Court held that on a plain reading of section 8 ***the bottom line is sustainability.*** *That must be the Minister's ultimate objective . Without it, there will eventually be no utilisation.*

*[emphasis added]*

### **TAC– a sustainability measure – Part 3**

10. The setting of a TAC under section 13 of the Act is a sustainability measure.
11. Before doing that, the Minister must:
- a. consult on the proposed measure; and
  - b. provide for the input and participation of tangata whenua having a non-commercial interest in the particular stock concerned and have particular regard to Kaitiakitanga: section 12.

The Minister's mandatory obligations under section 12 were discussed at previous hui of the Hokianga Accord, and I am sure will be on the agenda of future hui.

### **Setting / varying the TACC, and allowing for non-commercial interests – Part 4**

#### *Setting the TACC*

12. Where the Minister decides to introduce a species into the quota management system (QMS) then he or she must set the TACC for that stock: section 20(1).
- The TACC shall not be set unless the TAC has been set. Nor should the TACC be greater than the TAC: s20(5); para. [22].*
13. In setting or varying the TACC the Minister must have regard to the TAC for that stock and ***allow for*** both *non-commercial fishing interests in that stock, and all other mortality to that stock caused by fishing*: section 21

*[emphasis added]*

14. In that regard Harrison J:
- a. agreed with submissions for the Minister that:

- a TACC cannot be set without the Minister first allowing for non-commercial fishing interests;
- it would be open for the Minister to set the TACC 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: para [24].*

*[emphasis added]*

- b. held that setting a TACC is *a mechanism for **allocating the utilisation** or use of the TAC between competing interests once the appropriate level of sustainability has been set*, and contrasted sustainability with utilisation as recognised in the different purposes of TAC and a TACC respectively.

In setting the TAC the Minister is obliged, first, to have regard to the TAC and, second, to allow for non-commercial fishing interests in the stock: para [54].

*[emphasis added]*

#### *Utilisation*

15. In the Court's view, because the TACC is a means of providing for the utilisation of a fisheries resource the criterion of enabling people 'to provide for their social, economic and cultural wellbeing' is a mandatory consideration at (the) stage of allowing for recreational interests in the stock: sections 8 and 21(1): para [55].

#### 16. The Judge:

- a. found that:
  - utilisation, as defined involves use as well as conservation, enhancement and development of a fishery; and
  - the allowance for recreational interests reflected in the level of a TACC should appropriately recognise the extent to which kahawai provides for their wellbeing which must mean the *state of people's health or physical welfare* provided either by catching kahawai or by purchasing it from retail outlets: para [55];

*[emphasis added]*

- b. observed that the regrettable fact of economic life over the past 20 years or so since fishing quotas were introduced, that people's wellbeing has suffered due to the market forces of supply and demand making fish so expensive: para [56];
- c. held that utilisation also provides for *economic* wellbeing of commercial fishers – para [57]; and

*Minister's responsibilities*

17. The Court held that that when setting a TACC the statutory starting point is to identify and make an appropriate allowance for recreational interests by reference to the social, economic and cultural value of the fishery to their wellbeing being both a quantitative – *economic* – and qualitative – *social and cultural* – exercise of judgement.
18. The Judge found that the Ministry of Fisheries' (MFish) evaluation in its 2004 Initial Position Paper (IPP) of social and cultural wellbeing *was an **exclusively economic** exercise by applying a solely quantitative or economic measure as the index for assessing the requisite social or cultural value of kahawai to recreational fishers ... A **micro analysis** was used to satisfy a distinctively **macro purpose***: para [64].

*[emphasis added]*

19. In particular, Harrison J held that a *policy preference for catch history cannot take precedence over a mandatory requirement to adopt a utilisation approach*: paras. [67] and [69].
20. In noting that MFish had rejected a *utilisation* approach in favour of a policy preference for catch history - para [67] - the Court subsequently refers to the judgment exercise of weighing up and balancing the right of non-commercial fishers to provide for their *social, economic and cultural wellbeing* when setting a TACC, and contains a helpful summary of the approach to be taken by the Minister:

*the Minister must have regard **first** to the TAC and **then** allow for non-commercial fishing interests in the stock. This is an **exercise in judgement**, to be carried out by **weighing up and balancing** the recreational fishers' right to provide for their social, economic and cultural wellbeing by fishing for kahawai against the extent, if any, to which the peoples, in the sense of the wider general public, wellbeing is served by commercial interests in satisfying consumer demand ... paras. [72]; see also para. [74].*

*[emphasis added]*

21. In effect, the Court found that the Minister, and MFish as advisers, have been misconstruing the purpose of the Act when allowing for recreational interests in setting the TACC.
22. The approach the Minister, and MFish as advisers, must take as laid down by the Court will have particular relevance to the management of all fish stocks in which non-commercial fishers have an interest.

**Qualitative factors – social and cultural well-being**

23. Concerning the social and cultural – qualitative – components the Court held in relation to kahawai that:
  - a. recreational fishers' progressive loss of access to other more highly-prized inshore species including snapper;
  - b. kahawai's minimal value to people other than recreational fishers, as reflected in the small retail market for kahawai;

- c. the recreational fishers' well-settled common law right to fish and provide for his or her needs, subject only to express statutory limitations;
  - d. patterns and levels of recreational catch history although not decisive but of assistance in determining whether proper allowance is being made for recreational fishers' interests *subject to the Minister's satisfaction that it meets current needs*: para [59]
24. Moreover, the Court held that the Minister must weigh these factors in the mix: para [60].

### **Judgment**

25. Harrison J held that it was appropriate to grant declarations that the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister:
- a. fixed the TACCs for kahawai for all KAHs without having proper regard to the social, economic and cultural wellbeing of the people;
  - b. failed to take any or proper account of sections 7 and 8 Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH1.
26. Also, it was appropriate to grant a declaration that the Minister failed without giving any proper reasons to consider advice from MFish to review bag catch limits for recreational fishers.
27. The Minister was directed to reconsider or review his 2005 decisions to take account of the terms of the declarations of unlawfulness.

### **What the decision means for future management of our inshore fisheries**

28. The Court has provided helpful guidance and comment on a range of linked subjects and issues in the scheme of fisheries management as set out in the Act including:
- a. Sustainability
    - sustainability *is the bottom* line in fisheries management;
    - without sustainability *there will eventually be no utilisation*.
  - b. TAC
    - the TAC is a sustainability measure;
    - that having set the TAC, the setting of the TACC is a means of providing for the utilisation of a fishery.
  - c. TACC

when setting a TACC the **starting point** is to identify, make and appropriately **allow for** non-commercial fishing interests by reference to *social and cultural* – qualitative – criteria, and *economic* – quantitative – criteria relative to enabling people to provide for their wellbeing.

d. Non-commercial common law right to fish

Concerning people's social and cultural wellbeing, each and every New Zealander possesses a common law right, subject only to express statutory limitation, to fish and provide for his or her needs.

29. In very simplistic terms, in the case of kahawai, the Court has said that the Minister did not do what the Act required him to do to enable all New Zealanders to provide for their wellbeing. In a phrase leave "more fish in the water."