Decision Relating to Case: NZ Federation of Commerical Fishermen & ORS V Minister of Fisheries & Ors
IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CONSOLIDATED CP 237/95

UNDER Part I of the Judicature Amendment Act 1972

IN THE MATTER of an application for review

BETWEEN NEW ZEALAND FEDERATION OF COMMERCIAL FISHERMEN (INC)

First Applicant

AND NEW ZEALAND FISHING INDUSTRY ASSOCIATION (INC)

Second Applicant

AND SIMUNOVICH FISHERIES LIMITED, NORTH HARBOUR NOMINEES LIMITED AND MOANA PACIFIC FISHERIES

Third Applicants

AND AREA 1 MAORI FISHING CONSORTIUM AND NGAPUHI FISHERIES LIMITED

Fourth Applicants

AND HAURAKI MAORI TRUST BOARD

Fifth Applicants

AND PAEPAE/TAUMATA 2

Sixth Applicants

AND MINISTER OF FISHERIES

First Respondent

AND THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES

Second Respondent

AND NEW ZEALAND RECREATIONAL FISHING COUNCIL INC

Third Respondent

CONSOLIDATED CP 294/96

BETWEEN TREATY OF WAITANGI FISHERIES COMMISSION

Plaintiff

AND MINISTER OF FISHERIES

First Defendant

AND THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES

Second Defendant

Date: 18-21, 24-27 March; 2-8April 1997

Counsel: J L Marshall for First Applicants
J E Hodder, B A Scott, J Hannah for Second and Third Applicants
C F Finlayson, D A Laurenson, M K Mahuika for Fourth Applicants
M A Solomon for Fifth and Sixth Applicants
A P Duffy, I C Carter and L J Johnston for First and Second Respondents
C F Finlayson, D A Laurenson, M K Mahuika for Plaintiff in CP 294/96
M J Slyfield for Third Respondent

Decision: 24 April 1997

RESERVED JUDGMENT OF McGECHAN J

Solicitors:

Buddle Findlay, Barristers & Solicitors, Wellington for First Applicant
Chapman Tripp Sheffield Young, Barristers & Solicitors, Wellington for Second and Third Applicants
Craig Griffin & Lord, Solicitors, Auckland for Fourth Applicants
Hanning Connor, Barristers & Solicitors, Wellington for Fifth and Sixth Applicants
Crown Law Office, Wellington for First and Second Respondents; and Defendants CP 294/96
Morrison Kent, Solicitors, Auckland for Third Respondent
Bell Gully Buddle Weir, Solicitors, Wellington for Plaintiff CP 294/96

I.
PRELIMINARY

With apologies to Mark Twain, this will be a long judgment: I do not have time to write a short one.

It is a case about snapper. Really, it is a number of cases. Applicants complain that for fishing years 1995 and 1996 the Minister set the total allowable commercial catch for SNA-1 at an inappropriately low level, and negated resulting conservation benefits by failing to impose sufficient controls on a burgeoning non commercial catch. The Fourth to Sixth Applicants raise additional questions as to Treaty of Waitangi rights in respect of commercial fisheries and customary Maori non commercial take.

The case is not, of course, an appeal. There is no statutory appeal to this Court from the Minister's decision. It is, as always, an application for judicial review on administrative law grounds; with all the limitations on judicial power which follow. I am not some Master Minister who can say the two decisions were right or wrong on their own merits. All I can do, to put the matter very generally, is determine whether the two decisions were reached; "fairly, reasonably and according to law." Beyond that, matters lie in the wilderness of fisheries and treaty politics.

The challenge to the 1995 decision, in itself, has become academic. The First to Third Applicants immediately obtained interim relief. Progress then faltered, and the fishing year expired. The clock cannot be wound back. The theory underlying the 1995 decision remains significant, to the extent it carried through into the subsequent 1996 decision. The Minister repeated his decision for the 1996 year. Applicants obtained further interim relief, with stricter controls imposed. Almost half the 1996 fishing year remains, and the challenge to the 1996 decision retains some point accordingly, although it too will be history after 30 September next.

The two decisions were reached under the Fisheries Act 1983 as it then stood. The Fisheries Act 1996, Assent 13 August 1996, was not in force (except for presently

irrelevant ss 354 and 355). As at date of this judgment, certain additional provisions have been brought into force through the Fisheries Act Commencement Order (No 2) 1996 SR 1996/255. These include new s 2 definitions, and Part III "sustainability measures" including a new s 13 controlling setting of a total allowable catch. They do not yet include a new Part IV relating to the quota management system, and within that new ss 20 and 21 governing setting and variation of total allowable commercial catches. The conclusions which I reach as to the 1995 and 1996 decisions under the 1983 legislation may need revisitation if and when questions arise in the future under 1996 legislation.

To avoid misunderstanding, I note the Minister involved in the 1995 and 1996 decisions is not the current Minister.

The case proceeded on affidavits. As is all too common in modern practice, many affidavits ventured past evidence into fields of opinion and argument. Counsel for the Minister took specified objections. I had not acted upon non-expert opinion, or argument, as if it were fact, whoever the deponent may be. Affidavits filed included two by prominent authorities on the international law of the sea. As to admissibility, these have been approached in accordance with indications given in a pre-trial minute dated 16 December 1996, which reads:

> ". . . matters of treaty interpretation, and matters of the content of international law, are not evidence, but are questions of law; and the affidavit, so far as it ventures into legal interpretation or international law content, will not be read. However, the factual background as to causes, and preparatory works, and indeed negotiations leading on to treaties, which treaties are of relevance on our own legislation, I would regard as admissible as an interpretative aid."

Counsel were permitted, additional, to adopt those experts' opinions extending into matters of interpretation, not as evidence, but as matters of submission.

Last, some matters of nomenclature. In this judgment, acronyms and terms have the following meanings:

"Act"	Fisheries Act 1983
"Biomass"	Weight of fish stock at or above MLS
"Area One"	Fourth Applicant
"B_{msy}"	Biomass at which fishery approaches MSY
"Commission"	Treaty of Waitangi Fisheries Commission
"Deed of Settlement"	Deed of Settlement dated 23 September 1992 between Crown and Maori, as referred to in the Settlement Act
"FIB"	Fishing Industry Board
"Fishing year"	1 October through 30 September following year
"FMP"	Fisheries Management Plan under Part I (repealed) Fisheries Act 1983
"Hauraki"	Fifth Applicant
"ITQ"	Individual transferable quota issued under the QMS
"Applicants"	First, Second and Third Applicants
"Juveniles"	Snapper below MLS
"Kaitiaki"	(approximately) Guardians
"MAF"	(former) Ministry of Agriculture and Fisheries
"Maori Applicants"	Fourth, Fifth and Sixth Applicants

"MFish"	Ministry of Fisheries (from 1 July 1995)
"Minister"	Minister of Fisheries
"MLS"	Minimum legal size
"MSY"	Maximum sustainable yield
"NZRFC"	Third Respondent
"Paepae/Taumata 2"	Sixth Applicant
"QMA"	Quota Management Area created under QMS
"QMS"	Quota Management Scheme initiated by Part IIA Fisheries Act 1983
"Settlement Act"	Treaty of Waitangi (Fisheries Claims) Settlement Act 1992
"Snapper"	Pagrus Auratus and/or Chrysophrys Auratus
"SNA1"	The snapper fishery within QMA-1 (approximately Cape Runaway to North Cape)
"TAC"	Total allowable catch
"TACC"	Total allowable commercial catch
"Year class"	Snapper progeny born in a given year

II.
THE CLAIMS

Industry Claims

I look only at essentials at this stage. Finer detail can hold over to point of decision.

Industry note that on 21 September 1995 the Minister announced his SNA1 TACC decision for the 1995/1996 fishing year. TAC was set at 5600t divided recreational fisheries 2300t; Maori customary take 300t; and commercial TACC 3000t. (The commercial TACC for 1994/5 had been 4928t; and the 3000 tonne level was a 39% reduction). The Minister also reduced recreational daily bag limits from 15 to 9, and indicated an intention to amend commercial fishing regulations to implement seasonal closure for commercial fishing in the inner Hauraki Gulf from 1 October to 31 March each year, and to extend 125mm minimum trawler net size to apply year round in shallows outside the Hauraki Gulf. The Minister did not implement a recommendation for removal of MLS restrictions on stated commercial methods. Industry further note that on 26 September 1996 the Minister announced his like decision for the 1996/1997 fishing year. He set a TAC of 5600t, likewise divided. He imposed no new controls on recreational fishers, and again declined to reduce MLS or stated commercial operations. As a result of interim relief the reductions of TACC from 4928t have not taken effect, and ITQ holdings have not been reduced.

The Crown raises no significant dispute to this point. I note the Minister corrects the Industry's 4928 tonnes to 4938 tonnes, and formally admits on the pleadings that the 1996 decision is to be interpreted as repeating the 1995 2300 recreational/300 Maori customary division, although not on its face so stating.

Matters then become contentious.

Industry plead both 1995 and 1996 TACC decisions are invalid on a variety of administrative law grounds:

1. Illegality / Error of law

(i) Improper purpose; i.e. to achieve increase in recreational catch rates, and a reallocation from ITQ to non commercial fishers, without compensation

(ii) Errors in interpretation of the Act, to the effect

(a) that the definition in s 2 of "Total Allowable Catch" required movement of the fish stock towards MSY

(b) that the Act did not require management controls on non commercials to constrain catch to the allowance made

(c) that the Act required priority to non commercials

(iii) Mistakes of fact

(a) management measures would limit recreational catch to 2300 tonnes

(b) reliance on models erroneously omitting historic Japanese catch

(c) that yield was below MSY, and reduction in TACC would lead to significant increase

(iv) Failure to take into account relevant considerations put as

(a) legislative intention to create strong property rights in ITQ

(b) the possibility of Crown "shelving" quota under s 28D(1)(b)(ii)

(c) economic impact

(d) alternative management measures

(e) yield equivalence already to MSY

(f) benefits, on proper analysis, of the reduction.

2. Breach of legitimate expectation

(i) Expectation of reasonable notice

(ii) Expectations, in relation to FMP's and constraint on recreational catches, that ITQ would not be reduced as a result of increase in recreational catch.

3. Unreasonableness / substantive unfairness / proportionality

(i) Sustainable yield at current level is 92% MSY

(ii) The 8% increase in yield at the Minister's MSY is theoretical, and in practice yield at that MSY would not be detectably different

(iii) impact of reduction in the TACC is out of all proportion to increased future yield

(iv) penalising the commercial sector for absence of constraint on recreational fishing

(v) non commercial catch should be restricted to a similar degree

(vi) reduction in recreational bag limits is ineffective

(vii) reallocation without compensation

(viii) economic hardship

(ix) reduction is unreasonably severe, given no danger of sharp decline, or concern over time frame to rebuild

(x) time frame is unreasonably short; with phasing appropriate

(xi) Ministerial refusal to accept voluntary substock effort spreading

4. Breach of duty to consult

Minister accepted an obligation to consult the First and Second Applicants but failed to consult adequately or to have proper regard to views expressed through the FIB.

Extensive particulars are given. There is the usual overlap amongst the various headings adopted.

The Industry seeks declarations the two decisions are invalid or unlawful; orders setting aside; a declaration the Minister is required to impose management controls limiting non commercial catch to the TAC allowance; a declaration that on reduction of the TACC to reallocate commercial to non commercial interests the Crown must first acquire and cancel ITQ equivalent to that reduction (s 28OD(1)); and other "appropriate" directions as to exercise of discretion to set TAC, TACC, and as to imposition of relevant management controls.

Maori Claims

Again, I look only at essentials.

The Maori claims as pleaded have two dimensions. The first, from a shared commercial perspective, supports the industry claims. Reduction in TACC and perceived take-over by recreational interests are as unwelcome to Maori engaged in

commercial fishing as to non Maori. The second, from a Maori perspective, protests the reduction in the TACC as derogating from Treaty rights carried through into the Settlement Act and reflected in ITQ held by the Commission; and protests the inadequacy of, and lack of priority given, Maori customary non commercial take. All, including the Commission's claim, concede a Treaty based priority to this latter customary non commercial take; an enthusiasm obviously not shared by Industry. With that said, it suffices to note distinctive features inter se.

The Commission recites background constituted by the Maori Fisheries Act 1989, Deed of Settlement, Settlement Act, constitution of the Commission, acquisition of ITQ by the Commission, and asserted Treaty duties resting on the Crown to implement and protect that outcome. The Commission then asserts that in making the 1995 and 1996 TACC decisions

(1) The Minister failed to take into account, as relevant considerations,

(i) ITQ so provided was in substitution for Treaty rights in commercial fisheries and in settlement of those rights

(ii) Crown duty under the Acts, Deed, and continuing relationship to implement and protect those rights

(iii) value of compensation received in settlement for the Treaty Maori commercial fishing rights will be reduced by approximately $14.6 million

(2) The Minister defeated legitimate expectations that

(i) ITQ so received by the Commission would not be devalued without sufficient justification under the QMS or reasonable compensation

(ii) if a TAC (sic) reduction was justified under the QMS, ITQ would not be transferred from Commission or Maori to recreational fishers

otherwise than by proportionate reductions in TACC and non commercial interests.

The Commission seeks relief generally similar to that sought by Industry.

Area 1/Ngapuhi Fisheries Limited, essentially a commercial Maori fishing interest, filed an updated pleading during course of hearing to essentially the same effect.

Hauraki Maori Trust Board, established under the Hauraki Maori Trust Board Act 1988, represents 12 iwi groups. It leases significant SNA1 ITQ from the Commission. It also sees itself as speaking for non commercial Hauraki Maori interests. The claim rehearses the Treaty and Fisheries legislation background, including the Deed and Settlement Act, and the 1995 and 1996 Minister's decisions. The claim then asserts "obligations" on the Minister's part, at time of the decisions and ongoing, to protect commercial and non commercial/customary rights which Hauraki say arise under tikanga Maori, Treaty, Common Law and Equity, International Law, the Deed, the Settlement Act, and Fisheries legislation. Those "obligations" are said to include

(1) to actively protect the rangatiratanga rights of Hauraki to their customary non-commercial fisheries as guaranteed under Article II of the Treaty of Waitangi;

(2) to act in accordance with the principles of the Treaty of Waitangi when developing policies to help recognise use and management practices for Maori in the exercise of non-commercial fishing rights and interests;

(3) to consult with Hauraki when developing such policies under (2) above;

(4) to consult with Hauraki when making an allowance for non-commercial interests in the SNA1 fishery under section 28D(1)(a)(i) of the Fisheries Act;

(5) to consult with Hauraki before varying the TACC under section 28D(2) of the Fisheries Act;

(6) to have proper regard to the sustainability of the SNA1 fishery and in relation thereto:

(a) to develop and implement effective management controls on the recreational fishing sector;

(b) to acknowledge and have regard to the traditional role of Hauraki as kaitiaki of the fisheries resources of Tikapa Moana (Hauraki Gulf) including SNA1.

(7) not to diminish the value to Hauraki of the fisheries settlement between the Crown and Maori as evidenced by the Deed of Settlement and the Settlement Act;

(8) not to undermine or threaten the re-establishment of Hauraki as a significant commercial fishing presence in its traditional fishing waters of SNA1;

(9) not to confiscate the commercial and non-commercial customary fishing rights or interests of Hauraki in SNA1 and re-apportion or re-allocate those rights and interests to the recreational fishing sector.

Hauraki allege breaches by the Minister of these obligations. Put shortly these breaches comprise:

(A) failure to recognise and protect priority of customary fishing rights, and to actively protect commercial rights

(B) failure to consult (s 28D(2)) Hauraki as tangata whenua of the rohe and as holding a beneficial interest in Commission ITQ

(C) breach of statutory duty to impose adequate management controls to constrain recreational catch to allowance within the TAC (2300t)

(D) mistake of fact through mistaken belief measures in place or now under implementation would limit recreational catch to 2300t

(E) failure to take into account as relevant considerations

(i) priority for Hauraki customary rights under the Treaty

(ii) economic impact

(iii) effects on biomass of customary take set below actual take

(F) breach of legitimate expectation rights would not be impacted upon by progressive increase in recreational catch.

Hauraki add a claim the Minister's decision was infected by ***Wednesbury*** unreasonableness, was substantively unfair, and was "contrary to the spirit of the fisheries settlement, given Hauraki's rights and interests as tangata whenua to customary fisheries".

The Minister declines to plead to a considerable proportion of the Hauraki claim, categorising it as a pleading of law. There are, however, certain relevant admissions. The Minister accepts "some" of the SNA1 fishery is a taonga; Hauraki are tangata whenua in respect of part of the SNA1 fishery; tangata whenua have tikanga bearing on a traditional role as kaitiaki of snapper; conservation is important to Maori from both commercial and non commercial perspectives; that Hauraki iwi have "an interest" in assets held by the Commission ("extent...yet to be determined"); and that the Minister did not "specifically consult Hauraki", but the Minister contends Hauraki had declined opportunities to be consulted.

Hauraki seek a raft of declarations and directions. In addition to those featured already, Hauraki seek a declaration of an obligation to act in accordance with the principles of the Treaty (s 10 Settlement Act); requirement to recognise priority of Maori customary fishing interests over all others; duty to preserve integrity of the settlement; and reconsideration taking into account a duty to consult Hauraki, and

social and economic impact on Hauraki. Alternatively, if the Minister's decision is found not to be invalid or unlawful, Hauraki seek declarations of duty under the Treaty to provide for Maori customary non commercial interests as a first priority in the TAC; that that balance be allocated to commercials second and recreationals third; duty to preserve the settlement; that TAC reductions require percentage reductions for recreationals along with TACC, and management controls on recreationals constraining to the recreational allowance; and like Crown "shelving" and other directions orders.

Paepae/Taumata 2 are a group of four persons mandated (via a larger body termed Paepae/Taumata 1) appointed by Hui a Iwi to develop, with the Crown, customary fishing regulations pursuant to s 89(mb) of the Act and s 10 Settlement Act. Paepae/Taumata 2's claim, with modification for that different status, substantially tracks the Hauraki claim but with some additions. In particular Paepae/Taumata 2 add

(i) allegation of failure to provide Maori customary non commercial fishers with an opportunity to be heard, contravening principles of natural justice and s 27 "Bill of Rights Act 1990"

(ii) failure to have regard, as a relevant consideration, to

(a) priority for Maori customary take, with the resulting recreational take representing confiscation and diminution in the mana of tangata whenua and

(b) customary practice of kaitiakitanga

(iii) breach of legitimate expectation no material decisions would be made regarding Maori customary non commercial management until after agreement on Maori customary non commercial fishing regulations has been reached.

Paepae/Taumata 2 seek essentially similar relief to that sought by Hauraki.

The Minister adopts a similar stance to that taken to the Hauraki claim. Relevant admissions include acceptance Paepae/Taumata 2 represents "some non commercial customary fishing interests in SNA1;" and tangata whenua whose rohe encompasses some of SNA1; a "cultural and spiritual" association between tangata whenua and snapper fisheries in Hauraki Gulf extending back many generations; management by tangata whenua in accordance with tikanga for generations; and a customary fishing practice of kaitiakitanga. The Minister also accepts he did not specifically consult Paepae/Taumata 2, but asserts the latter indicated to officials there was no mandate, and declined opportunities beyond matters involving customary fishing regulations.

As against all Applicants the Minister also pleads, as barriers to the discretionary relief sought, "the overall circumstances of the case", and facts particularised as:

(A) If there were errors of law in respect of procedure, particularly consultation, such were minor in the context of a "comprehensive and transparent" consultation process conducted every fishing year and in the years concerned.

(B) If there were errors of law in statutory interpretation, "delay and or waiver and or acquiescence", in that the interpretations adopted by the Minister were or ought to have been known since at least 1988.

(C) By time of hearing and judgment Applicants will have received "the benefit of a substantive remedy" for fishing years concerned through interim orders, so being in fact unaffected by the Ministerial decisions.

(D) In event of error, the decisions should not be set aside but be remitted for reconsideration in the context of the "stock assessment, consultation and decision making process now in train" to be completed before 30 September 1997, to set the 1997/1998 TACC.

It remains only to note the position of the Third Respondent NZRFC. This body was joined at Crown suggestion to represent the interests, so far as practicable, of

recreational fishers. I declined to order public funding, and no doubt at least partly in consequence it has played a somewhat restricted role. Statements of Defence filed make no concessions; and in particular deny any "reallocation" from commercial to recreational interests, or any priority to Maori customary take.

III.
BACKGROUND

The snapper in SNA1 is a relatively well researched fish. It spawns, on a massive scale, over the spring and summer months. Spawning success appears to be related to water temperature. The warmer the weather, the greater the success. On average a "year 1" class of some 15 million is expected. This class of "juveniles" reduces through natural mortality to some 11 million "recruits" entering the 25cm MLS approximately four years later. The spawning process and juvenile growth feature mainly in shallower waters. Hauraki Gulf is a particular focus. As the fish grow larger there is a movement outwards to deeper waters, although snapper remain an essentially inshore fishery. As a generalisation, the species is most abundant between 15 and 60 metres. Longevity is uncertain, but is thought to run up to 60 years. Growth rate and weight gain slows significantly with maturity. There are no significant natural predators. The SNA1 stock comprises three substocks: East Northland, Hauraki Gulf, and Bay of Plenty. There is sufficient interaction between Hauraki Gulf and Bay of Plenty to treat the latter as one stock for management purposes. On 1996 figures, Northland comprises approximately 14%, and Hauraki Gulf/Bay of Plenty 86% of total stock.

The virgin biomass (B_0) is unknown, but is thought to have been some 250,000-350,000 tonnes. Certainly, snapper were abundant in pre contact times. Unsurprisingly, there was a well established traditional Maori fishery. Most evidence relates to Hauraki Gulf, but I infer the same for East Northland and Bay of Plenty, both well settled areas. This had non commercial (sustenance and ceremonial) and commercial elements. The latter involved pre contact barter and koha, and post contact sales. I have no difficulty in applying the conclusions of the

Muriwhenua report in a broad way not only to East Northland but to adjacent Hauraki and Bay of Plenty areas. There is indeed an interesting reference in the report to a contemporaneous account of Maori hawking snapper for cash in early Auckland. Local Maori regarded themselves as a kaitiaki (loosely, "guardians") of the fishery within the rohe, and fished according to tikanga (customary practices) which included conservation elements. The present resource, received from ancestors, was held as if on a trust to be passed on in turn to descendants. I do not have evidence, but doubt whether Maori traditional fishery made much impression on the overall virgin biomass pre contact. There would not have been the technology, let alone the numbers.

With European settlement, fish stock began a progressive decline. This is best established within the Hauraki Gulf, which became something of a fish bowl for the burgeoning Auckland population. There has been a recognised European fishery in the Hauraki Gulf since before the 1890's. Records are available from 1915 onwards. The impact of systematic fishing with more advanced technology was accentuated by an extended period of below average temperatures in the earlier part of the century. Input restrictions upon commercial fishers were no more successful in SNA1 than elsewhere. It is thought the fishery sank through B_{msy} around 1950. It now appears that there may have been significant Japanese fishing activity in the inshore fishery through the 1950's into the 1970's prior to enactment of the Exclusive Economic Zone legislation in 1977, although its accent may have been outside SNA1 on the west coast. Removal of local licensing restrictions in 1963 added to pressures. Extraction appears to have peaked in 1971 and again in 1978 and 1979 in excess of 10,000 tonnes per annum. By 1982 there was sufficient concern for the Hauraki Gulf to be declared a controlled fishery. The first recreational controls (albeit somewhat notional) soon followed. There were also concerns for all fisheries at a national level, resulting in part in the Fisheries Act 1983.

I have little direct evidence as to the on-going state and exercise of the traditional Maori snapper fishery in SNA1 down to 1983. I am prepared to infer that here, as elsewhere, Maori continued to fish both for sustenance and commerce, but practices were overwhelmed. Traditional kaitiakitanga and tikanga did not entirely disappear, at least in the minds of Maori, but received scant regard at government,

industry, or recreational fishing levels. Maori would not have been in a social or political position to make effective protest, so much a feature of the present time.

The Fisheries Act 1983 made provision for fisheries management plans, which would lay down a relatively holistic system of commercial and non commercial restraints. Promulgation of FMP's required a ponderous process analogous to Town Planning (Resource Management) procedures at their worst. Work did indeed start on an FMP for the SNA1 area, a topic to which I will return, but political judgment at the time was that additional measures were necessary to preserve national fish stocks and the industry more immediately.

The ultimate result was the QMS system introduced by the Fisheries Amendment Act 1986. As originally constituted it provided for the declaration of QMA's, and application to particular fisheries within such QMA's. A definition of TAC was carried through from the Exclusive Economic Zone legislation. The Minister, after "allowing for" so called "Maori, traditional, recreational, and other non-commercial" interests, would set the TAC. ITQ were to issue to commercial fishers based on catch history. In the event total ITQ exceeded the TAC, there would be ITQ proration downward, with compensation or an elevated right to priority in event of subsequent increase in the ITQ. An appeal system was instituted. In event additional ITQ was upheld, the TAC was to increase correspondingly. Importantly, ITQ was recognised as a strong property right; effectively an inalienable right to harvest. In the scheme as originally instituted, if the Minister reduced the TAC (as was permitted for conservation reasons), and thus reduced ITQ, Crown compensation was required.

Government had recognised the QMS would not work on the ground (water) unless it had industry support. There was a considerable education and consultation effort for some years prior to introduction. Officers spoke to meetings. A much quoted "blue book" was widely circulated. Commercial fishers can be a hardy and independent lot, and took some convincing. One area of concern was the perceived intrusion by recreational fishers. This could well have featured more in the SNA1 fishery than most others. Not much remains in writing. However, I accept without difficulty that fishers, asked to constrain commercial activity at personal cost, did

indeed ask pointed questions as to what constraints would be placed upon recreational fishers, who obviously could move in and take all the benefits. I have no doubt that within a campaign designed to promote the QMS, positive and reassuring responses were given. It would be natural. Indeed, it would be almost inevitable. Probably, those responses were general in character. I do not doubt they were given in good faith. (The first bag limit was put in place in 1983, and indeed more would follow, whether or not effective). These representations were not adequately recorded. They are now inconvenient. They are now officially denied. They live on in industry folklore. I prefer the latter. I am satisfied some assurances, albeit general in character, were given that recreational fishers would be controlled to an appropriate degree; and these assurances would have had some influence in procuring industry acceptance of the QMS. It is a matter of common-sense.

With the QMS in place, and applied to SNA1, an initial TAC was required. It was set at 4710t. I do not have the relevant material in evidence. Received wisdom is that the Minister operated from outset upon a view the statute, through its definition of TAC including reference to MSY, required him to set TAC levels moving stock to B_{msy}; and on a view the statute did not require priority for Maori traditional customary, or recreational, interests. That may have been so. It became academic, as a mass of successful QAA appeals, which took years to resolve, in fact carried the TAC upwards to some 6010 per tonnes by 1993, much nearer to the actual historic catch. It became necessary to direct a sharp reduction to 4900 tonnes. It occurred in 1992.

Meantime, developments took place on both recreational and Maori fronts.

The Fisheries Act 1983 Part I, relating to FMP's, still stood. It envisaged controls on recreational fishing as well as on commercial fishing, as part of an overall plan. Despite the advent of the QMS in 1986, some work continued both nationally and locally. Nationally, a draft recreational policy was released for public submission in May 1986. A developed recreational policy document emerged in 1989. It is interesting in proposing a priority for recreational fishers over commercial in popular locations easily accessed. A draft Auckland Region FMP, including recreational elements, was released for public submissions in late 1989. However,

with a change of government in 1990, enthusiasm waned. FMP's, and the national policy, were not actively progressed. Cabinet decided to repeal Part I in November 1992. Part I was eventually repealed, seemingly under litigation pressure, in 1995. The SNA-1 recreational fishery was left to itself until introduction of tighter bag and net size limits in 1993.

Maori, nationally, did not all accept the QMS. The theory was that fisheries were a taonga, preserved to Maori under the Treaty, as recognised by statutes down to s 88(2) Fisheries Act 1983. The QMS, with its stipulated commercial property right, was put as incompatible. By the 1980's, the Maori voice was resurgent. A brace of proceedings issued challenging the QMS as it affected Maori stock. They acquired immediate practical significance through an interim injunction issued in relation to certain species in 1987. Whether or not the remaining proceedings were to be seriously pursued, they were taken seriously. Negotiations followed. An immediate outcome was the 1989 Maori Fisheries Act constituting the (then) Maori Fisheries Commission and transferring $10 million in cash and 10% of quota or cash substitute. The longer term outcome was the 1992 Deed and Settlement Act. Background is recorded in recitals in the latter. Essentially, Maori discontinued legal proceedings, and accepted the QMS as legitimate, in return for funding of $150 million to purchase a half interest in Sealords (a major deep sea quota holder) and a 20% entitlement to new quota. Section 10 dealt separately with Maori non commercial fishing rights. However derived, these "henceforth have no legal effect, and are not enforceable in civil proceedings or a defence to criminal or regulatory proceedings, except to the extent provided for by regulations". They do, however "continue to give rise to Treaty obligations" and the Minister was obliged to consult and develop policies to help recognise "use and management practices". Provision was made for regulations (s 89(mb) Act) as to customary food gathering and special relationship involved; with obligation under s 10 on the Minister to recommend regulations so providing. As an interim measure Regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 SR 1986/221 was amended (s 37) to exclude controls on amateur fishing in relation to approved traditional purposes as specified.

As a pleasant complication, amidst these developments there was a move in 1990 to so called "proportional ITQ". The original scheme had envisaged ITQ as a property

right, alteration of which would require compensation. If the TAC went up, and new ITQ became available, it would belong to the Crown, and could be sold. If TAC went down, the Crown compensated the holder. In 1990 there was a major philosophical change. The Crown decided to shift the biological risk, i.e. the risk TAC and thus ITQ might be reduced for conservation ("biological") reasons, over onto the industry. No longer would the Crown compensate. The *quid pro quo* would be that any increase in TAC, and therefore in ITQ, would go as a bonus to ITQ holders. No doubt financial considerations played a significant part. Money was in short supply in 1990. There was also an arguable economic justification. With biological risk squarely on the industry, it would be more conservation conscious.

An opportunity was taken at the same time in 1990 to move from the TAC to include the new concept and term "TACC". The Minister no longer made allowances for specified interests (Maori, recreational, and other); so deriving a TAC representing automatically the commercial allocation. Instead the Minister determined a new "TAC", and then moved on to specify a "TACC" under s 28D. The Minister when specifying a TACC was obliged to "have regard" to the TAC (including foreign catch) and then to allow for "Maori, traditional, recreational, and other non commercial interests in the fishery" and for s 12 allowances for foreign catch. The Minister was obliged, when considering reductions in TAC to "have regard"

(i) to whether imposition of other controls under the Act (i.e. management controls) would suffice to "maintain" fish stock at a level where current TACC could be sustained and

(ii) whether a reduction in fishing level could be achieved by the Crown obtaining and "shelving" quota.

The Minister was obliged to consult the FIB, and "such other persons or organisations as the Minister considers are representative of persons having an interest in the fishery", and to "have regard" to views expressed.

In conjunction with the 1992 Settlement, s 28D was amended. Reference in s 28D(1)(a)(i) to allowances for "Maori, traditional, recreational, and other

non commercial interests" in the fishery were replaced by the simple category "Non-commercial interests". The Commission was added to s 28D(2) as a body to be consulted.

It is clear Maori negotiators in 1992 were aware that ITQ held by the Commission, and further ITQ to be received by the Commission and Maori, would be subject to reduction along with the TACC on biological grounds. Likewise, it might be increased. That risk, and potential benefit, were known and accepted. I accept Maori did not envisage, or accept, that TACC and quota might be reduced simply to enable a greater recreational allocation of the resource. It is highly unlikely Maori would have agreed to surrender Treaty rights for the better gratification of Auckland boatmen. The thought did not cross the tangata whenua mind.

I have limited evidence as to SNA-1 TAC and TACC setting processes between 1988 and 1994, and pass over those years briefly. Advice papers put up to the Minister made it clear the intention (and present obligation) was to move all species to a stock size which would produce B_{msy}; with a particular view taken as to determination of MSY.

Initial TAC was allowed to ride up with QAA appeals increases until the 1992/93 fishing year. In that year TAC was 6010t. Officials estimated SNA1 at approximately 50% B_{msy}. Officials estimated recreational catch (which seems to subsume Maori non commercial) at 1500t which allowed a revised TACC of 4900t. To allow rebuild to move stock to MSY the TACC should be less than 4900t. A TACC of 4000t would allow MSY in 34 years; and 2000T MSY in 10 years. (There was a warning surveys now showed recreational catch could indeed be up to 2700t). Restrictions on recreational catch would increase the rate of rebuild, but "would have to be considered nationally for snapper". The industry urged no change; NZRFC 4710t; and the Commission 4700t. The Minister opted for a TACC of 4900t and for consideration of restrictions through recreational bag limits. Essentially, on August 1992 information, the 4900t TAC held the line. Indeed, it took the TACC back to approximately the original 1987 level. As an outcome, government encouraged a joint industry/recreational/Maori/MAF "Strategic Management Group" to work through conflicts between various sectors. It made a promising beginning, but in the

end broke down amidst some recriminations. Changes to regulations reduced maximum recreational bag to 20 and net sizes to 125mm.

The fishing year ended 30 September 1994 saw no TACC change.

For the year ending 30 September 1995 the Minister clearly was contemplating combined reduction in the TACC, and increased recreational management controls. The Minister was particularly concerned to reduce juvenile mortality. On 1 December 1994 the maximum recreational bag was reduced to 15, and the MLS for recreational fishers was increased to 27cm.

This TAC/TACC process was not conducted in an information vacuum. Attempts were made to measure biomass. In 1983 and 1984 a visual tag and release programme had been undertaken. In 1992 catch and effort data were drawn from the commercial long line fishery. (This data, taken along with intermediate catch data and stock predictions, was considered to demonstrate post 1984 decline in biomass, and was influential in the 1992 TACC cut. The long line method is now less favoured, being considered to show little contrast). In 1993 (last quarter) a substantial tag and release programme was undertaken. It involved 30,477 fish, commercial trawl and long line. Cryptic tags were used, undetectable without MAF equipment. Commercial catches were sampled for tags through 1994 (recreational recoveries were not detectable). Ministerial scientists consider this survey removed much of the uncertainty as to biomass prior to 1993. There was a simultaneous December 1993—November 1994 recreational telephone and diary survey, and January 1994—June 1994 boat ramp landing survey (line catch from boats is the predominant recreational method). Data from 1994 efforts did not become available until early to mid 1995, and was not available to assist with the TACC for the year ending 30 September 1995. There was also, of course, annual catch data from commercial fishers' returns. For future reference I note the catch landing, and also the 1984-85 tagging and 1994 recreational survey data, as follows:

<u>Commercial Landings</u>

	Landings	TACC
1983-4	6539	

1984-5	6898		1984-5 recreational catch (t) 1600	21%
1985-6	5876			
1986-7	4016	4710		
1987-8	5061	5098		
1988-9	5793	5614		
1989-90	5826	5981		
1990-1	5315	6002		
1991-2	6191	6010		
1992-3	5433	4904		
1993-4	4859	4928	1993-4 recreational catch (t) 2850-3250	37-40%

Throughout this period Ministry scientists used and developed a stock assessment model. Like all such models, viability depends very much upon the validity of basic assumptions. It was cross-checked, and no doubt adjusted, in the light of developing extrinsic information. The consistent message appears to have been that biomass was standing at approximately one half B_{msy}, as MSY was gauged by the Ministry. There was also one other developing concern. The summers and autumns 1990/1991 through to 1993/1994 were cooler than average. This produced a likelihood of poor recruitment to the biomass for the years 1993/4 through 1997/8; unrelieved until a warmer spell in 1994/5 would produce better recruitment in 1998/9.

The TAC/TACC process settled into a recognised pattern in the early 1990's. Early in the calendar year working groups for snapper "SAWGS" comprising Ministry, industry, after 1992 recreational and other representatives formulated views on current fish stock status. Ministry scientists, with expertise and modelling facilities, obviously played a crucial role; moderated by industry scientists and user knowledge to some degree. All working groups reported conclusions (and differences) to Plenary Sessions (all fish stocks) in about May. Plenary Sessions produced fish stock reports. MAF Initial Position Paper ("IPP") concerning review of TACC's and management controls followed on. They were circulated, through the Ministry, to interested parties; notably industry, the Commission, NZRFC, and ecological groups. Submissions and consultations followed. Up to and including 1994 industry and other groups were consulted separately. The Ministry then produced, around July-August, a Final Advice Paper to the Minister, who then made

the necessary statutory decisions as to any changes, to take effect for the next fishing year commencing 1 October next. The Minister communicated his decision to the groups concerned shortly before gazetting. As a matter of record, the same individual was Minister from 1990 through 1996.

IV.
1995 DECISION

I refer here to the decision reached in September 1995 for the fishing year commencing 1 October 1995.

I will pass over preliminary SAWG studies in early 1995. Their outcome, as moderated, can be gathered from the 1995 Plenary Report dated 29 May 1995. It is a detailed scientific document. It is prefaced by acknowledgements of difficulties both in data and as to the intended scope of Maori and recreational interests. It adopts the particular approach to definition of MSY previously noted. It assumes a requirement to move to MSY. It acknowledges a role for management controls. It records historic commercial landings and estimates of recreational landings. It notes "snapper formed important fisheries for Maori, but the annual catch is not known". It records outcomes (to date) of the 1993-1994 tagging and recreational surveys. Assisted by 1993-1994 information, it derives biomass estimates (on various approaches) ranging from 46,276t to 53,385t. It puts the commercial catch at 4859t, and recreational catch at 3050t; with recreational 39% of total. It derives MSY for East Northland of 1290t, and Hauraki Gulf/Bay of Plenty 6120t, total 7410t. It considers East Northland to be close to B_{msy}; but declining on current commercial and recreational catches through 1999 and 2005. It considers Hauraki Gulf/Bay of Plenty to be "about half B_{msy}", declining likewise through 1999, then returning through 2005 to 1994 level.

The MAF Initial Position Paper dated 8 June 1995 followed on. It is prefaced as being preliminary, and to promote discussion. It summarises stock assessment in terms of the Plenary Report. It notes in particular the 1993-4 TACC of 4928 tonnes,

commercial catch 4859 tonnes, and estimated recreational catch 2850-3250 tonnes. It notes biomass estimates as alternatively 52,819t and 46,276t. It derives MSY as East Northland 1290t and Hauraki Gulf/Bay of Plenty 6120t, total 7410t. Even on best figures, commercial catch and recreational catch exceed that MSY. It notes predictions for the two substocks. It concludes "MAF recommends that the TAC and current management controls be reviewed". There had been an increase in recreational MLS from 25cm to 27cm effective 1 December 1994, and a recent reduction of bag limit. No additional general controls were recommended.

The Initial Position Paper was circulated to industry, the Commission, and recreational and ecological groups on 12 June 1995. Beyond the Commission, there was no distribution to specifically Maori organisations. Consultations were to follow, for the first time in combined meetings. (It seems the NZRFC may have conferred with the Minister first (23 June 1995) before the standard consultation invitation letter issued (30 June 1995); a source of some concern later to industry when discovered). From 7 July 1995 sub-ministerial consultation meetings and sector group submissions began. Positions taken appear sufficiently from the MAF 1995 Final Advice Paper ("Recommendation of TACC's and Management Controls for the 1995 and 1996 Fishing Year") issued to the Minister 14 August 1995, to which I now turn.

The Final Advice Paper was a detailed document. It clearly assumes a particular view of MSY, and a need to attain MSY in the long term. It eschews belief the Act implies any "strong preference" for non commercial users; but implies "a reasonable allowance be made"...an "adequate allowance". Increase or decrease may lead to need to "adjust catch" on commercial fishing; and may require adjustment to the TACC, so as still to move to MSY. It states MAF recognises the interests of Maori and "any changes have been discussed with non-commercial representatives" (unspecified). It draws attention to requirements to consider whether controls would suffice to maintain current TACC's; and to like requirement for consideration of Crown shelving quota; noting relevance of time requirements and cost to the Crown. A view was noted to the effect TACC should allow at least a 50% chance of movement to MSY "over time".

It then records the Plenary and Position Paper estimates of biomass (46,276-52,819t), the anticipated decline, and MSY (7410t). It puts estimated biomass at 42-48,000t with B_{msy} put at approximately 80,000t. It notes industry views as including:

(i) little change in stock since 1985, with commercial catch reducing from 6,000t to 4,700t and recreational catch increasing from 1600t to 2800t: stock rebuild from commercial cuts having been absorbed by recreational increase

(ii) current removal levels are sustainable: stock size has not changed despite average removals of 8,000t per annum for 10 years

(iii) current management regimes do not constrain recreational catch: on growth since 1985, and increasing effort, recreationals may harvest the total catch within 15 years

(iv) commercial rights cannot be sequestered and given to others (recreationals) without compensation: this will occur in the absence of proper controls on recreationals

(v) no priority exists under s 28D for any one of commercial, non commercial, or foreign catches

(vi) it is legally permissible to manage stock at levels below MSY (invoking the ***Greenpeace***) ***NZ Inc v Minister of Fisheries*** (unreported, High Court, Wellington, 27 November 1995, CP 492/93, Gallen J)

(vii) severe socio economic impacts will follow cuts, particularly for small fishing communities

(viii) the TACC should remain at (1994) 4900t; with meaningful controls on recreational fishing, and transfers to the recreational sector to be transparently by Crown purchase of ITQ.

It notes a Maori view in two parts. First, no doubt because of the source, it records within "industry views" a submission for Area 1 raising Treaty and Deed issues. It notes the submission as to the effect (I) the Deed did not extinguish non commercial fishing rights, which remain subject to Treaty principles, and still give rise to Treaty obligations on the Crown; (ii) treating a particular sector group (seemingly industry) as excluding others would breach the Deed; and (iii) all user groups must be brought to account, with explicit output controls. Second, the Commission is noted as concerned at non implementation of measures put forward in February 1995 (no doubt in the context of SAWG discussions and involving MLS abolition for trawlers/Danish seiners and 125mm trawl mesh); and at the very high rate of increase in recreational catch, to detriment of Maori interests in both customary and commercial areas.

The Advice Paper also notes NZRFC and ecological group views. It suffices to say that NZRFC took a converse view to that taken by industry, was highly critical of industry and alleged industry practices, questioned the 1994 recreational catch estimates on the basis 1994 was a particularly good year, and recommended a 4100t TAC, 1980t recreational, 20t Maori and 2100t TACC. Recreational limit bag could go down to 10. The ecological groups saw a need to reduce take overall, with pain shared by both industry and recreational. The view was limit bags could go down to six.

Having reviewed submissions received, MFish expressed disagreement with a number of key industry views. It considered stock *is* declining: stability 1985-1994 was ascribed to a period of high recruitment, now to be followed by low recruitment. Current removals were put as *not* sustainable. Absence of recruitment had not been due to increased recreational catches, put as only an additional 5000 tonnes total over the previous 10 years. Rebuild *was* necessary: it was a legal obligation over time. A move from 6900 to 7400 MSY would give an additional 500 tonnes, better fish for both sectors, and make SNA1 "more robust to major fluctuations". (It made no comment on Maori treaty based aspects). The Advice Paper set out two TAC rebuild tables. The first assumes no increase in recreational catch. The second, recognising difficulties in holding annual catches, assumes

increase; but also assumes it remains at the same proportion of total biomass. MSY is estimated at 7400t. Outcomes are:

	TAC (No recreational increase)	**TAC** (Proportionate recreational increase)
B_{msy} in 10 years	3800-4400	3050-3500
B_{msy} in 20 years	5450-5850	4300-5150
B_{msy} in 30 years	6050-6300	4900-6600
MSY	7400	7400

(I draw attention to the 5450-5850 bracket; which appears to be the source of the ultimate 5600t TAC eventually adopted by the Minister. The alternative figures were not repeated for his benefit towards the conclusion of the paper). Maximum removals to maintain current size were 6900t (recreational 2600, TACC 4300). A short term reduction of 600t would ensure sustainability; but more was needed (taking removals below 6900t pa) to rebuild towards B_{msy}.

The Advice Paper then reviewed the potential of other controls, and of Crown shelving quota. Other controls were seen as going more to specific problems. MFish supported removal of MLS, and a 125mm net size for trawlers in shallow waters. (The former would require landing of juveniles against quota; seen as an incentive to minimise juvenile catch by altered fishing methods). It recommended against increase in commercial MLS to 30cm. It took no view on area closures. Shelving quota was seen as raising duration and cost considerations. Moreover, it was said, "the Government has decided that it is not appropriate to compensate fishers for reductions in TACC's for sustainability purposes". Wrapped in with this, but not highlighted, the paper acknowledged TACC reduction was likely to have significant economic consequences "particularly severe on small operators", and on "a number of small coastal communities".

The Advice Paper looked specifically at reducing recreational catch. This was estimated to move up from the 1994 estimate of 2850t to 4000t at B_{msy} (7400t); with industry fearing ultimate total capture. Average catch per person/day was 1.9 snapper. Reduction in daily bag to 10 would give a 4-6% reduction (130t), and to 6 fish would give 8-12% (260t) reduction in recreational take. MFish noted a recreational view that recreational catch was not "controllable by bag limits". An

increase in MLS was the most likely to assist. A research project was in hand to measure release mortality. No specific recommendation was made at that stage.

Splitting substocks was dismissed as requiring legislation, and as administratively impracticable.

In the ultimate, MFish took a view rebuilding of stock in 10 or 20 years would require "a very large reduction" in total removals. The fishery was put as "not in danger of sharp decline". In the short term a reduction of 600t was necessary to prevent further decline. Total removals to rebuild at 10, 20, or 30 years were in accordance with the table set out above. In the short term, there were *no* viable alternatives to a TACC reduction as a means of reducing commercial take. For juveniles, elimination of MLS and net size measures would be effective.

The Minister met with officials in mid August 1995, and then with sector group representatives on 17 August 1995. I do not have any satisfactory records of the course of discussions in either case. I was presented with numerous cryptic hand-written notes taken by various persons present on behalf of various interests, unexplained by the authors. Such material has significant dangers. Clearly, however, from the tenor of a letter from the FIB to the Minister on 18 August 1995 immediately after the meeting, industry became acutely concerned at the scale of TACC cuts contemplated and lack of corresponding constraints on the recreational sector. The Minister met the FIB again on 29 August 1995. Again, there is no adequate record of the course of discussions. The Minister said 10 year rebuild was in contemplation. It is clear the Minister was not prepared to contemplate a 30 year rebuild, and regarded recreational CPUE as unacceptably low. The Minister accepted also, however, there was a need to consider restraints limiting recreational take. On 29 August 1995 a standard letter followed to sector groups advising the Minister's "preliminary views" following the 17 August meeting, and anticipating a further 6 September 1995 meeting. The Minister stated:

> "As I mentioned at the meeting I am concerned at the current state of the snapper 1 (SNA 1) fishery. This years stock assessment, the best we have had for ten years, indicates the overall SNA 1 stock is at about

> half the biomass level that will the (sic) support the maximum sustainable yield (B_{MSY}). It also indicates that the current level of total removals are not sustainable. Over the last ten years above average recruitment (28% higher than the mean) has mitigated the effect of excess removals. However, NIWA estimates that the following five years have a mean index of only 0.82 (18% lower than mean recruitment). This includes the above average 1995 year class which will not recruit until the 1999-2000 fishing year. In view of this, and the overall state of the stock, I believe it is time to implement a management strategy that will not only preserve some of this below average recruitment but also allow SNA 1 to rebuild to B_{MSY}. Further, I believe that this fishery needs to be rebuilt within an acceptable time-frame and I am considering measures that will achieve this over the next ten years."

The reference to 10 years would imply a TAC between 3050 and 4400t; with a TACC well below that figure. Distribution was as before. Further submissions were invited. They followed. They were in largely predictable terms. The industry (FIB letter 1 September 1995) now proposed a TACC reduction from 4900t to 4000t, "preferably through shelving quota" coupled with a hatchery based enlargement scheme; plus management measures and effective constraints on recreational catch. The Commission added a concern as to "a considerable affect (sic) on the value of the fisheries settlement to Maori".

The second consultation meeting between the Minister and sector groups took place as planned on 6 September 1995. The Minister obtained some further advice in anticipation, and met with officials in advance. Again, there is no satisfactory record of those discussions. Clearly the Minister was concerned to increase the CPUE for recreational fishers, and was advised (unsurprisingly) that increase to B_{msy} would carry some, but not necessarily proportionate, advantages in that respect. Again, there is no satisfactory record of the consultation meeting. Industry pressed a need to consider management methods rather than TACC reduction. The Minister was somewhat dismissive: such "only acted at the margins of the problem". The Commission repeated that TACC cuts without recreational cuts transferred

settlement rights to recreational fishers. Recreation and environmental representatives contributed. The Minister did not announce an immediate decision.

The Minister met officials on 7 September 1995. Again, there is no reliable contemporaneous record. There was some further material received from an FIB expert relating to a 30 year rebuild scenario, with associated reduction in recreational catch.

The final decision was drafted 20 September 1995 and signed off by the Minister on 21 September 1995. It began with expressions of confidence in current assessments of the state of the fish stock. As to this assessment the Minister noted

> "I was concerned to note that the assessment for SNA 1 indicates that currently:
>
> (i) the East Northland substock appears to be close to the biomass level that will support the maximum sustainable yield (MSY), but at current levels of total removals is predicted to decline;
>
> (ii) the Hauraki Gulf-Bay of Plenty substock is only about 11 to 13% of virgin biomass, which is half the biomass level that will support the MSY;
>
> (iii) overall, the estimated biomass for SNA 1 is between 42 000 and 48 000 tonnes. The biomass level that will support the MSY is estimated to be about 80 000 tonnes."

As to recreational catch satisfaction, the Minister noted:

> "Results from the boat ramp surveys undertaken in 1994 show the average snapper catch per person per boat trip was about 1.9 fish. Between 40 and 50% of trailer boat fishers caught no snapper on a given fishing trip. In 1991 the average catch per fisher per hour was 0.4 snapper. In 1994 the average was 0.6. However, this was calculated during autumn which is the best period for recreational fishers to catch snapper. The above figures are estimated only from

> boat caught snapper, and do not include land based fishers (eg surfcasters) who generally have much lower catch rates."

The Minister then turned to present removal sustainability

> "The assessment shows that the current removals from SNA 1 overall are not sustainable. I cannot, in the case of the East Northland substock, allow the current biomass level to decline any further. Also, I regard the Hauraki Gulf-Bay of Plenty substock, which is only 11 to 13% of virgin biomass, to be well below the level I require to ensure that this fishery will be sufficiently robust to withstand future fishing pressure. Of particular concern is that the next five years of recruitment have a mean index of only 0.82 (18% lower than mean recruitment). This includes the above average 1995 year class which will not recruit until the 1990-2000 fishing year."

Then came his decision on TAC, and on "allocation":

> "I have come to the clear view that total removals in this fishery need to be substantially reduced. I believe that I have a responsibility to ensure that the current level of removals is sustainable and that this fishery is rebuilt toward a level that will support the MSY. I have, therefore, decided to set a total allowable catch (TAC) for SNA 1 of 5 600 tonnes. Within this TAC I have set aside 2 300 tonnes for recreational fishers and have made a specific allowance of 300 tonnes for Maori customary take. The TACC for SNA 1 will thus be reduced from 4 928 tonnes to 3 000 tonnes."

The Minister then paid considerable attention to the recreational sector position:

> "I would like to acknowledge the commitment to improved stock status the recreational sector has made over recent years by putting forward effective proposals for the management of the amateur snapper fishery. I consider the current catch per unit effort (CPUE) for recreational fishers to be inadequate and that it is reasonable to seek to obtain a modest increase in this catch rate. However, I also recognise the need to constrain the overall level of removals of amateur fishers

both now and especially in the future. Snapper is the most important recreational species for fishers from the Bay of Plenty to Northland. As a consequence, management decisions for SNA 1 need to take into account this area's current and expanding population size. I have decided therefore to reduce the daily bag limit for SNA 1 from 15 to 9 snapper. I noted during the consultation process that there is a large degree of support amongst recreational fishers for a bag reduction of this extent which therefore should ensure good compliance. The reduced limit will also assist enforcement officers to target illegal activity, and I will be seeking further funding for compliance to ensure that the new catch limit is effective.

I note that in 1995-96 there will be the opportunity to conduct research on the survivorship of snapper released by recreational fishers. Results from this research will be available within the next two years and will be used to review the existing amateur minimum legal size (MLS) of 27 cm. There is also another survey planned for 1996 to determine the recreational harvest and daily catch rate in SNA 1. The results from this survey should be available for the 1997 fishery assessment plenary and will provide information on the between year variability in recreational catches.

I, and my Ministry, will need to continue working with recreational leaders to ensure the non-commercial harvest is restrained to an appropriate level. I also believe that it is an appropriate time to initiate discussions with charter boat operators to begin to formalise their contribution and involvement in the management of this fishery."

The Minister then turned to "other controls":

"Under the current Fisheries Act I am required to consider whether other controls would be sufficient to maintain the fish stock at a level where the current TACC could be sustained. I have been considering other controls for the commercial fishery for a number of years, but I am not aware of any realistic options that could provide the reduction in removals necessary to set this fishery on the road to rebuild or allow maintenance of the current TACC. However, there are some

> additional controls that will assist the rate of rebuild by reducing the level of juvenile bycatch in the commercial fishery."

The Minister proceeded to detail extension to 125mm net size; seasonal closure to commercials of inner Hauraki Gulf October through March; and intended research on net size, long line mortality, and other matters. Enhancement was dismissed for the present. "Shelving" was said to be untenable for reasons including cost recovery, effect on minimum holdings, and tenure for the scale of reduction determined.

The Minister then turned to impacts. He noted, briefly:

> "While I recognise the serious impacts the reduction in the TACC will have on operators in the commercial fishery, I consider the measures to be implemented this year necessary to move the SNA 1 stock towards a biomass level that will support the MSY within an appropriate time-frame. The research I have commissioned for this fishery in 1995-96 indicates the ongoing concern I have for SNA 1. Over the next two years I intend to use the research results to develop additional measures for both commercial and non-commercial fishers that will assist the biomass to rebuild towards the MSY level and provide further information to assess and, if necessary, further constrain non-commercial catch."

TAC, and TACC/quota changes would take effect 1 October 1995, 10 days away. Regulation changes would take effect 1 December 1995.

The Minister also issued a 21 September 1995 press release headed "Strong Measures Adopted for Auckland Snapper". It contains nothing additional. As emphasis, it was said "industry and recreational fishers" must reduce to conserve and rebuild. The Minister stated he was "acutely aware of the serious impact" reductions would have on commercial operators but his actions were "vital" to ensure the future.

The Minister made an affidavit (9 October 1995) as to the process involved in his decision. Ultimately, leave was not sought to call him for cross-examination. After reviewing available information as to fish stock, juvenile catch, and projected poor recruitment, the Minister observed:

> "11. I consider that under the Fisheries Act and the international obligations created by the Law of the Seas Convention, I have an obligation to move fish stocks substantially towards MSY. From the information available to me I concluded that the only measure which would assist in achieving this aim was to reduce the TACC. I have also sought to reduce the catch of non-commercial fishers by reducing their daily bag limit from 15 to 9. This reduction augments previous bag limit reductions and measures I have implemented to increase the minimum legal size of fish they can catch."

The Minister referred to consideration of management measures, other than reducing TACC, but concluded:

> "13. However from the information I have available, if the stock size is to rebuild and move substantially towards MSY, I consider the total allowable catch must be constrained if (sic) this is to be achieved there is no alternative but to reduce the TACC."

Then, as to time-frames and impacts:

> "14. The 3000 tonnes TACC and the restrictions I have imposed on the non-commercial fishers will reduce the total allowable catch (TAC) to a level which will allow the stock to rebuild over a 20 year period. To achieve a lesser rebuild period would require a greater TACC reduction now. When I advised industry the stock size needed to rebuild and that I would be reducing the TACC to achieve this, the reduction I had in mind was based on a 10 year rebuild period. This would have necessitated reducing the TACC to 1500 tonnes. As a result of industry's submissions on the hardship this would cause to

commercial fishers, I decided to adopt a 20 year rebuild period which allowed me to set a TACC of 3000 tonnes. I consider that in the case of SNA 1 a rebuild period beyond 20 years would lack credibility.

17. My overall aim when deciding to set a TACC is to secure the future of the fishery. While I am conscious of the economic consequences of TACC reductions particularly in fisheries such as SNA 1, I consider that if I do not act to conserve this fishery it may ultimately be lost. Having decided that, (sic) a TACC reduction is one of the necessary measures to reduce fishing pressure on SNA 1, I have attempted to balance the need to move the biomass of this fishery substantially towards MSY by choosing a rebuild period which will minimise the economic consequences on commercial fishers."

As to non commercial fishing the Minister stated:

"15. To reinforce the TACC reductions I have implemented mesh size changes and a closure to inshore areas in the Hauraki Gulf. These will assist in the rebuild by reducing level of juvenile bycatch in the commercial fishery. I have also signalled my commitment to further regulatory amendment for both commercial and non commercial fishers over the next two years as results become available from research to be commissioned on mesh selectivity and incidental death of fish in fishing. As these measures are applied I believe a comprehensive and integrated package of comntrols (sic) will develop to augment the changes to catch limits.

16. The restrictions I imposed on non-commercial fishers of a daily bag limit of nine snapper and increased minimum legal size are what I consider to be the maximum restrictions that could be imposed at this time which would still ensure non-commercial fishers' compliance. In my experience if restrictions imposed on recreational fishers are too unpopular and do not have their support, this is likely to result in illegal catch. It is more difficult to prevent illegal fishing by non-

> commercials than it is in the case of commercial fishers as the latter are subject to an individual catch reporting regime. I do not accept however that the non-commercial catch cannot be controlled and I have a firm intention to work with recreational fishing leaders to constrain catches as the stock rebuilds. The Recreational Fishers Association had suggested reducing the daily bag limit to ten. I went further than this. I did not consider I could reduce the daily bag limit below nine."

The Minister commented 1995 was the first occasion on which the proportions allowed for non commercial had been "publicly identified" and observed:

> "22. I presented my decision in this way to allow for greater transparency. The catch of the non-commercial fishers cannot be quantified as accurately as it can in the same way as for commercial fishers. The catch provision made for non-commercial fishers can only be an estimate as the number of non-commercial fishers in the SNA 1 is not limited in the way that the QMS limits the catch of commercial fishers to the ITQ held.
>
> 23. The non-commercial catch portion of the TAC is only an estimate. However by identifying the estimated amount of catch available for customary Maori, I have provided for the recognition of Maori as a Treaty partner of the Crown and of their interest in SNA 1. Customary Maori fishing rights will be provided for in the Customary Fishing Regulations soon to come into force. The figure of 300 tonnes was an arbitrary figure adopted by me as there is presently little information on the quantity of catch taken. This will improve when the Customary Fishing Regulations come into force. The 300 tonne estimate is conservative but I considered it crucial to take into account the exercise of Maori customary fishing rights and to be seen to be giving effect to these rights.
>
> 24. I also considered it necessary to identify the portion of the TAC I had estimated recreational fishers would take. The

> recreational fishers have been complaining bitterly for many years about deteriorating fish stock in SNA 1 as evidenced to them by poor catch rate (that is the number of catch caught per trip). SNA 1 is the most popular recreational fishery. I considered it important when I was going to be reducing the recreational fishers catch to identify the portion of the TAC I had estimated as being available to them."

The Minister concluded by expressing views the industry, given previous indications, was not taken by surprise by the cut; and stated he did not view the reduction, when made, as "having any impact on the Crown's agreement with Maori under the Deed of Settlement". (I note in passing the Minister was a signatory to the Deed of Settlement).

V.
THE 1996 DECISION

I refer to the decision reached in September 1996 for the fishing year commencing 1 October 1996, still current.

Again, I pass over preliminary SAWG studies in early 1996. Outcome, duly moderated, can be gathered from the 1996 Plenary Report ("Report from the Fishing Assessment Plenary, April-May 1996: Stock Assessments and Yield Estimates", May 1996). Interestingly, explicit reference in the 1995 document to "some difficulty in data and scope involved in assessment of Maori and recreational interests" disappears. The 1995 approach to definition of MSY continues. Terms of reference acknowledging a role for management controls continue. It again records historic commercial landings, and non commercial estimates (including Maori customary take as "not known"); adding a 1994-1995 commercial landing of 4831 tonnes against TACC 4938 tonnes. The stock assessment (biomass) section is rewritten. It opens with a warning the assessment is updated relative to 1995 through using revised estimates of biomass from the 1993 tagging; additional information on catch and recruitment; allowance (10%) for under reporting of commercial catch; and a model

of the fishery which includes an increasing trend in recreational fishing effort (2% per annum, plus an increase proportional to biomass changes). The model also allowed for effects of MLS increase on 1 December 1994, with an assumed 80% return survival, and effects of bag reduction on 1 October 1995, put at an 8% drop in catch weight. No allowance was made for further management controls post 1995, if any.

The data which followed in the Plenary Report is detailed and technical. I borrow, for present purposes, the preceding internal summary:

> "**SNA 1** - The current status of the two substocks differs. The east Northland substock appears to be above the level that will support the MSY. It is projected to increase in size through until 2005 at TACC levels between 3000 and 4938 t based on the projected catch allocation between the two substocks and with current recreational fisheries management. The Hauraki Gulf / Bay of Plenty substock is about half the size that will support the MSY. This substock is projected to remain at this level through to 2005 at the 4938 t TACC but is projected to increase in size at the 3000 t TACC. It is not projected to reach the size that will support the MSY under either TACC with existing management controls on the recreational fishery."

I add this. Change from the 1995 projection of a decline in East Northland stock simply reflects a shift in allocation of biomass between the two substocks (East Northland goes from 20% to 14%), and the allowance (10%) for under reporting. The body of the report observes in relation to Hauraki Gulf/Bay of Plenty projections that "in the years after 2005, the increasing recreational catch would prevent further rebuilding of the stock to B_{msy}". It adds, as to projected percentage of recreational take:

> "In 1994 the recreational share of the total SNA 1 catch was estimated to be 34%. The results of the simulations suggest that this is estimated to increase to 62% with a 3000 t TACC, or to 38% with a 4938 t TACC."

The MSY involved depends upon a range of assumptions chosen. For East Northland it ranges between 1295 and 1991t, for Hauraki Gulf/Bay of Plenty

6145 and 8586t; with ultimate selections on a catch: biomass ratio of 9.6% at B_{msy} of 1500 and 7100t respectively, total 8600t. (Compare 1995, 7410t).

An MFish Initial Position Paper followed on 31 May 1996. It is prefaced as in 1995. It distils the stock assessment information in the Plenary Report. In particular it puts biomass at approximately 50,350 tonnes; B_{msy} at approximately 89,900 tonnes; MSY at approximately 8,600t. It notes that under current TACC 3000t (actually, suspended) and recreational controls biomass will "increase substantially" over 10 years; but to reach B_{msy} in 20 years further controls on "total removals" are needed. It refers to research results, including MLS and 1996 surveys, which will become available in 1997 allowing more accurate assessments.

Sub-ministerial consultations followed through June and July 1996. They encountered growing difficulties. I note in that regard the background of existing litigation, and a pending election, both of which may have exerted some influence. Industry (13 June 1996) requested additional modelling, adopting premises beyond those which had been used in work up to the Plenary Session stage. Revised premises included constraints on recreational catch, changes in substock split, and more optimistic recruitment levels. MFish staff preferred to think the industry had already accepted ("consensus") previous assumptions, and displayed considerable irritation at requests for further work calling into question the position the Ministry had reached. Industry preferred to call present premises "biased". This spat ran on for some time. Tempers were not improved by the Minister's formal invitation letter, distributed around 19 June 1996, which indicated preliminary views for discussion. The Minister said:

> "This fishing year I have not been able to implement the reduction in the TACC I made to ensure that this fishery begins to rebuild to the biomass level that will support the MSY over a period of about 20 years. I am most concerned that this rebuild is not delayed any further and intend to keep the TACC at 3 000 tonnes for the 1996-97 fishing year. I stated last year, my view that it is reasonable to seek a modest improvement in the current low catch rates for recreational fishers, while acknowledging the need to constrain the total removals of

> recreational fishers both now and especially in the future. My views on these matters have not altered.
>
> In recent years I have taken a number of steps to constrain recreational catch, including reducing the daily bag limit and increasing the minimum legal size. I note that results from the 1996 recreational telephone/diary survey will be available in 1997 to estimate the recreational catch in SNA 1 in 1996 and allow a more accurate assessment of the effect of recent changes to recreational controls (increase in minimum legal size to 27 cm in December 1994 and reduction in daily bag limit from 15 to 9 snapper on 1 October 1995). Also, results from the research programme to estimate the mortality of snapper less than 30 cm taken by recreational fishers will be available next year and will allow a review of the minimum legal size. Until these results become available, my view is that it is premature to consider further constraints to recreational fishers in the 1996-97 fishing year."

Eventually, the additional modelling requested was done. It was received by the industry on 5 July 1996. A final consultation meeting on 11 July 1996 found the parties still at odds. Industry filed a full written submission on 15 July 1996. It contains extensive technical information. It states principal considerations very much in terms raised in these proceedings. It identified the stock assessment as providing new information which warranted a TAC of 7700, and TACC retained at 4900t, and repeated the contention of present reallocation to the recreational sector. The Commission also filed a relatively brief submission, protesting time elements. It saw a need to address and properly define respective shares for customary, recreational, and commercial users; and to enforce restrictions upon recreational fishers.

The MFish Final Advice Paper to the Minister is dated 4 August 1996. It is a detailed document containing full technical information, including outcomes of the further modelling requested by industry. It contains an extensive summary of industry's submissions. Other submissions are reported also. Officials repeat advice of legal obligation to ensure TAC will, on balance of probability, move stock "over time" to B_{msy}; with qualifying factors allowing variation as to rate. Officials reject the industry

view the Act allows management at a sustainable level below B_{msy}. Likewise, there is repeated advice as to "allowance" to be made for non commercial interests; controlled by management. Officials advise reduction of TACC is not a "reallocation"; and draw on (asserted) distinctions between "intent and consequence". Officials remind the Minister of his intention to restrain non commercial catch; noting that because of low recruitment it is not predicted to increase in the short term. "Other controls" are identified and reviewed at length, but not favoured (except removal of MLS for trawler and Danish seine methods). Crown "shelving" is rejected as a "short term" mechanism. Substocks splitting is seen as raising legislative and administrative difficulties. Economic factors are acknowledged: significant consequences, with loss of profit, employment, and downstream reduction in economic activity, particularly severe on small operators. Consultation complaints (including additional modelling) are noted and dismissed. The paper makes no recommendations for change from an (assumed) 3000t TACC level. It points to research still in hand as to management controls and recreational catch.

A first Ministerial consultation (so far as SNA1 was concerned) followed on 6 August 1996. Again, the only record is by way of random notes. As stated, there are considerable dangers in drawing conclusions from such material. It may be significant, however, that the Minister appears to have opened the meeting with a question "why change the 3000t TACC?". The Minister requested the industry to supply certain further information on matters which it raised at the meeting. That information followed. It included further data on the now contentious historic Japanese catch. MFish advice was called for. It was dismissive. Further industry material and contacts also followed. Eventually, on 26 September 1996 (four days before the new fishing year) the Minister's decision issued.

The Minister opened by explaining the delay (as against intended programme) had arisen from the large quantity of material received for consideration, and a need for full consideration. He recapitulated decisions (TAC and management) made for 1995.

The Minister then referred to updated stock assessment material:

> "This year the 1995 assessment was updated using revised estimates of biomass from the 1993 tagging programme, an additional year's information on catch and recruitment, an allowance for under-reporting of commercial catches and a model of the recreational fishery which includes an increasing trend in fishing effort. In addition to the assessment given in the 1996 Plenary Report, I also note that there has been extra modelling on SNA 1 undertaken by MFish following various requests by sector groups. Industry in its final and supplementary submissions, and at the 6 August 1996 meeting in my office, has also brought forward a range of new analyses and information relating to SNA 1 that it considered relevant to my considerations."

The Minister then identified restoration to B_{msy} as "one of the key issues" and gave his reasons:

> "After considering all the available assessment information, I conclude that one of the key issues for the management of SNA 1 is that it is currently well below its target biomass level. The target biomass level, as specified in the Fisheries Act, is one that will support the MSY. At a substock level, the East Northland substock is slightly above the size that would support the MSY, but the Hauraki Gulf/Bay of Plenty stock, the larger of the two, is only about half the target biomass size. Given this assessment, my primary intention regarding the long term management of SNA 1 remains unchanged from that stated last year, that is, to implement long term management measures that will ensure SNA 1 rebuilds to the desired biomass level within a reasonable timeframe.
>
> The benefits of rebuilding SNA 1 to a biomass level that will support the MSY are many: there will be an increase in the available yield able to be taken from the fishery each year; catch rates for all users would be substantially increased and catching costs reduced; the average size of snapper would increase which may reduce the incidence of highgrading and provide greater satisfaction for recreational fishers; the fishery will be more robust to major fluctuations in recruitment;

> conflict between user groups may be reduced due to higher catch rates; and the yield per recruit from the fishery will improve."

The Minister then proceeded to repeat the 1995 TAC and TACC decisions. He did so by a particular process: restating the 1995 figures; expressing concern at decline through poor recruitment; dismissing alternative industry scenarios; and re-emphasising the perceived need to move up to B_{msy}. In fairness, the words should be quoted in full:

> "The management decisions I made last year were based on an assessment that showed that the level of total removals from SNA 1 was not sustainable and needed to be substantially reduced. After carefully considering all of the available information and issues, I decided that an appropriate TAC was 5 600 tonnes and, after setting aside 2 600 tonnes for non-commercial fishers, reduced the TACC from 4 938 to 3 000 tonnes.
>
> The legal action taken by industry has resulted in the level of commercial harvesting remaining unchanged for the 1995-96 fishing year. The seasonal area closure for the inner Hauraki Gulf has been in abeyance since December 1995 and therefore the potential benefits of reducing commercial fishing activity in areas of high juvenile abundance have yet to be realised. The interim relief gained by industry preventing the implementation of the 3 000 tonne TACC extends only until the end of the 1995-96 fishing year. Therefore, I am able to determine a TAC and TACC for SNA 1 for 1996-97.
>
> I am concerned that further delay in the implementation of the existing TACC of 3 000 tonnes will slow the start of the rebuild of SNA 1 from its present depleted level. The assessment for SNA 1 indicates that because of poor recruitment predicted to enter the fishery over the next two years the overall biomass will decline at the current level of total removals. Indeed, even with a TACC of 3 000 tonnes it is estimated that the biomass will still decline, albeit to a much lesser extent. The next strong (above average) year class of snapper is not predicted to start recruiting into the fishery until the fishing year 1998-99. Another strong year class is also predicted to recruit in 1999-2000. This good recruitment will begin to rebuild SNA 1 but the extent of

this rebuild will be dependent on a number of factors, in particular the controls limiting the total level of removals from the fishery.

Industry has provided me with a number of alternative assessment scenarios to consider based on their re-analysis of various aspects of the assessment detailed in the MFish Plenary Report. I have carefully considered industry's alternative assessment and the subsequent advice I have received from MFish. On balance, I am not satisfied that there is reason to significantly depart from the assessment provided by my Ministry.

Under the current level of commercial removals (4 938 tonnes) and with no further controls on non-commercial catch and 10% "under-reporting" of the commercial catch, the overall biomass of SNA 1 is predicted to rebuild only slightly by the year 2005. Under a 3 000 tonne TACC and under-reporting, and the existing non-commercial controls, the biomass is predicted to have substantially rebuilt by 2005. I note that the modelling of SNA 1 biomass projections assumes that only 10% under-reporting of commercial catch occurs. If the actual illegal take exceeds this level then the estimates of the rebuild in future biomass would be more pessimistic. It is with some concern therefore that I note the recent MFish enforcement operation in Auckland on black market fishing activity, estimated to be turning over a million dollars of fish a year. MFish Compliance has estimated the illegal removals from SNA 1 at between 700 and 1 800 tonnes a year. Note that these estimates have not been included in the modelling of the biomass projections of the stock.

In order to mitigate the effects of the predicted poor recruitment to SNA 1 through to 1998-99 and ensure that the fishery rebuilds strongly towards a biomass level that will support the MSY once better recruitment occurs, I have decided to reset the TAC at 5 600 tonnes. Within this TAC I have decided to set aside 2 600 tonnes for non-commercial fishers and have maintained the TACC at its existing level of 3 000 tonnes for the 1996-97 fishing year."

The Minister did not expressly divide the 2600 tonne non commercial allocation between 300 Maori customary take and 2300 recreational as in 1995; but it is admitted on the pleadings that subdivision was implicit.

The Minister then acknowledged economic impact:

> "The significant implications and economic hardship likely to result from a 3 000 TACC have been outlined in some detail in the submissions from industry sent to me both this year and in 1995. I recognise, and have spent some time considering, the serious impacts this TACC will have on commercial operators in the SNA 1 fishery. However, I am of the firm view that a reduction in the commercial take to 3 000 tonnes is necessary to provide for the eventual rehabilitation of the stock to the desired biomass level."

The Minister then turned to recreational fishers. There would be no change, but research was in hand relevant to the 1997 review:

> "For the 1996-97 fishing year, I intend to maintain the existing controls on recreational fishers. Last year I reduced the daily bag limit from 15 to nine snapper. This reduction followed cuts to the limit made in the previous two years. I note there has been overall a 70% reduction in the limit since 1992 from 30 to 9 snapper per day. In 1994 I also increased the minimum legal size from 25 to 27 cm for snapper caught by amateurs. The fishery assessment predicts that as a result of the decline in biomass of SNA 1, owing to poor recruitment through to 1998-99, the recreational catch will decline over the next two years. In fact, recreational take is not predicted to increase beyond its present estimated level until the 1999-2000 fishing year.
>
> Notwithstanding this prediction, I intend to use results from research programmes I commissioned in 1995 and 1996 to assist with a review of future management controls of recreational fishers in SNA 1 for 1997-98. There is, as part of a national survey, a recreational telephone / diary survey that will provide an estimate of the 1996 (calendar year) amateur catch of SNA 1. This survey will also give length frequency and catch weight profiles of the recreational take and

> thus allow the effect of recent changes to the bag limit and minimum legal size to be more accurately assessed. It is hoped the preliminary results of this survey will be available in time for the 1997 fishery assessment process, and thus the 1997 review of TACs and management controls. I note that MFish will soon be consulting on a proposal, as part of the nature and extent of research services for 1997-98, to extend the recreational diary survey through to the end of 1997.
>
> Results from a research project to estimate the mortality of snapper less than 30 cm taken and released by commercial longline and recreational fishers should also be available in 1997 and will be used to review the minimum legal size for recreational fishers and commercial longlines for the 1997-98 fishing year."

The Minister referred to, but dismissed, the efficacy of other possible controls:

> "Under the Fisheries Act I am required to consider whether other controls would be sufficient to maintain the fish stock at a level where the current commercial catch could be sustained. This year a number of proposals were put forward by sector groups, in particular industry, for my consideration as management strategies and controls that could be introduced to enhance the SNA 1 fishery by reducing current losses and wastage by both the commercial and non-commercial sectors. Some of these proposed measures have promise and are currently being investigated through research to assess how they could be applied, and to predict their effectiveness and implications. However, I have been advised by my Ministry that many of the proposals hold little prospect of giving immediate benefit to the stock and cannot provide the reduction in removals necessary to rebuild this fishery or allow the maintenance of the current level of commercial catch."

The Minister made additional references to additional enforcement, both commercial and recreational, now approved; and to further research now being analysed.

The Minister noted, but dismissed, the substocks sharing proposal:

> "During the consultation round, some sector groups suggested that the 2 substocks of snapper in SNA 1 (the Hauraki Gulf/Bay of Plenty substock and East Northland substock) should be managed as separate quota management areas (QMAs). As noted earlier the East Northland substock is close to the size that will support the MSY, while the Hauraki Gulf/Bay of Plenty substock is only about half the desired size. If a greater proportion of the SNA 1 catch was taken from the East Northland substock, than is currently estimated, then the Hauraki Gulf/Bay of Plenty substock would rebuild at a marginally greater rate. While there is some merit in the proposal, I have been advised by MFish that to do this would be contentious and administratively difficult to achieve because of the need to reallocate quota among the existing 199 quota-holders. I note that any regulatory arrangements that would in effect split the catch of SNA 1 without splitting the QMA, would be administratively burdensome and involve expense for industry and the Ministry. Enforcing any arrangement would also be difficult and likely to involve real time reporting and observer coverage in order to close an area once the catch limit was reached. For these reasons I favour retaining the current management arrangement of a single QMA at this time."

The Minister concluded with final references to the need to rebuild to B_{msy} and to the prospect of further non commercial constraints:

> "The management decisions I made last year and this year for SNA 1 have all been aimed at rebuilding this fishery towards a level that would support the MSY within a reasonable timeframe. I am of the view that it is important to begin the rebuild without further delay and set this fishery on a course that will ensure it can meet the reasonably foreseeable needs of future generations. The research in SNA 1 that is planned, currently underway or nearing completion will provide results to assist the review of current, and development of additional, management measures for both commercial and non-commercial fishers that will assist the rebuild process. I am mindful that further constraint of the non-commercial catch in future years, especially when good recruitment enters the fishery, may be important to achieve the desired level of biomass."

There was the customary associated press release. It adds nothing.

The Minister made an affidavit (8 October 1996) as to the process and decision involved. Again, leave was not sought to cross-examine. After reference to the 1995 decision, and to non implementation due to interim orders, the Minister continued:

> "3. My decision this year was to reaffirm the TACC level I set last year of 3000 tonnes. I firmly believe there is no more time to be lost and that immediate measures are necessary to move the biomass of this fishery towards the level that will support the maximum sustainable yield (MSY). I am confident that the evidence provided in the Ministry's advice papers to me is of the highest quality and in view of that evidence I believe I can not but act.
>
> 4. Given the current level of the biomass in the fishery, I do not believe that I could in all conscience continue to accept responsibility as Minister of Fisheries if I did not act now to put in place measures that will see this fishery begin the long journey back to its MSY. The biomass of the total fish stock in SNA 1 is at only half the level at which the biomass should be to support the MSY . . . Already the substantive measures I put in place in the last fishing year to move the biomass of the fishery towards its MSY have been delayed as a result of the interim orders obtained by industry."

The Minister rejected proposals for phased introduction on the basis immediate action was required: there was no uncertainty such as had prevailed in relation to Orange Roughy (ORH-3B).

The Minister was emphatic as to his object, means of procurement, and the urgency involved:

> "6. My concern is to achieve long term sustainability and optimal yields from the SNA 1 fishery and I believe that acting now to move this fishery towards a biomass level which will support the MSY is the only means of confidently achieving this. The

> fishery is unique as it comes under great pressure from a large number of commercial and non commercial fishers alike.
>
> ..
>
> 8. I reject any suggestion of the applicants that the actions I have taken to move the SNA 1 fishery biomass towards MSY are precipitant (sic) or unnecessary. The reduction in commercial catch which I decided last year, if implemented, will see the fishery reach a biomass level to support MSY in about 20 years time. I believe that the choice of a 20 year time frame to rebuild the fishery is conservative and that anything longer would lack credibility."

The Minister dismissed, as taken out of context, an industry position based on MFish advice to the Minister that "The SNA 1 fishery is not in danger of sharp decline and MFish believes there should be no great concern over the time-frame to rebuild". He observed:

> "It is important to put this advice in its context and not look at it in isolation. The advice was given in the context of my having received submissions from conservation and recreational interests whose concern over the SNA 1 fishery was so great that they were contending that the move towards MSY should be over a 10 year time frame which would have resulted in a greater TACC reduction. My understanding of the officials advice was that because the fishery was not in danger of a sharp decline, which I would interpret as being in danger of imminent collapse, there was no need to adopt the 10 year time frame advocated by the (sic) these groups and that a 20 year time frame would do. I did not read this advice, and nor do I believe was it intended to be read, as indicating that there was no need to be concerned about the fishery."

The Minister then turned to recreational catch:

> "10. . . . affidavits filed by the applicants make assertions that my decision to reduce the SNA 1 TACC is motivated by a desire to increase the recreational catch and is not based upon a desire

> to ensure the fishery's sustainability. I reject this assertion. I accept that in my TACC decision I said that one of the benefits of increasing the biomass would be an increase in recreational fishers satisfaction. However this factor is only one of a number of factors to which I referred. Once again there is a need to read the comment in context and not in isolation."

The Minister referred to context provided in his earlier observations as to "The benefits of rebuilding SNA 1 to a biomass level . . . ".

The Minister stated intention to constrain recreational catch in upcoming years, mitigating "reallocation":

> "11. Provision for recreational fishers is one of the matters I must take into account when setting a TACC. I have not, however, attempted in my decision to reallocate to recreational fishers catch that would otherwise be taken by commercial fishers. My concern is to reduce all catch in the SNA 1 fishery. I am aware of the comments in . . . affidavits about reallocation of catch to recreational fishers. What these comments overlook is that I will not allow recreational catch to go unconstrained in the coming years. I have been content to leave the current restraints of the 9 bag limit and 27mm size limit I imposed last year in place because the advice I have received from my officials is that given the current and predicted poor recruitment of juveniles in the SNA 1 fishery the catch of recreational fishers over the next two years is expected to drop."

He continued, speaking as at 11 October 1996:

> "12. Over the next two years the Ministry is investigating other possible measures to constrain recreational catch. By the time the increase in fish stocks occurs I expect then to be in a better position to put in place measures which will ensure that gains in fish stock as a result of the TACC reduction are not lost by any substantial increase in the catch of recreational fishers.

> When the fishery has begun to rebuild will be the time to determine the extent of each group's share of the fishery. Especially as the low juvenile recruitment over the next two years will be a sufficient constraint on recreational catch.
>
> 13. It is important to remember that management measures for fisheries are considered and implemented each fishing year. The absence of any further measures for this fishing year does not mean that the recreational catch will always be managed in the way it presently is. I have every confidence in the advice I have received from Ministry officials that in the immediate future the recreational catch will drop. When it begins to rise will be the time to impose further constraints. Within the next couple of years the Ministry should have received better information about the recreational catch and be in a better position to implement effective measures to constrain the recreational catch."

The Minister then proceeded to note, but dismiss, industry proposals to split by substocks, with voluntary catch spreading agreements, as impracticable. He claimed to have accepted the industry economic hardship material, and to be fully aware of hardship considerations; but put this factor as outweighed by a need to rebuild the fishery. He deposed to extensive consultation, and listed highlights of correspondence, meetings, and submissions between June and September 1996. The opportunity was taken to ascribe delays to industry providing new information, and requesting additional material, at a late stage.

The Minister made no express reference to distinctly Maori dimensions.

VI.
POST 1996 DECISION DEVELOPMENTS

The industry, having survived the 1995 fishing year on interim orders, updated its proceedings to relate to the 1996 decision and obtained further interim relief. The

effect has been that the 4900 tonnes TACC has remained in force for a second extended period, impinging into a year of anticipated lower recruitment.

A number of research projects are in hand.

The 1996 national diary and boat ramp survey has yielded some preliminary results. Data for the period January to June 1996, suitably extended using historical parameters, provides further information on recreational catch. There are indications limit bags are not often caught; but the introduction of a 9 fish limit bag from 1 December 1995 has had some effect nevertheless. There are like indications that the MLS increase from 25-27cm has had some effect: mean weight estimates of recreational fish caught have increased for all substocks between 1994 and 1996. Some undersized fish continue to be taken. The catch estimate for December 1993 to November 1994, adjusted to enable comparison, is revised to 2735. The catch estimate for calendar year for 1996 is put provisionally at 2041 tonnes. This is a significant reduction from the previous fishing year estimate of some 2800t, but has been subjected to further analysis in SAWG meetings underway for the 1997 fishing year. The SAWG adjusted the 2041 tonnes upward to 2218 tonnes on an 8% factor ascribable to bag limit, and then up to 2331 tonnes ascribable to increase in the MLS (25-27 cm). The balance between 2331 tonnes and estimated 2800 tonnes is accounted for (upon at least one view) as representing error in estimate, changes in stock abundance, and yearly variability in catch. The SAWG then revised the 1996 figure further upwards to enable a true comparison with 1985 and 1994 figures, and on that basis identified a growth rate in recreational catch of 3.8% per annum (compounding). This compares with 2% per annum (compounding) used in the 1996 stock assessment as put before the Minister. On one analysis, the substitution of the 3.8% growth rate in the 1996 basecase model still shows a similar stock movement pattern. I include the comparative tables (both substocks) as the latest informed assessments available to me (the catch split between substocks may no longer be accepted):

> "Table 1: Results from the basecase model of predicted recreational catch in Hauraki Gulf:Bay of Plenty snapper sub-stock under a 3000 t TACC, assuming no further recreational controls.

Biomass estimates are mid-season.

		2% underlying trend in effort		**3.8% underlying trend in effort**	
Fishing year	Commercial catch (tonnes)	Recreational catch (tonnes)	Biomass (tonnes)	Recreational catch (tonnes)	Biomass (tonnes)
1994-95	4 250	2 244	34 010	2 244	34 010
1995-96[1]	4 345	2 063	32 461	2 143	32 423
1996-97	2 838	1 814	31 131	1 911	31 006
1997-98	2 838	1 678	31 386	1 789	31 149
1998-99	2 838	1 729	34 943	1 864	34 562
1999-2000	2 838	2 422	38 332	2 647	37 754
2000-01	2 838	3 075	40 221	3 389	39 354
2001-02	2 838	3 436	41 568	3 795	40 322
2002-03	2 838	3 633	42 582	4 013	40 903
2003-04	2 838	3 787	43 340	4 177	41 194
2004-05	2 838	3 967	43 849	4 362	41 231

[1]TACC of 3000 t. Assumes catch split of 86:14 between Hauraki Gulf/Bay of Plenty:East Northland and 10% under-reporting."

"Table 2: Results from the basecase model of predicted recreational catch in East Northland snapper sub-stock under a 3000 t TACC, assuming no further recreational controls. Biomass estimates are mid-season.

		2% underlying trend in effort		**3.8% underlying trend in effort**	
Fishing year	Commercial catch (tonnes)	Recreational catch (tonnes)	Biomass (tonnes)	Recreational catch (tonnes)	Biomass (tonnes)
1994-95	1064	967	22 250	967	22 250
1995-96[1]	760	920	22 201	955	22 184
1996-97	462	909	22 242	959	22 182
1997-98	462	896	22 482	959	22 364
1998-99	462	898	23 337	973	23 145
1999-2000	462	1019	24 090	1119	23 807
2000-01	462	1106	24 490	1228	24 094
2001-02	462	1124	24 784	1258	24 253
2002-03	462	1173	24 992	1323	24 312
2003-04	462	1198	25 114	1359	24 270

2004-05	462	1217	25 169	1387	24 151

[1]TACC of 3000 t. Assumes catch split of 86:14 between Hauraki Gulf/Bay of Plenty:East Northland and 10% under-reporting."

The official "Briefing Document for the Minister of Fisheries" dated December 1996, obviously for the incoming Minister, may point to likely future policy. It has this to offer on recreational fishing:

"**Recreational Entitlements**

Recreational fishing is an important element of the New Zealand lifestyle with approximately 20 per cent of the population going fishing every year. It also generates considerable economic activity.

The adoption of the QMS has clearly benefited and strengthened commercial claims on fisheries resources. Within this system recreational fishing interests have tended to be been (sic) dealt with implicitly rather than explicitly. This creates uncertainty for both recreational and commercial sectors. However, the Fisheries Act 1996 provides for a more explicit identification of recreational interests. From 1 October 1996 the Minister is required to quantify and allow for non-commercial interests, including recreational interests, when determining a TACC.

There remains a need to further clarify recreational interests and rights because:

- recreational fishing interests are defined by more than just the ability to catch a certain quantity of fish (eg fish size)
- a better quantification of recreational catch is needed to have input into the sustainability measures and the allocation between user groups processes
- the management of the recreational fishery would be improved
- recreational fishers need a legally enforceable right to the fishery to protect their interests from being undermined by other sectors.

> How to more explicitly recognise recreational rights is an issue needing comprehensive policy analysis.
>
> The solution of making recreational fishing congruent with the QMS is attractive. However, previous discussion of such solutions has proved controversial with many recreational fishers, who perceive it as an unwarranted interference with the traditional freedom to fish the sea without charge or restriction.
>
> Nevertheless it is becoming increasingly evident that a greater number of recreational sector representatives see some benefit in a better definition of recreational entitlements. Work in this area needs to proceed in close consultation with stakeholders."

Discussions between MFish and Paepae/Taumata 2 as to s 89(mb) regulations governing customary food gathering have reached an impasse. I do not know why. Maori seek priority for Maori customary take over all other interests, commercial and recreational; and a role, or at least consultation, in setting the TAC and TACC. The current proposal is that the Minister should refer the matter to the Waitangi Tribunal under s 8(2)(b) Treaty of Waitangi Act 1975. In view of the novelty of the matter, even that proposal must first go to Cabinet. With no disrespect, I have no faith in early outcome; or prompt advent of the necessary regulations. I allow myself some doubt whether delay on this scale was envisaged at the time of the Settlement Act in 1992.

The Fisheries Act 1996 has been brought into force as to Parts I, II and III; and with that (from 1 October 1996) its provisions as to TAC (s 13) and definition of MSY (s 2); but not as to Part IV relating to the QMS and setting the TACC. There are some signs that delay was not originally anticipated. The extract quoted above from the December 1996 Ministerial briefing paper, paragraph 2, illustrates. I have no information as to the reasons for delay, or as to when the companion TACC provisions may come into force.

At least so far as one can judge from news media material placed in evidence, and the tenor of closing submissions by the NZRFC, relationships between the commercial and recreational sectors are not improving in the slightest.

VII.
OBLIGATIONS TO MOVE TO B_{msy}

The dispute

The Minister clearly operated upon the basis of an assumed obligation at law to move the fish stock to or substantially towards B_{msy} over time. The period he chose to adopt was 20 years.

The industry claims that assumption was wrong in law. It was open to the Minister, the industry submits, to maintain stock biomass at any level, so long as the level chosen did not endanger the stock, and yield was sustainable. It was open to the Minister, therefore, to maintain the biomass at its present level of approximately 50% B_{msy},, and on present yields, which had been sustained for some 25 years.

A starting point

It is convenient to start with some certainties.

First, the Minister, albeit indirectly, is obliged under the statute to determine a "TAC". There must be a TAC; as the Minister is obliged to have regard to the TAC under s 28D(1)(a) when proceeding to determine TACC.

Second, the "TAC" is defined exhaustively in s 2 in the following terms:

> " 'Total allowable catch', with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards:"

A comment

The definition has a difficult structure. The TAC, referenced to a "yield" from a "fishery", is said to mean the "amount of fish" that "will produce" from the fishery, the "maximum sustainable yield", "as qualified by" stated factors. The factors are a miscellany. They range through socio-industrial matters such as economic factors and fishing patterns, the biological matter of interdependence of stocks of fish, and aspects of international law by way of generally recommended standards.

That structure gives rise to a problem which has been the subject of intense focus in this case. What do the various "qualifiers" relate to? In particular, do they relate to "the amount of fish" (biomass), with the result the Minister does not look to the MSY and apply qualifiers to the MSY, but to the biomass, and then apply qualifiers to the biomass? Or do the qualifiers relate to the MSY, with the result the Minister looks to the MSY and applies the qualifiers to the MSY, and not to the biomass? At the risk of some iconoclasm in the context of the presentation of this case, I add the question: does it really matter?

Industry submissions

The industry submitted the definition of TAC should be read as directing attention to biomass; that biomass being subject to prescribed qualifiers including economic or environmental factors and others. The industry acknowledged it was appropriate to take B_{msy} as a "starting point"; but a correct determination of TAC in terms of the definition then involved determination of the biomass that is appropriate given the various qualifiers. This could be below B_{msy} . Yield must be sustainable; but would

follow on from the level of biomass chosen, and accordingly could be below maximum sustainable yield.

Industry's reasons for this submitted interpretation come under two headings.

First, internal and context considerations. It is said the reference to "amount of fish" . . ."that will *produce*" points to the biomass as the factor to be qualified. Further, s 28D(1)(b)(i), which provides that when considering any reduction in the TACC the Minister shall have regard to

> "(i) Whether or not the imposition of other controls under this Act on the taking of fish would be sufficient to maintain the fish stock at a level where the current total allowable commercial catch could be sustained;"

would serve no purpose if the Minister is obliged to manage at B_{msy}. It is said to point to contemplated management at levels below B_{msy}. There was some mention also of the "utilisation" aspect inherent in the long title. The Act is not merely a "conservation" act.

The second is clarification from an international law background. (This was perhaps the primary aspect advanced). The definition of "TAC" was put as having its origins in a like definition appearing in s 2 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977. Both, accordingly, are put as based on the draft Convention on the Law of the Sea ("UNCLOS") then under negotiation. Support was drawn from Hansard in respect of the 1977 Act. Submissions then invoked Articles 61 and 62 of UNCLOS, which read as follows:

> "*Article 61*
>
> *Conservation of the living resources*
>
> 1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
>
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and

management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article 62

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.

2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having

particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of

such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other co-operative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations."

Particular reference was laid upon the Article 61(1) right of the coastal State to determine "allowable catch"; and Article 61(3) obligation to take measures "designed to maintain or restore populations . . . at levels which can produce the maximum sustainable yield, as qualified by . . ." the various stated qualifiers. It was emphasised that Article 62(1) requiring promotion of optimum utilisation was expressed to be "without prejudice" to the provisions of Article 61, including any restraints inherent in Article 61(3). Then, returning to Article 61(3), the submission was mounted that the stated qualifying factors clearly relate to the population "levels". It is the "levels" of stock abundance which are qualified by the various qualifiers; and with that the consequential yield. It is said there is no absolute obligation to go up to the level representing B_{msy}. The obligation is more limited.

In support, submissions for the industry proffered as submission cited extracts from an affidavit of Professor W T Burke, an eminent expert in the law of the sea, who states as follows:

"4.3 this authorisation for a coastal state decision is provided by the phrase '*designed to maintain or restore populations of harvested species at levels which can produce*

the maximum sustainable yield as qualified by relevant environmental and economic factors...' The qualifying words here refer to levels of abundance, not to the yield to be taken from that level.[1] In these negotiations, it was assumed, and still is by fishery scientists for theoretical purposes, that a maximum sustainable yield is available from a stock biomass of a particular level, or size. While acknowledging this theoretical relationship between stock abundance and MSY, Article 61 nevertheless specifies that the coastal state can modify the level of abundance because of environmental and economic factors and it need not adopt a level that allows for the maximum sustainable yield. It thus seems unequivocal from Article 61(3) that a coastal state is not obligated to manage its fisheries in order to achieve the MSY.

4.4 This latter conclusion is reinforced by the provision in Article 62 that the obligation '*to promote optimum utilization*' is '*without prejudice to Article 61*'. Commenting on this provision I have previously written:

> 'This qualification means that the coastal state's authority under Article 61 is unaffected by any obligation regarding "optimum utilization"... In light of Article 62, paragraph 1, Article 61 authority could be exercised to set an allowable catch or a permissible yield at whatever level the coastal state determines to be in the interests of its harvesting effort, or any other lawful objective it seeks to enhance.'[2]

4.5 The importance of this emphasis on the abundance of exploited fish populations, and on the right of the coastal state to determine what it is to be, is that any such level can be sustainable but it is not necessarily the maximum. A larger level of abundance than the

> one chosen by the coastal state might (or might not, see para 5.5 below regarding recruitment) permit a larger sustainable yield than the one selected, but Article 61 specifically does not dictate that choice of level. Accordingly, because the coastal state is free to determine the level of abundance under this provision in Article 61, it cannot be said to be obligated to move toward or away from the level that produces the MSY (assuming it is practicable to do so). That decision follows from the assessment of coastal state interests, not from the compulsion of Article 61. As noted further below, this freedom of the coastal state to choose the level of abundance allows officials to choose among a range of management objectives.

. . . .

14 To understand discretion in application of the clause in Article 61 '*to maintain or restore harvest species at levels which can produce the maximum sustainable yield*', the immediately following modifying terms cannot be overlooked: '*as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global*.' Fairly read, these terms allow New Zealand to choose to seek specific economic interests (or others) by maintaining a particular level of abundance in a given fishery. Their purpose is not confined to allowing coastal States to alter only the rate of progression to the MSY producing stock size. The qualifications or modifications relate to the '*levels*' of biomass and therefore mandate a different level of biomass being selected at which the stock can be managed.

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[1]While this conclusion appears form the normal sentence structure, it is confirmed in the most authoritative legislative history of the treaty negotiations where it is stated: "The Evensen Group (which was the best known of the private negotiating groups operating in the Conference) also provided for the adoption of measures aimed at maintaining or restoring populations of harvested species at levels which can produce the maximum sustainable yield, *those levels being qualified by any relevant environmental and economic factors. That would free the coastal state from exclusively biological considerations and concerns.*"

(emphasis added) II S Nandan and S Rosenne, United Nations Convention on the Law of the Sea 1982 - A Commentary 605-606 (1993), It is this formulation from the Evensen Group which appears in Article 61(3).

[2] Burke, *The New International Law of Fisheries* at 61 (1994)".

For context and clarity I add the following passage:

> "15 Insisting that a biological goal of MSY abundance must be sought by New Zealand, without regard to New Zealand's economic interests, seems in clear contradiction to Article 61. To require New Zealand to substitute some other goal determined wholly by biological concerns is a major change in the scope of its authority under Article 61. Whether MSY is labelled a long term or short term goal seems irrelevant - in either case it deprives New Zealand of its freedom of action to determine its management policy. As noted below, New Zealand may in its discretion choose a course of action dictated by biological factors alone, but it is certainly not compelled by Article 61 to do so, except when it fails to protect against endangering by over-exploitation."

The industry submits there are no limitations on that "very broad" discretion conferred under Article 61(3). In particular there are no limitations confining the discretion merely to the rate at which to proceed to B_{msy}; or to determinations as to biomass levels above B_{msy}. There are no words or implications open to such effect. Limitations would be inconsistent with the broad wording used in the Article 61(3) discretion. Article 61(2) would be redundant if stock would only be at B_{msy}.; and limitations would be inconsistent with the sovereign rights of the coastal State recognised in the Convention. Added to that, Article 61 decisions involved, if challenged, merely go to conciliation (Article 297). An obligation to go to B_{msy} would involve the coastal State in costs the benefit of which may go solely to foreign States.

The industry seeks to reinforce this interpretation of UNCLOS by reference to the latter's legislative history. Details are traced from 1958. I will not explore them in full. The industry's submission notes *inter alia,* that in 1975 the Evensen Group first introduced the concept of an MSY qualified by relevant environmental and economic factors; stated to be thus freed from an exclusively biological derivation.

That formulation was the basis of the revised single negotiating text ("RSNT") on which the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act definition proceeded. Further, a 1982 FAO commentary on the final version of UNCLOS analysed the Convention as highly discretionary, and as not requiring MSY at any level. In industry's submission, legislative history shows B_{msy} to be considered "desirable" under Article 61, but "not mandatory".

Anticipating Crown reliance on post-UNCLOS international law instruments, notably 1995 proceedings in relation to straddling and highly migratory fish stocks, industry denies these give "new meaning" to Article 61 and 62 obligations. The industry argues the 1995 agreement includes highly migratory species which create distinct difficulties; confirms sovereign rights; does not prejudice rights and obligations under UNCLOS (Article 4); contains a repetition of Article 61(3), with its discretion (Article 5(b); and by Appendix II Guidelines paragraph 7 directs that B_{msy} "can" (not "must") serve as a rehabilitative target.

At the end of this voyage through the law of the sea, the industry's essential submission is that definition of TAC in the Fisheries Act 1983 should be read consistently with UNCLOS Article 61(3); with the "amount of fish" being the factor qualified by the stated qualifiers, thus allowing a discretion whether or not to proceed to B_{msy}. The Minister, it is claimed, erred in proceeding on the basis of an absolute obligation subject only to time factors.

Minister's submissions

The position taken for the Minister was put in a number of ways, and submissions are to be considered as a whole. To avoid misrepresentation I will quote submissions as to the Minister's basic position verbatim; and then attempt a summation.

Counsel first referred to arguments presented in ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (HC Wellington, 27 November 1995, CP 492/93, Gallen J).

Counsel continued:

> "1.2 These arguments ranged from:
>
> 1.2.1 an argument which asserts the Act has a conservation bias and that the *setting* of TACCs is determined by the TAC and that this in turn must be fixed at a level which will in that fishing year improve the restoration of the biomass to a level which will produce MSY;
>
> 1.2.2 to arguments (made by the fishing industry) that the TACC and TAC of a fishery need never be at a level which will produce the MSY."

The present submission then stated:

> "1.3 The Minister's interpretation falls somewhere in the middle of this range. In his interpretation MSY is a goal towards which there should be substantial movement. That does not necessarily mean that in the case of every fishery, every time a TACC is set, it should be set at a level which moves the fishery towards that goal. The question of *when* to begin the restoration process depends upon the circumstances relating to that fishery and whether it is reasonable to do so. The Act does not impose any time constraints as to when the restoration process should commence."

Then, after distinguishing ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra) on its facts, the submission continued:

> "1.6 The Minister accepts that the definition of TAC does not *require* the TAC to be fixed on the basis of MSY. At the same time he contends that the decision as to whether or not to fix a TAC which will move a biomass towards the level which will produce the MSY is a discretionary decision for him. And that after weighing the information before him and considering the qualifying factors set out in the definition of TAC in s 2 he

> must decide whether the TAC should be at a level which will see the fishery level move towards its goal or whether there are sufficient reasons to delay doing so."

After a diversion as to the asserted merits of a 20 year timeframe it was said:

> "1.8 The Ministry's view is that the TAC is not the same as the MSY but rather is a catch level that will allow the fishery to produce the MSY over time. Therefore, it is the Ministry's view that when the Minister is contemplating changes to TACs he/she needs to be satisfied that the TAC considered will, on the balance of probabilities, ensure that over time the stock size moves towards a biomass level that will produce the MSY (this biomass level is referred to as the "B_{MSY}"). Further, it is the Ministry's view that the qualifying factors specified in the definition of TAC enable the Minister to qualify the level of the TAC in order to vary the rate at which the stock is expected to move toward B_{MSY}. This is how the qualifying factors come into play."

(The "balance of probabilities" standard is explained as a Ministerial creation). The submission then diverts to the accepted impossibility of maintaining a stock at exactly B_{msy}; characterising it as an aim; and continues:

> "1.11 The fishing industry and the Treaty of Waitangi Fisheries Commission ("TOWFC") are of the view that the Minister of Fisheries can allow the stock to be "sustainably" managed at a level less than that which will produce the MSY. They believe this is appropriate if pursuing the MSY goal would impose significant economic costs which in their view are unreasonably disproportionate to the gains in yield achievable at $B_{MSY.}$ The Ministry, while very aware of the economic implications of TACC reductions, does not believe the legislation can be interpreted in this manner. The Ministry's interpretation is that there is an implicit obligation under the Fisheries Act and the United Nations Convention on the Law of the Sea ("UNCLOS") to determine TACs that will ultimately produce the MSY in fisheries.

1.12 The 1983 Act (and the current Act) is silent as to the time period over which the fishery should be moved toward B_{MSY}. That period will depend on the circumstances of a particular fishery. The factors to be given appropriate consideration would be those stated in the definition of the TAC which include relevant economic factors.

1.13 The Ministry is of the view that it would not be logical to qualify MSY, which is a biological reference point, by economic considerations. This appears to be what Professor Hilborn and Mr Starr suggest when they say in paras 17.2 of their affidavit that where to manage within the "target range of biomass levels" should be based upon considerations "other than those of maximal yield" they suggest other consideration covered include economics, likelihood of stock decline, allocation of catch between stakeholder or other relevant goals (sic). In a sense they are suggesting something also to qualify the MSY by these considerations. Submit MSY and notions of maximal yield are biological reference points which whether seen as specific points or a bound of biomass levels should not be qualified by non biological considerations. In *Greenpeace* at p22 Gallen J considered that the qualifiers in s 2 applied to TAC and not MSY:

> 'The TAC is inherently variable, whereas the maximum sustainable yield derived as it is from absolutes is much less variable if at all. Accordingly it is much more likely that the qualifying factors will apply to the TAC rather than the MSY and so I conclude'

1.14 The Ministry's view is that the factors in the definition of TAC can modify the level of the TAC and, therefore, the rate at which the stock is expected to move towards B_{MSY}. The Ministry is also of the opinion that in any particular year, provided the Minister is confident that it poses no risk to the stock, and there is a clear intent to move the stock towards B_{MSY} over time, a catch level may be determined that will not

> immediately move the stock toward the B_{MSY}. However, in the long term there is a clear imperative that the target stock size must be that which will produce the MSY."

There is some apparent flirtation in the opening portion of submission paragraph 1.6 with the concept—dear to industry's heart—that TAC definition does not "require" TAC to be fixed so as to produce MSY; i.e., at B_{msy}, and that the decision as to level is discretionary. However, when the submissions are read as a whole, it is clear the Minister continues to see TAC as requiring B_{msy} as a goal towards which the Minister is obliged to aim; the discretion (through qualifiers) going only to rate of progress. (The submission accepted that qualifiers were mandatory relevant criteria in terms of CREEDNZ doctrine).

Submissions for the Minister did not take time over internal considerations, beyond some emphasis that the word "maximum" in "maximum sustainable yield" must be given its due weight: the term is "MSY" not simply "SY". Submissions turned more towards support from case law; and (primarily) from international law.

As to case law, the Minister cited ***Sealord Products Limited v Moyle and Ors*** (HC Wellington, 22 May 1987, CP 182/87), a decision of my own; and ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra). ***Sealord Products Limited v Moyle and Ors*** (supra) was not seen as assisting. It was put as holding MSY, and the qualifiers, are relevant considerations which the Minister is obliged to take into account when setting the TAC; a position which the Minister accepts. ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra) is advanced as more in point. In view of the unreported character of the judgment, I will quote in full the passages relied upon by the Minister (counsel's italics added):

> "I am of the view that this material [UNCLOS and the Rio Declaration] establishes a background to the New Zealand legislation that makes it appropriate to place an emphasis on the conservation of harvested species *and that the concept of conservation includes as an element, restoration of the stocks of those species to a level which can produce the maximum sustainable yield (MSY).* At that same time, that *obligation* must be seen in the light of relevant environmental and economic

factors. Those factors include the needs of communities dependent upon fishing ... The decision as to the *relevance and weight of the appropriate factors, is a matter for the Minister."*

(p 19)

"The MSY, however, imports a much longer term connotation. It involves a degree of permanency and refers to the foreseeable future. The concept involved in the term 'yield' does have a sense in which periodic reduction is significant, but when the MSY is considered the other factors to which reference has already been made, that is the way in which the stock is maintained or added to by the addition of fish bred over some 20 years before, [relevant in the case of orange roughy] mean that the effect of the adjectives "maximum" and "sustainable" must be construed over a period apt to take into account all the factors. These include a number operating over a period much more extended than one year. The MSY has an objective which can on this basis reasonably be projected into the future. It is an objective determined by reference to principles of conservation accepted in the statute and deriving from the Convention and must I think, be in the forefront of the Minister's consideration as he determines what the TAC will be for a particular period. It seems to me therefore that the TAC in any one year, must not be such as to have the effect of reducing the maximum sustainability of the MSY, assessed over a period appropriate to take into account all relevant factors. The attainment of the MSY will depend upon a whole series of factors, of which the TAC is only one. *The important question therefore when considering the TAC in each year, is whether the figure at which it is fixed will have the effect of reducing the longer term MSY, bearing in mind that that is an objective which may involve decisions which promote the increase in size of the breeding stock in existence at the time decisions are made."*

"The element of objective in the MSY means that its *attainment must be programmed over an appropriate period,* but is a period which is reasonable bearing in mind all the relevant factors. The relationship of the MSY to the TAC would therefore allow those factors which qualify the TAC *to have a bearing on the choice of period over which the objective of the MSY is to be attained."*

> "On that basis it is not necessarily helpful, although it may be relevant, to ask whether the TAC in any particular year will have the effect of tending to promote the MSY. Rather, the question is whether it will impact upon the maximum sustainability of the MSY, bearing in mind that the maximum nature of the concept will have itself been calculated in terms of a whole series of factors including potentiality."
>
> (p 23)

> "In summary to this point then, I conclude that the MSY is that yield which could be sustained from the virgin biomass without depleting it, but that *yield is a potential yield an objective which the setting of the TAC must be directed towards*; that the attainment of that objective must be predicated within a reasonable time period so that a programme may be seen as extended through that time period. In arriving at what is an appropriate time period, all factors must be taken into account and these can reasonably include economic and socio-economic factors; that each TAC fixed *must be such as not to compromise the MSY or the programme and period within which that* objective is to be attained, but need not necessarily promote the MSY in the sense of shortening the time frame within which it is to be achieved."
>
> (p 29)

> "...The Minister must set a TACC which will best manage and conserve the fishery bearing in mind the obligation to ensure the attainment of MSY within a reasonable period. In assessing the information upon which a decision must be based the precautionary principle ought to be applied so that where uncertainty or ignorance exists decision-makers should be cautious."
>
> (p 33)

The Minister adopts these elements of ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra) judgment as correctly stating the relationship between TAC and MSY; and as an interpretation supported by UNCLOS. It is put as supporting a responsibility to ensure removals are consistent with sustainability, and "the biomass is rebuilt to a level that will produce the MSY".

Submissions then turned to international law background.

At outset, the Minister accepted the s 2 definition of TAC is to be interpreted against the background of UNCLOS, citing Gallen J in ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra) 18:

> "I accept that the Convention and its supporting and explanatory material to which counsel helpfully referred in detail is relevant, not only because New Zealand is a signatory to the Convention, but also because there are ambiguities in the New Zealand statute which would allow such extrinsic material to be called in aid for interpretatory purposes."

The Minister likewise accepted the TAC definition is to be interpreted in the light of s 2 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 which reflects principles established in the Revised Single Negotiating Text (RSNT) of UNCLOS.

The Minister's submission then voyaged through Articles 55, 56, 61, 62, and 297 of UNCLOS and through recognised international law materials; notably 1, 2 Nandan and Rosenne, "United Nations Convention on the Law of the Sea 1982 - A Commentary" (1993). After tracing the negotiating history through to the Evensen Group ISNT, introducing a requirement upon coastal States to promote optimum utilisation, the submission contends:

> "1.52 This became the compromise between Articles 61 and 62. A coastal State has to determine its TAC and, using best scientific advice and proper management, ensure that there is not over-exploitation. At the same time, they must try to keep harvested species at levels which can produce MSY and not ignore the interdependence of stocks. Then, in promoting the objective of "optimum utilisation" the coastal State must work out its harvest and allocate the surplus.
>
> 1.53 This balance would be overturned if Article 61 of the Convention was interpreted to mean that coastal States were

> never to be under an obligation to obtain MSY, because MSY is one means of ensuring optimum utilisation."

Submissions for the Minister met Professor Burke's contrary view (i.e. that coastal States are not obliged to achieve MSY) by reference to two matters. First, the words of Gallen J in ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra), page 19, quoted supra.

Second, to a broad perspective taken by Ambassador Nandan, in affidavit proffered as submission:

> "12. The oceans have been a traditional source of food for mankind since time immemorial. In this regard, it may be observed that the formula contained in Article 2 of the 1958 Convention reflects the value placed by the international community on assuring the supply of food from the oceans. Thus the management concepts expressed in Article 61 are all geared towards maintaining those resources for the use of present and future generations. This was an important consideration in the discussions during UNCLOS over the extension of coastal State jurisdiction. The concern that was expressed was the possibility that the international community may be denied access to food resources which could not be fully utilised by the coastal state. It is for this reason that certain management principles and obligations were established in Article 61 which would not only ensure continuation of the food supply but also utilisation of resources in a sustainable manner. The obligations on the coastal State contained in Article 61 clearly enunciate a high degree of management responsibility with the objective of ensuring the maximum sustainable yield (MSY) over a period of time consistent with the policy goals of the coastal State."

And again, quoting Ambassador Nandan:

> "30. Professor Burke suggests in his affidavit that the obligation contained in Article 61, paragraph 3 is subsidiary to the

> obligation contained in Article 61, paragraph 2. In my view, Article 61, paragraph 3 is clearly worded as being additional to anything in Article 61, paragraph 2. This is apparent from the opening words of Article 61, paragraph 3 which states: "Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by ...". The emphasis in Article 61, paragraph 3 is on the application of the concept of MSY. The coastal State can depart from MSY if certain specific qualifications apply, but cannot ignore biological considerations. In this respect, MSY provides a mandatory starting point for the exercise of discretion given to the coastal State."

The submission distils to an asserted obligation under UNCLOS to recognise obligations to restore biomass, over time, to a level which will promote MSY; timing being a matter for the coastal State concerned. That restoration is part of the obligatory promotion of the objective of optimum utilisation. The obligation is a price paid for the agreement of landlocked states to forego previous rights to fish within the high seas areas concerned.

Submissions for the Minister then urged an ambulatory approach to interpretation of the s 2 TAC definition, allowing in international law developments post-UNCLOS. It is said the Court should treat the law as always speaking; and interpret the s 2 definition in light of new developments affecting its origins. The Minister referred in particular to the Rio Declaration on Environment and Development, and to Agenda 21, adopted at the 1992 UN Conference on Environment and Development; to the Straddling / Migratory Stocks Agreement 1995 (as I will call it); and to the FAO code 1995. I will take these in turn.

The Rio Declaration recognises the so-called "precautionary approach" as appropriate in conservation matters generally.

Agenda 21 chapter 17 (Protection of the Ocean etc) paragraphs 17.1 and 17.5 propounds "new approaches" which are "precautionary and anticipatory"; and

through paragraph 17.74(a)(c) requires States to develop marine resources "to meet human nutritional needs as well as social economic and development goals", and to

> "(c) Maintain or restore populations of marine species at levels that can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, taking into consideration relationships among species;"

Agenda 21 provisions are stated to be in context of the effect of UNCLOS (17.77), and to place an emphasis on sustainability (17.79) using MSY as the mechanism. Compliance (including compliance by New Zealand) will be subject to international monitoring by a newly formed "Commission for Sustainable Development".

The Straddling/Migratory Stocks Agreement ("Agreement for the interpretation of the provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the conservation and management of straddling fish stocks and highly migratory fish stocks") was signed by New Zealand on December 1995, although not yet ratified. It focuses on deep water fisheries (in a New Zealand context notably bluefin tuna, and orange roughy in Challenger) but is put by the Minister as relevant to good management of other fisheries. It is put as demonstrating movement towards sustainable development and precautionary principles. It does not prejudice the position under UNCLOS (Article 14). Like UNCLOS Articles 61 and 62, it looks to "long term sustainability" and "optimum utilisation". Measures under the agreement are to be designed, again, "to maintain or restore stocks at levels capable of producing maximum sustainable yields as qualified by relevant environmental and economic factors" (Article 5), applying the "precautionary approach" (Article 6). States are required to apply Annex II Guidelines, which includes MSY as a limit reference point.

The FAO code, as reported from the Rome conference in October 1995, and still in draft, recognises and follows on from all the above. The Minister cites extensively from Articles 6 and 7, emphasising both sustainability and optimum utilisation; and within that a need to apply a precautionary approach and to avoid compromise by

short term considerations. (Economic impact of reduction of TACC in SNA1 is identified as in the latter category).

The Minister refers also to the Kyoto Declaration ("The Kyoto Declaration and Plan of Action On The Sustainable Contribution of Fisheries to Food Security") 1995, which includes an affirmation of the precautionary approach.

The Minister submits these subsequent developments support the approach taken by him, said to incorporate both sustainable development and a precautionary approach. They are said to show use of MSY to promote optimum utilisation is not viewed internationally as inconsistent with UNCLOS. Further, and perhaps boldly, it is said the impact of "recent developments and trends" is "to alter the weighting that is to be given to the qualifying factors in Article 61(3); the greater emphasis now being on ensuring the harvest population of fish species (the biomass) is maintained or restored to a level which will produce the MSY for the species".

Decision : Obligation to move to B_{msy}

I start with the s 2 definition of "total allowable catch". My task is to interpret the statute; not the Convention, however interesting the latter exercise might prove.

In interpreting the statute, I start with the actual words used, and their ordinary meaning.

The definition, as is all too easily overlooked through concentration upon the abbreviation "TAC", deals with a "catch". The concept under definition is a total allowable "catch"; in the sense of a "take" from some larger body. The same, of course, is to be said of the immediately following reference to a "y*ield* from a fishery". ("Fishery" is specially defined as essentially a management unit). The definition then identifies that "catch" as being an "amount of fish" ... "that will produce from that fishery" ... "the maximum sustainable yield" ... (with reference following to qualifiers).

Pausing at this point, there is a possible problem emanating from the words “amount of fish”. They could bear two possible meanings: (i) picking up on preceding references, they could mean a “catch” or “yield”; a part taken of the larger whole, that if so taken will constitute the MSY from that whole., Alternatively, (ii) they could mean not the “catch” (or “yield”) so taken from the whole, but that whole in itself—a biomass—which will give rise to a lesser “catch”.

Which is intended? There are some linguistic signals both ways. References to “catch” and “yield from a fishery” both point to a lesser take from a whole. On the other hand, reference to an “amount of fish” that “will produce from that fishery” is perhaps then an unusual structure. In such a situation, the more natural wording might be “amount of fish representing the MSY”. The structure used perhaps indicates that the “amount of fish “ under consideration is not a catch taken from a whole, but indeed the larger whole itself; which whole (biomass) more naturally would be said to “produce” an “MSY”. Suspending judgment, one moves on to see if guidance exists through the following qualifiers. It does not. The stated qualifiers can apply to moderate a catch MSY, and an “amount of fish” in a biomass sense, with equal ease. The Act, incidentally, sees no conceptual difficulty in qualifying an MSY by non biological factors; c.p. s 2 definition of “optimum”. Nor is there much assistance to be obtained from s 28D(1)(b)(ii) as context. Certainly, it assumes a situation where a biomass is being fished down excessively, and restraints are needed; but that situation could occur just as easily in the course of some longer term progress upward, as it could during some steady state at biomass level below B_{msy}. If there were nothing more, I would simply backtrack and choose, despite difficulty, between the two meanings open. I would prefer the first: we seek a definition of a “catch”; referred to as a “yield” from a “fishery”: the wording is redolent of an “amount of fish” extracted from some larger biomass, as opposed to the biomass itself. The structure which then results: a “catch” or “yield” which “produces” the “MSY” is somewhat clumsy, but is quite possible. This approach is to be preferred to the alternative which forces a “catch” to be quantified as a “biomass” albeit a qualified biomass. The “catch” (“yield”) prima facie is to be such as produces MSY; but that catch is, of course, subject to moderation by the qualifiers stated.

As it happens, that approach gives the satisfaction of according with the outcome of Gallen J's analysis in ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra), albeit along different lines. It is not inconsistent with His Honour's formulation of an obligation over a reasonable time to move to biomass which yields MSY; that progress being moderated by qualifiers. The ***Sealord Products Limited v Moyle and Ors*** (supra) decision did not involve any sharp focus on the present question, and does not assist.

However, there is potentially more.

There is some degree of ambiguity; and along with Gallen J I am prepared to look for any assistance that may be gained from international law materials. There is room for a view Parliament intended to implement obligations it saw as assumed (or soon to be assumed) under UNCLOS. It does not much matter whether the latter are taken in terms of the 1976 draft in existence in 1977 (Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977) or 1983 (the 1982 Convention itself). Draft Articles 50 and 51, and final Articles 61 and 62, are sufficiently similar. Unfortunately, however, there is an immediate complication. There has been considerable violence done to language in the process of translation of Article 61 of the Convention into the s 2 definition in the statute. At the expense of some repetition, I set out Articles 61(1)(2) and (3), and then, for comparison, the s 2 definition (italics added).

"*Article 61*

Conservation of the living resources

> 1. The coastal State shall determine the *allowable catch* of the living resources in its exclusive economic zone.
>
> 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management *measures* that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international

> organizations, whether subregional, regional or global, shall co-operate to this end.
>
> 3. *Such measures* shall also be designed to maintain or restore *populations* of harvested species *at levels* which can *produce the maximum sustainable yield,* as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global."

The structure requires the coastal State to determine "allowable catch"; then to take "measures" to avoid danger through over-exploitation; and then (crucially) that such measures be designed to put "populations" at "levels" which can "produce the maximum sustainable yield", as qualified by stated qualifiers.

In contrast, the, s 2 definition of TAC states:

> " '*Total allowable catch*', *with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will* produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards:"

What has happened is that the draftsman of the definition of "total allowable catch" has taken "allowable catch" from Article 61(1); deleted Article 61(2) reference to "measures"; ignored the introductory references to "measures", "populations" and "levels" in Article 61(3); and artificially tried to force the 61(1) "allowable catch" (expanded incidentally to "total allowable catch") into their place in front of the remainder of 61(3).

Arguably, the two still align. It can be said s 2 simply goes straight to the upper fish stock level which Article 61(3) seeks: and "amount of fish" (s 2), or "population . . . level" (Article 61(3)) which "will" (s 2), or "can" (Article 61(3)) produce MSY in both

cases "as qualified by" stated qualifiers). That is the industry's submission. It was argued "it is apparent that the drafters of the definition of TAC in our domestic legislation have tried to meld together paragraphs (1) and (3) of Article 61. In so doing, some of the clarity has been lost". If the two can so be aligned, there is corresponding room to transpose Professor Burke's view—that Article 61(3) qualifiers are intended to refer to fish population levels, with no obligation to seek MSY—across to assist with interpretation of s 2. That would not, of course, be conclusive. Treaty obligations are a guide to legislative intention, but not more. The ultimate question would remain one of Parliamentary intention, with all considerations weighed.

I have my doubts as to that simple alignment approach. First, there is no exact transposition of wording and context. It is simple enough within Article 61(3) to grasp "populations . . . at levels which can produce maximum sustainable yields" as referring to a capital stock which produces a yield. It is not so simple within s 2, introducing as it does a complicated context of "catch" and "yield" and the potential ambiguity already noted. One does not usefully resolve an ambiguity through an uncertainty. Second, Article 61(3)'s "*can* produce" has been changed in s 2 to "*will* produce". There is a considerable difference between "can" and "will". I doubt whether the change was inadvertent. It may only be a matter of emphasis; but if so, it is an important emphasis. Clearly enough, the s 2 definition is relatively emphatic that MSY is expected, subject only to qualifiers; an emphasis which goes to the heart of present considerations. Third, there is another item of internal evidence of perceived willingness to depart from strict Article 61(3) terminology. In Article 61(3), the obligation is merely one of "taking into account" fishing patterns and following items. In s 2, that phrase is removed: the items concerned become full blooded "qualifications". (That change was a deliberate one during passage of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977).

Further, even if one accepts the simple alignment solution, some problems remain with transposition of Professor Burke's approach. As to the grammar, and with all respect to a contrary view expressed, there is room for difference whether within Article 61(3) the "as qualified by" relates to "populations . . . at levels" or to "maximum sustainable yield". Either is possible as a matter of language. As to

UNCLOS legislative history and overall aims, and with diffidence, a manifest intention that biological considerations not be the sole criterion does not in itself exclude biological considerations (MSY) as a starting point or goal subject to qualifiers. That, indeed, seems to be the thrust of UNCLOS offered by Ambassador Nandan.

I think it better to avoid potentially simplistic alignments of language, and cross-application of detailed interpretation. I prefer to concentrate upon the actual words of the s 2 definition, and on policy approaches.

I do not doubt Parliament would seek to comply, at the very least, with basic obligations under UNCLOS, but likewise would be seeking to uphold domestic policy and interests. Parliament would not infringe the Treaty, but could well choose to go further, and to adopt particular emphases if such were seen as domestically desirable.

Clearly, UNCLOS would have been seen as involving two precepts: Article 61 conservation, and Article 62 utilisation. Primacy was to be given to avoiding dangers through over-exploitation. Subject to that, a factor readily accepted, the obligation was to endeavour to maintain or restore populations to levels producing MSY; and indeed to promote "optimum utilisation". MSY was a goal. That goal was not without constraints. As well as the basic non endangerment obligation, this was made subject to economic and environmental considerations and other stated qualifiers, any of which could severely limit movement towards B_{msy}. It was subject to additional obligation to share with other States catch which could not be taken domestically. However, there was a clearly discernible international drive towards fishing to MSY, and towards optimum utilisation, albeit subject to important constraints. New Zealand did not resist that drive. Indeed, at outset New Zealand and Australia pressed for rights to fish at MSY alone, without such accompanying constraints: II Nandan & Rosenne "United Nations Convention on the Law of the Sea 1982 - A Commentary" (1993) 599, citing A/AC.138/SC.IVL.11, said to be reproduced in SBC Report 1972, at 183. The correct citation appears to be A/AC.138/SC. II/L.11; and I presume the passage concerned is the following (underlining is in the original):

> "II. It shall be the responsibility of the coastal State to provide proper management and utilization of the living resources within its zone of exclusive jurisdiction, including -
>
> (a) maintenance of the level of stocks which will provide the maximum sustainable yield;
>
> (b) rational utilization of the resources and the promotion of economic stability coupled with the highest possible food production; and
>
> (c) where the resource is required for direct human consumption in the coastal state; the highest possible priority to be given to the production of fish for direct human consumption."

It is likely that is how New Zealand saw the international background. Clearly, at the very least, it would have been seen as open to New Zealand to approach its domestic fishing legislation in that way; but it is likely New Zealand saw the MSY standard in rather stronger terms. That is how Parliament would have seen matters; and is how its words should be interpreted.

There also are some indications from purely domestic policy considerations. As is well known, and indeed clear from incidental evidence in this case, in the late 1970's and early 1980's the fishing industry in New Zealand was in a reconstruction phase. Government was attempting to reshape a viable fishing fleet, and particularly to exploit opportunities opened up by the recently recognised 200 mile exclusive economic zone. The 1977, 1983 and 1986 fishing legislation exemplify. Government was intent on exploiting the deep sea catch, and developing, along with foreign association, a much needed diversified export industry. There were of course conservation and sustainability concerns. There were depleted fisheries, particularly inshore (SNA1 amongst them). However, subject to conservation considerations, there was a strong domestic drive towards exploitation to MSY. It was not the expectation that stocks would be exploited at unnecessarily low levels, with lower yields. Indeed, a policy centred upon exploitation up to MSY is still very much the case. The Fisheries Act 1996 s 13 (in force) directs the Minister to set TAC at levels specifically maintaining stock at or above MSY. Policy, as it has developed, is beyond question.

I have some concerns at the "ambulatory" approach which would treat interpretation of New Zealand domestic statutes as constantly updated by reference to developments in relevant international law. It may sometimes be safe, and indeed appropriate. Where the domestic statute is generally phrased, and clearly is intended to give effect to international norms, and there is a consistent development in those norms to which New Zealand has acceded or which is not in any way repugnant to New Zealand perceptions, that could be Parliament's intention. But that is the key: did Parliament, in the statute as presently worded, so intend? There could be developments e.g. in human rights, treatment of indigenous peoples, or indeed marine matters (such as affecting marine mammals) which Parliament might well have considered best retained for the Executive or Parliament to consider, without ad hoc judicial policy intervention, however well intended. In this present case, it seems safe to take into account the Rio Declaration, Agenda 21, FAO code, and indeed Kyoto Declaration as showing continued and developing UNCLOS policy to the same effect as that originally underlying the statute; perhaps with the addition of the common sense of the express precautionary principle. It demonstrates there is no obsolescence factor. However, it is not a matter to which I give significant weight. Caution is appropriate.

I return to s 2 definition of "TAC" as worded. Is the Minister obliged to move fish stock towards B_{msy}; or can the Minister accede to long term biomass below that level? Given the most natural interpretation of words used; policy emphasis in UNCLOS; and domestic policy considerations, I consider the TAC does envisage MSY; that yield being subject, however, to the qualifiers stated. The Minister is expected, implicitly, to progress the stock to B_{msy}, subject to those qualifiers. The qualifiers apply to necessity to go to that yield. Specifically, they do not apply to the biomass itself. As hinted earlier, that may be an idle distinction. One keeps down a yield because doing so will preserve a biomass. It may not much matter whether one controls the yield, or controls the biomass directly. However, I do not accept industry's submission that there is no obligation to move to MSY at all. That is not how the definition is constructed.

There was no error in law by the Minister. He correctly proceeded on a basis he was obliged to move to B_{msy} over time, subject to qualifier controls. I am moved to say that even if there had been error, and the matter was one of discretion for the Minister, a large question as to discretionary relief in this Court would then have arisen. The Minister clearly was strongly motivated to increase stock abundance so as to form a buffer against vulnerability to natural disaster; and considered, but discounted, the economic consequences. If the matter had not been one of obligation, it seems very clear it would have been the outcome of exercise of discretion. It could well have been the case any error did not affect ultimate outcome. However, I leave that open. In my view, there was no error in law of the character alleged.

VIII.

LAWFULNESS : PROPER PURPOSES : RELEVANT CONSIDERATIONS : REALLOCATION, DEROGATION OF PROPERTY RIGHTS

Preliminary

Final submissions for the industry selected and ran together claims under various administrative law headings. These shared a common focus upon treatment of the interrelationship between commercial and non commercial interests. They comprised claims of:

(1) (i) improper purpose; i.e. an increase in the recreational catch, and reallocation without compensation

(ii) erroneous interpretation of the Act i.e. (a) no requirement for management controls on non commercials and (b) priority required for non commercials

(iii) mistake of fact i.e. that management measures would or could limit recreational catch to 2300t

(iv) failure to take into account relevant considerations i.e. (a) strong property rights (b) Crown shelving of quota

(2) (ii) defeating legitimate expectations (based on representations) that biological risk/sustainability would be the only proper basis for TACC reductions.

This last was argued in terms perhaps somewhat broader than the relevant pleading. It was observed in argument that this last also "shades into unfairness and unreasonableness". Arguments based on unfairness and unreasonableness were not separately advanced. The possibility is considered within a wider context in due course.

One must see the wood for the trees, if that can be said in a fishing case. In effect, the industry at this point mounts a mixed fact and law scenario along the following lines. In 1995 and 1996, the Minister reduced the TACC from 4900t to 3000t. It is said that if the Minister had proceeded according to law, i.e. with regard to the purposes of the Act (effectively a ***Padfield*** analysis) the Minister would have respected and reinforced desirable incentives and conservation elements built into the QMS; would have dealt with any reallocation which followed by purchasing quota to shelve or cancel; and would not have allowed priority for non commercial interests. In like vein, if the Minister had proceeded according to law, he would have had regard to "strong" property rights conferred on ITQ holders; and to the alternative of obtaining and shelving quota. It is said the Minister did not do so. Instead, the Minister acted without regard to the purposes of the Act. He effected a reallocation in derogation of property rights of ITQ holders, and erred in law through failing to impose effective management controls on non commercials; mistakenly believed measures imposed on non commercials could or would be effective, and erroneously gave priority to non commercials. Further, it is said, in so acting he defeated a legitimate expectation on the part of the industry that TACC would be reduced only to meet biological risk; and not to confer benefits on recreationals.

I take this step by step.

Padfield considerations

Speaking generally, I do not see this as a Padfield situation at all, although some further reference will be needed during subsequent consideration of individual matters.

As ***Padfield*** illustrates, a discretion conferred by legislation must be exercised so as to promote the purposes of the legislation concerned. It is not to be exercised so as to frustrate those legislative purposes, or to secure some extrinsic and ulterior purpose.

A necessary first step is to ascertain the legislative purposes in question. In the present case, the long title and the nature of the content which follows make that clear. It is an Act to provide for "the Management and Conservation" of fisheries. Both are significant. Within that duality, the Act is directed to both commercial and non commercial fishing. Within that again, the regulation of commercial fishing through the QMS and its property right ITQ is a very important feature.

Industry submits the Minister's decisions do not reconcile with the purposes of the QMS. It is said the decisions do not "respect and reinforce" desirable incentives for management and conservation within the QMS, "Parliament's scheme". Submissions focused, in the course of oral development, upon factual assertions SNA1 was not at biological risk; would not deteriorate further; and reduction in the TACC was not needed. Moving from those premises, it was said the (QMS) purposes of the legislation would not be served by the Minister's actions.

This raises contentious issues of fact, some perhaps not capable of definitive resolution, which will be addressed again elsewhere. Suffice it to say for present that decisions directed towards achievement of the Act's purposes—conservation and management—whether arguably right or wrong—are not to be treated as

frustration of those purposes, or as deviations based on extraneous matters. They are, by their very nature, an overt attempt to implement the Act's purposes.

Moreover, the QMS is not the start and finish of legislative purposes. Conservation, and non commercial (including Maori customary) fishing have their own recognised place. When the Minister reaches a decision in relation to fishing which impacts adversely on holders of ITQ, but which is intended to serve legitimate conservation purposes, or which advantages—deliberately or incidentally—non commercial interests, that does not in itself imply any improper purpose. The Act encompasses management of non commercial as well as commercial fishing. It is not outside or against the purposes of the Act to allow a preference to non commercials (e.g. greater CPUE) to the disadvantage in fact of commercials and their valued ITQ rights, even to the extent of the industry's worst case of a decision designed solely to give recreationals greater satisfaction. Both are within the Act. It is not as though the Minister seeks to reduce commercial effort to enable additional sea room for the America's Cup; or to divert marine construction effort into economy housing or the like. It is not as though the Minister is shown to have sought only some political advantage from the step taken. (It is due to the Minister to record that while a General Election was to take place slightly more than a fortnight after the 1996 decision, the latter was in large part a carry over from the 1995 decision, which cannot be so easily stigmatised as politically driven, and that no argument based solely on politics was advanced against him). The decision may be open to challenge on other and more specialised administrative law grounds, but not on some general ***Padfield*** approach.

Failure to have regard to "strong" property rights

I interpret the word "regard" as meaning "sufficient regard". I treat the industry's word "strong" as designed merely to emphasise the importance the industry says is to be attached to such property rights, and not to state some additional threshold for the industry to prove.

The allegation raises a number of constituent issues (i) are there property rights through ITQ? (ii) if so, of what character? (iii) was the Minister obliged to have regard to any such property rights (CREEDNZ principles) (iv) if so, did the Minister have sufficient regard?

I accept without difficulty that ITQ constitute a form of property right. ITQ represent a right to harvest a "quota". However, ITQ have a peculiar characteristic. Prior to the amendments in 1990, it was a right to harvest a fixed tonnage, if it could be caught, regardless of biological factors. The only constraint was by way of management controls applicable generally; such as net size, MLS, closed areas, seasons and the like. If the Minister considered it necessary to reduce the TAC (as it then was) the Crown was obliged to compensate. From 1990, with introduction of so called proportional ITQ, that protective insulation disappeared. As it is put, "biological risk" now is on the ITQ holder. If the TACC (as it now is) is reduced, the ITQ (or more accurately, tonnage which may be harvested under the ITQ) reduces proportionally and without compensation, transitional arrangements having expired. It is a right; but now is a right subject to over-ride.

Was the Minister obliged at law to have regard to ITQ holders' property rights of this character when reducing the TAC and TACC? I apply CREEDNZ principles. There is no express direction in the Act to that effect (c.p. s 2 definition "total allowable catch"; ss 28C, 28D, 28OB, and 28OD). Is it implicit, however, in the scheme of the legislation? On the one hand, one can point to the very absence of express direction; given some added point by the presence of express directions as to other considerations in s 28OB(2) and 28D. Arguably, an inference is open that when Parliament intended a mandatory criterion in this legislation, is said so. On the other hand, the property right—even the qualified right since 1990—is a very important one. Quota is a key element in commercial fishing operations. Whether a qualified right or not, it is sought after and traded or leased for considerable sums. A tonne of SNA1 quota can be worth between $30,000 and $60,000. It is arguable that Parliament would not have intended such quota to be reduced, let alone possibly extinguished, without regard to the valued "rights" of those involved. It is tempting to cite s 21 New Zealand Bill of Rights Act 1990, but there may be more direct statutory support. Before reducing the TACC, and thus potentially ITQ, the

Minister is obliged under s 28D(1) to have regard to possible alternative approaches in the form of other management controls and shelving quota. Moreover, if and when ITQ is reduced under s 28OD(1), Crown quota must first be applied in reduction. Clearly, the Minister is to recognise the importance of ITQ by treating reduction as a measure of last resort, at least to that extent.

In my view, the solution lies once again in the rather special character of the property right concerned. If when considering reduction in the TACC the Minister must have regard to ITQ rights, then his gaze will fall upon rights subject to over-ride. ITQ holders have rights which—as they well know—are subject at all times to a prospect of the very statutory reduction without compensation now in contemplation. It is not as though the Minister will be invading a fee simple. The Minister, when adversely affecting these ITQ property rights, will be doing no more than the law allows, and ITQ holders are required by law to accept. ITQ which they hold is in a market which reasonably can be taken to accept and allow for such possibilities. The "property right" expressly is subservient to the Minister's powers. The fisher holds the ITQ on a basis he may need to take rough along with the smooth. In such circumstances it is precious to imply a Parliamentary intention the Minister must have regard to the "property right" as such. There is no unlawful seizure when the law permits it. Sections 28D(1) and 28OD(1) are explicable not only on the basis of concerns for the sanctity of property rights, but alternatively on a basis of other potential financial and social impacts. Loss of ITQ tonnage is not only an uncompensated loss of capital property, but carries with it potential loss of income and a wider potential for financial and community hardship; indeed severe hardship. Without diminishing other significance, that is not the present "property rights" issue. There is no compelling inference back from the existence of such provisions to implied obligations to have regard to property rights in themselves.

Sanctity of property has its place in law and society, but much depends on the terms of which the property is held. ITQ since 1990 has been held at risk of lawful reduction. I am satisfied there was no mandatory obligation upon the Minister to have regard to a so called "strong property right", in itself, when considering SNA1 TACC reductions. Wider impacts following such reductions are a different matter, and fall for consideration under different heads.

Crown "shelving" of quota

The allegation as to disregard by the Minister of the "shelving" option is mounted both as ***Padfield*** frustration of legitimate purpose, and as failure to take into account a relevant consideration. There is some potential conceptual difference; but the two can be considered together.

Under s 28D(1)(b)(i) the Minister, if considering reduction, is obliged to have regard to whether or not a reduction "in the level of fishing" could be achieved by the Crown retaining, or obtaining, quota and "not making those rights available for commercial fishing". Regard to this matter is a mandatory requirement along the path to TACC reduction. Section 28OD(1) provides that upon decrease in TACC, quota held by the Crown is to be cancelled as the first casualty (unless retention is necessary to give effect to the Settlement). There is supporting power under s 28U under which the Crown may purchase or take leases of quota, without obligation to release to the industry. The process is termed "shelving", although the term has no statutory recognition. It is to be distinguished from the sometimes proposed voluntary shelving by industry of its own quota. The intended effect is obvious. The TACC is *not* diminished; but a portion represented by the ITQ shelved will not be fished commercially. At least in theory the biomass will be maintained accordingly. I say "in theory", as unless sufficient restraints are in place against non commercial fishing, there is an obvious potential for biomass so relieved to be caught by non commercial interests. Shelving, in itself, does not constrain recreational fishing.

The point while pleaded and maintained in argument was not canvassed extensively in industry's submissions. I look to the 1995 and 1996 Final Advice Papers, and terms of the actual decisions reached as the most reliable guide to the actual Ministerial attitude.

The 1995 Advice Paper reminds the Minister that s 28D(1)(b) requires him to have regard to the question. Under a prominent heading "Retain or Obtain" it repeats the existence of the requirement, and advises "this option would be effective where

current TACC's were fully utilised". It adds "should you wish to consider this option, the length of time the catch reductions would be necessary would be relevant considerations in determining what Crown would have to pay to obtain quota". (This may assume a leasing in approach). It adds further that under the proportionate ITQ system, it is quota holders who gain by the increase, as stock recovers. It adds, finally and perhaps ominously at this general level "consideration of this option would be at additional cost to the Crown". Turning to focus directly on SNA1 it notes industry's submissions that the so called transfer of catching rights from commercials to recreationals "must be transparent and achieved by the purchase of ITQ". (This presupposes reduction in TACC's will be soaked up by increased recreational fishers; but certainly puts the possibility as a real one). Finally, under a prominent heading "Crown Obtaining Quota" it advises:

> "95. You could consider leasing back SNA 1 on the market. Recent lease prices are about $2 800 per tonne. Attempts to lease large amounts are likely to increase that price considerably until a point where fishers will only lease if the price compensates them for the expected profit from fishing and sunk costs. The length of time the quota would need to be leased and the total cost would clearly be relevant considerations. The Government has decided that it is not appropriate to compensate fishers for reductions in TACCs for sustainability purposes."

The Minister's 1995 decision addressed the point in these terms:

> "Industry have also suggested shelving quota as a means of reducing commercial removals until the fishery has rebuilt to the desired level. While I am receptive to such a proposal I believe that shelving would be untenable for a number of reasons, including the application of cost recovery payments, effect on minimum holdings and the tenure of shelving required, for the scale of commercial catch reductions I have determined for SNA 1."

The Minister's affidavit adds nothing to this material. I note the text of the Minister's decision does not openly adopt the resistance to compensation in respect of

sustainability matters so prominent in the Final Advice material. The Minister's latter puts matters on a more pragmatic plane based on perceived impracticability through cost, tenure and scale factors.

The 1996 Final Advice Paper (confined to SNA1 alone) again notes the s 28D(1)(b) requirement to have regard to the question. A subsequent heading "Crown Obtaining Quota" repeats this necessity and then adds somewhat jumbled advice. Analysed, it puts the industry position as suggesting a proposed reduction from 4900t to 3000t be met instead by the Crown obtaining and shelving. It notes, as previously, that shelving is "effective" where TACC's are fully utilised. It notes projections suggest the relevant 1995-1996 catch will be only "about 4100 tonnes". That, I observe, would itself be at least some answer to shelving approaches; but the paper hastily adds that "in recent years landings have been close to the catch limits available". The advice then takes a seemingly preferred position that current TACC is not 4900t but 3000t; and the need for change is to be considered against the latter. The latter 3000t figure is of course fully utilised. The Advice Paper refers again to the length of time involved in contemplated shelving as a relevant consideration: "removals will need to be reduced for a long period". It would be at cost to the Crown, put at likely to exceed current $4,900 per tonne per annum. The Paper repeats a conceptual objection to that course: leasing for a long period "would amount to compensation"; and under the proportionate system, quota holders gain by quota increases when stock recovers; and transition provisions for compensation had expired. Section 28OD(7) was put as prohibiting compensation. The advice, said to be known to and not challenged by industry, was that shelving "is relevant only as a short term mechanism"; while present intention is to operate long term. Somewhat surprisingly, the Paper also states (italics added) "The Crown *did not consider* this option last year because it has been clear that you were not seeking a short term reduction in the total removals of SNA1". Possibly "did not consider" means "considered but did not adopt"; but otherwise, given the materials put in front of the Minister and the terms of his decision in 1995, that is plainly wrong.

The Minister's 1996 decision does not refer in express terms to the matter of shelving at all. Nor does his relevant affidavit.

Crown's final submissions were consistent with aspects of the 1996 Final Advice Papers. It is said the "Ministry" has taken the approach that duration and extent of catch reduction are relevant considerations. Long leases, or large purchases, are considered to "amount to compensation". Transitional provisions allowing compensation for TACC reductions following introduction of ITQ have expired, and s 28OD(7) prohibits compensation. The "Ministry" considers the option "is relevant only as a short term mechanism". A reduction of 39%, for the purpose of rebuilding biomass, would have amounted, improperly, to compensation. Submissions pointed with evident concern to a possibility the Crown might purchase ITQ; stock might subsequently rebuild; and the industry might be entitled to increased TACC pro-rata with the Crown, thus obtaining "free benefit". It is said no provision exists allowing the Crown to sell extra ITQ. The submission also points to asserted valuation difficulties; there being no provisions comparable to those in force for compulsory acquisition of land.

In my view, all that saves the Minister is the wording of his 1995 decision. Section 28D(1)(b)(2) with its requirement the Minister first have regard to the question of "shelving" has not been repealed. It remains, notwithstanding 1990 amendments and proportional ITQ. It specifically obliges the Minister, when considering any reduction in the TACC, "to have regard to" whether or not reduction in fishing level instead "could be achieved" by shelving. It is not somehow set at nought by some policy directed against compensation for sustainability cuts. It is not somehow cancelled by s 28OD, which is directed at the later and ultimate situation where TACC cuts are indeed implemented. Nor is it affected by s 28OG relating to transitional compensation in event of reduction. It is not to be ignored on account of some (apparently nightmare) scenario over which the Crown pays, but industry later shares profit. It certainly is not put at nought by relative difficulties in calculating purchase price. The legislation clearly intended prevailing market price. One can appreciate that the possibility of major Crown outlay, with potential future windfall advantages to the industry, as opposed to placing burden upon the industry and in some measures upon other interests, would be anathema under current financial policies, but that does not excuse the Minister from even looking at matters which by law he is required to take into account. I am constrained to say that much of the advice put up to the Minister in 1995-1996, while no doubt well intentioned, was

erroneous in law. It effectively advised the Ministry to not discharge a binding obligation, raising to that extent ***Padfield*** considerations; and advanced irrelevant considerations as proper elements in a decision.

The Minister's decision in 1995, however, does not obviously or even probably turn on those matters. It does not refer to any grand policy as to compensation in relation to sustainability issues, or like problem areas. Indeed, and perhaps in quite different tenor, it signals the Minister is "receptive", but goes on to refer to some credible pragmatic difficulties, particularly given the scale of shelving which would be required. The Minister was experienced in the portfolio, and well able to weigh issues involved and make up his own mind. I am satisfied the Minister in 1995 did have regard to shelving; and is not shown to have approached it on any basis erroneous at law. Whether by good fortune or good judgment, he did not frustrate the legislative purpose or take irrelevant considerations into account.

An assessment of the Minister's 1996 decision is more difficult. Again, the Minister received some questionable advice. On this occasion he made no express reference to "shelving" at all. However, the probable thinking involved should be assessed in its historical context. He had considered and decided the point in 1995. The Advice Paper reminded him of the question again. The ultimate TACC decision, while approached afresh, turned out to be identical. It is somewhat regrettable this mandatory consideration was not mentioned at all in the ultimate decision. Possibly, there was some distaste for prolixity and complications which flowed from the 4900/3000 TACC point somewhat laboriously explored in the Advice Paper. It might have been regarded as now an obvious point not requiring detailed treatment. I simply do not know. However, given the mandatory nature of the point, the reminder, the attention clearly paid and decision reached in the previous year, and the identical ultimate outcome in 1996, I am not persuaded the Minister either overlooked the shelving matter or took any different approach in 1996. In particular, it has not been shown that, in what would have been a sharp change from 1995, he operated upon an erroneous view of the law.

I conclude the Minister did not err in a ***Padfield*** sense in declining to obtain or shelve quota as an alternative to TACC reduction, and did not fail to have regard to

the possibility of doing so. The view that such was impracticable was open to him. That view was taken. Others might think the decision was right or wrong, but the presently sought review is not open.

Priority to non commercial catch

Did the Minister give priority to the non commercial catch; and if so, was that erroneous at law?

As to priority, there is a threshold question. Are we speaking of intention, or of effect? So far as *intention* is concerned, there is a scattering of evidence against the Minister. Items advanced by the industry comprise a letter from the Minister to NZRFC (copy in evidence undated but apparently not long after 25 May 1993); and a speech by the Minister to an NZRFC conference on 8 July 1994. The letter states (italics added):

> "s 28C of the Fisheries Act requires that the non commercial component of the TAC be identified and provided *as a priority* before allocations are made to commercial fishers".

The speech notes, if followed (not always the case), show the Minister said (italics added):

> "I can give you a clear and unequivocal statement that recreational fishers will continue to come first in the allocation of fishers quota, along with the cultural needs of Maori. You will retain the *current privileged first place position*, with the legislation being amended to recognise the status of Maori customary fishing rights...only then [ie. when recreational fishers are prepared to work with other stakeholders] will recreational fishers be able to take advantage of the *privileged legal position they hold along with Maori* for access to the fishery resource".

Industry's submissions assert the Minister has not denied the allegation of a perceived priority. That is true in the explicit sense; although in fairness to the Minister he does deny he is "attempting...to reallocate to recreational fishers that which would otherwise be taken by commercial fishers".

Industry's submissions also assert that opinion within the Ministry differs. The Policy Manager, in a position to know, deposes there has been no such policy advice (to his recollection) since 1988; the advice having been to "make a reasonable allowance" for non commercials, not implying (it is said) a preference over commercials. Industry pointed also to the first draft (or version) of a speech to be delivered by Dr Sullivan (a senior Fisheries scientist, and later Science Policy Advisor) at a Brisbane conference in 1996, which stated "current legislation allows for non commercial users to be given priority over the commercial sector", and referred to fishing as "a priority right, with TACC's set after allowance was made". That should, however, be placed in its context. It was written while Dr Sullivan was on contract to NIWA. A revised version for actual delivery, changed after consultation within MFish, deletes these passages. The second is replaced by reference to the (moribund) 1989 National Policy on Recreational Fishing, and a line stating "where the resources are insufficient to meet the needs of all potential users, recreational fishers may be given precedence".

I do not find these passages persuasive. Perhaps it is the legacy of a lifetime in Wellington, but I regard letters and speeches by Ministers to sector groups as open to a slant which will appeal to the groups concerned; a slant which does not necessarily carry through to the acid exercise of actual costed policy formulation. Moreover, Ministerial expressions in 1993 and 1994 need to be checked against Ministerial actions in 1995 and 1996.

I am not inclined to attribute the private and eventually diluted views of an MFish science advisor, particularly when speaking as an individual to a professional audience, as necessarily reflecting the views of the Minister upon an essentially non-science priorities question.

More reliable indicators should be looked for in the then current 1995 and 1996 advice, and the actual terms of decisions then reached.

Final Advice in 1995 notes the s 28D(1)(a) obligation "to allow for" non commercial interests, adding (perhaps plaintively) "it does not provide any guidance as to the amounts you should allow." It then states "We do not believe the Act implies there is a strong preference for non commercial users but rather that a reasonable allowance be made". It adds that in event the Minister considers it appropriate to increase or decrease "allowance" for non commercials, this may lead to a need to adjust controls on their fishing, and the Minister may need to adjust the TACC to take the changed (non commercial) allowance into account and still move to B_{msy}. A further paragraph, bearing on quantum of recreational allowance informs the Minister he is "obliged to consider what is an adequate allowance for recreational fishers".

The dismissal of statutory requirement for any "strong preference" at first sight could be significant. On its face, it allows the inference a view is held that the Act implies some lesser—weak, or even moderate—preference for recreationals. However, this curious reference must be read in a particular context. As noted, on 8 July 1994 the Minister made a speech to the NZRFC which referred to recreational priority. In the Final Advice Paper for the 1994 TACC's, presented very shortly afterwards on 12 August 1994, officials (paragraph 66) took the trouble to refer to the speech as one which "suggested that recreational fishers have a privileged position given the allowance made in determining the TACC". Mfish differed from that view; continuing "we do not believe the Act implies such a strong preference" but rather that a reasonable allowance be made". I accept submissions for the Minister that the reference following in 1995 (and as we see in 1996) to "strong" preference simply refers back to that previous advice; and is not to be read as implying any MFish view some preference exists, albeit less than strong.

The 1995 decision itself does not speak in terms of priority as amongst interests. The Minister expresses a "clear view" that "total removals" need to be "substantially reduced"; and simply states the TAC is 5600t within which he has "set aside" 2300t for recreational fishers and "has made a specific allowance for "300t" for Maori

customary take. The text continues with a statement by the Minister he considers CPUE for recreationals to be "inadequate" and that it "is reasonable" to seek to obtain a "moderate increase" in recreational catch rate. He then hastens to warn that additional constraints upon recreational fishers may be necessary. Read objectively, and as a whole, the text of the Minister's decision does not even begin to approach a statement that non commercials, or recreationals alone, have a priority in law ahead of commercials. It states factual assessments, and undertakes a balancing exercise; not an exercise based on legal priorities.

The 1996 Final Advice (species other than SNA1) dated 22 July 1996 expressed a view the obligation to "allow" means the Minister must "set aside and reserve from commercial taking". The text which follows is similar to the 1995 advice (with continued reference to "strong preference"), but then goes further. It states enigmatically (paragraph 97) "however, the Act clearly does require that the Minister first make an allowance for non commercial fishers and to that extent there is a 'priority' for non commercial fishers provided by the Act." I note in passing that such "priority" is consigned to parentheses. The ***Greenpeace New Zealand Inc v Ministry of Fisheries and Ors*** (supra) decision is said to support. A Minister's restricted allowance for non commercial interests "is not a catch limit as such". Catch is determined by ancillary management measures. The advice notes the Minister's stated intention to restrain recreational catch.

The 1996 Ministerial decision in itself is not illuminating. It refers in passing to an increase in recreational fishers' "satisfaction" as one desirable outcome, amongst many, of a rebuilt biomass; but equally and repeatedly speaks of present and prospective recreational controls. Once again it simply states a TACC of 5600 tonnes; and that 2600 tonnes (this time not differentiated between Maori customary and recreational) is "set aside" for non commercials. Economic impacts of a reduction of TACC upon commercials are acknowledged, but the reduction is put as necessary. Again, there is no language indicating thinking in terms of legal requirements for priority. Once again, the decision is much more one of fact and balancing.

When the entirety of the evidence is weighed, I am not persuaded the Minister has been shown to have operated in 1995 or 1996 on an assumption of law that non commercial—or that either of the individual recreational or Maori customary takes—has priority at law ahead of commercial interests. In the documentation bearing most closely on the actual decisions in issue, the question of allowance is put in terms of exactly that—"allowance"—a reasonable or adequate "allowance"; and not of legal priority.

Did the Minister give priority *in effect* through absence of collateral recreational controls? I answer this under the next heading.

Error in law through failing to impose effective controls on recreationals:
mistake of fact controls on recreationals would or could be effective

There are a number of interrelated issues. (i) Was there an obligation in law to impose effective management controls? (ii) if so, was it breached? (iii) the correct approach in administrative law to situations of alleged mistake of fact (iv) was the Minister so mistaken?

There is no express obligation in the Act upon the Minister to impose controls on recreational fishers. No section states that when the Minister reduces TACC, the Minister must also impose management restrictions on non commercials necessary to safeguard potential stock conserved. The regulation making power in s 89, quite apart from being exerciseable by the Governor General and not the Minister, is permissive not mandatory. However, there is clearly a relationship. Under s 28D(1)(b) the Minister—before reducing the TACC—is obliged to consider whether imposition of other controls "on the taking of fish" would suffice to maintain stock at levels where current TACC could be sustained. While more usually viewed in terms of potential controls on commercial taking, the provision is not so restricted. The Minister can, and should, consider the possibility of additional controls upon recreational fishing also. In addition, there is room for common sense. There will be no point in restricting TACC for conservation purposes if the commercial catch so conserved simply disappears upwards on recreational hooks. There would be no

conservation gain. I am satisfied that when Parliament empowered the Minister to reduce the TACC for conservation purposes—not to improve recreational catch rate, but for conservation purposes—it expected the Minister to take any concurrent steps necessary to minimise sabotage by recreational fishing. It is a consideration going beyond s 28D(1)(b). It does not much matter how the obligation is labelled. The most direct route is an obligation implied into the s 28D power. Alternatively, on ***Padfield*** analysis the Minister is not to adopt policies calculated to frustrate the conservation purposes of the Act. Alternatively again, the obligation can be characterised as a ***Wednesbury*** rationality point; preventing the Minister from blowing hot and cold. The situation could even come within the "innominate" ground. As in many modern administrative law cases, different analyses overlap. The significant point is that both law and common sense dictate that a Minister should not reduce the TACC for conservation reasons unless able to take, and taking, reasonable steps to avoid the reduction being rendered futile through increased recreational fishing. The sense is captured by an industry witness's reference to steps "which reasonably attempt to constrain...".

Was this obligation breached? There is no doubt as to how the Minister viewed the situation. On the one hand, as at 1995, he considered recreational catch CPUE was insufficient, and warranted a "modest" increase. It is to be remembered such "modest" increase would be on a then current catch rate of 1.9 snapper per fisher per trip, and absolute numbers involved in any "modest" increase would not be large. At the same time, as the Minister's affidavit emphasises, he considered that with the advent of poor recruitment years through to and including 1997/1998 the total recreational catch was not likely to increase significantly. His aim was to conserve the good year classes (1994/1995) through to recruit stage (1999/2000), at which point a predicted increase in recreational catch could need further recreational controls. For the next two to three years he regarded the recreational bag limit reduction from 15 to 9, predicted by SAWG to reduce recreational catch by 8%, and MLS increase from 25-27cm, predicted likewise to reduce recreational catch by 10%, would be a sufficient constraint on the recreational side to align with reduction in the TACC and commercial management measures. For the future, 1999 and onwards, research would continue, particularly mesh selectivity and return mortality for both non commercial and commercial fishing. There was a clear

prospect of further recreational controls, such as bag limits, MLS, and perhaps hook types. The Minister clearly considered that for recreational constraints to be workable, they must have a sufficient degree of acceptance amongst recreational fishers on the water. The enforcement of unpopular measures at a recreational level was considered to be very difficult. Consultations with recreational leaders, and education, would be necessary. As to the separate complication of Maori customary take, the Minister looked towards completion of the s 89(mb) regulations and the beginnings of an information flow as a necessary preliminary.

The industry hotly contests this thinking. It disputes the prediction of decrease in recreational catch through to 1999. It points to items within historical data, particularly the trend from 1984 to 1994 tagging results, as tending to show a 1600t to 2850-3250t or 6-8% per annum growth. It projects this will continue through to 2005, with a 5000t recreational take comprising 62% of available catch. It particularly disputes the 1996 SAWG assumption of an 8% reduction through decrease in bag limits; pointing to an alternative (originally withheld) Mfish appraisal at 4.8%; and to the fact that few fishers catch limit bags even reduced to 9. It likewise disputes the 1996 SAWG assessment of a 10% reduction through increased recreational MLS. That is dismissed as having only transitory flow-on effects; providing larger fish and thus a greater tonnage for recreationals; and as being based on a fallacious 80% assumed survival rate for returned juvenile fish. Industry expresses strong doubts as to the compliance assumptions made, particularly in view of some evidence of major non compliance in relation to previous higher bag limits. Even on an assumption of compliance (which industry rejects) there is no comfort. Areas in the Hauraki Gulf closed to commercial fishing will receive greater attention from recreational fishers. They are the areas which contain concentrations of the juveniles the Minister particularly seeks to conserve. Lower bag limits, it is said, will lead to more fish being available; more fish will lead to more fishing; and more fish will be caught (in total) than before. (It seems the Minister cannot win: allowing fewer fish to be caught will cause more fish to be caught). It would be necessary, industry maintains, to take recreational bag limits down to 2 or 3 fish; but even then benefits would be lost through non compliance. It is almost contemptuous as to plans for further research before imposition of further recreational controls. On one industry view, the Ministry has been planning research as far back as 1985, but—whether through

funding difficulties or otherwise—nothing occurs. Industry draws a bitter contrast between commercial situations, where MFish applies precautionary principles in the event of uncertainty, and recreational situations, where it is said that does not occur. Industry points to situations where, in its view, Ministry scientists have reinterpreted data in an endeavour to justify previously determined outcomes. In the upshot, industry maintains the 1995 and 1996 decisions as to recreational catch and management controls are wrong: the recreational catch will not be held to the 2300t allowance, and the TACC reduction to 3000 tonnes will be purposeless.

The difficulty for the industry submission is twofold.

First, the view which the Minister, on expert advice, has taken is tenable. (I say "tenable". That does not mean necessarily right). On the data available, and recognising all the uncertainties involved in counting fish, there is at least room for the view taken by the Minister. There may be poor recruitment into the fishery for some years. The water temperature/spawning relationship allows that prediction. There may be lower removals by recreationals, given poor CPUE (even with "modest" increase facilitated) and reduced inclinations. There may be that breathing space. There could be some reduction in take through reduced bag limits and increased MLS. The figures 8% and 10% are not large, singly or even combined. I am included to the view bag limit—not often caught in any event—is likely to be less effective than MLS; but even that is subject to actual data. There will be a degree of non compliance. There always is, in any human activity, from driving to income tax. It will be true of non commercial fishers, as it will be true of commercials. However, particularly with pressure through recreational leadership and education brought to bear, and growing acceptance by recreational fishers, there is room for a view it can be kept within tolerable levels. There has been some research effort, and more is planned, within financial constraints. It is a credible decision to await research results before further recreational constraints are imposed; particularly given a need to create acceptance. Failures in the past to research adequately, or to implement research, if they occurred, do not inevitably imply failures for the future. The view is open that recreational compliance depends, in real life, on an informed consent, and that research is a necessary preliminary.

Second, research results to date—albeit limited and tentative—rather tend to support the Minister's projection of a decreased recreational catch, and some effect through new bag limits and MLS. I say this only provisionally, as results are incomplete. It is conceivable an ultimate full picture could point the other way, or be inconclusive. However, the 1996 January-June recreational study points to a recreational figure not of 2850-3250 tonnes as invoked by the industry, but 2041 tonnes. Even with adjustments, it approximates the 2300 tonnes allowed. There are few limit bags, but the limit is having some conservation effect. The increase in MLS is having a noticeable effect, as measured by increased average weight of fish caught. The Minister's approach not only is tenable; but there are some preliminary signs it may also turn out to be correct.

The onus is on the industry to prove breach in fact of the legal obligation on the Minister to take reasonable steps to prevent recreational capture of TACC reductions. It is not proved; at least, yet.

I turn to alleged "mistake of fact" as a separate ground. The point is more than answered already. In principle, in line with ***Fowler and Roderique Ltd v A.G.*** (1987) 2 NZLR 56 and ***NZFIA v MOF*** (1988) 1 NZLR 544 mistake of fact is not open as a ground, if the view taken by the Minister is one of a number which is open. Selection is for the Minister. The view taken was indeed open. The same applies *a fortiori* to ***Wednesbury*** considerations.

I find against the industry claim that the Minister erred in law through failure to impose effective management controls on non commercials; or was mistaken in fact as to efficacy of such controls. It is not shown for the present. For the future, on a new decision, and developing evidence, only time will tell.

<u>Defeat of expectations biological risk / sustainability</u>
<u>would be only proper basis for TACC reductions</u>

As pleaded (paragraph 47) this head invokes purposes and objectives of Part IIA and the QMS; purpose and objectives of FMP's; and the "pre QMS representations". The

latter are identified as representations that "the recreational catch, and particularly catch of snapper in SNA1 would be meaningfully constrained so as prevent any significant increase in level of total removals by recreational fishers". As argued in final submissions, industry confined itself to "expectations" (based on representations) of biological risk/sustainability being the only proper basis for TACC reductions" (again citing identical paragraph 47). Clearly, and understandably given present law as to legitimate expectations, industry is confining itself to the "pre QMS representations". It is less clear that (pleaded) representations as to creation of constraints preventing significant increase in *recreational removals* can give rise to (argued) *biological risk/sustainability being* the only proper basis for reduction. This is a reshaping beyond recognition.

In fairness to industry, however, I will consider the point in both formulations.

The first (pleaded) contention is not established on the facts. I accept there were general representations there would be controls on recreational fishing, just as proposed for commercial fishing. That is credible as part of a pre QMS "selling" process. I do not accept representations would have extended to statements controls would prevent any significant increase. MAF would not have gone so far as to promise recreational catch would somehow be virtually "frozen". That would be political dynamite, and was not the thinking at the time judging by Part I of the 1983 Act which was to be left in place, and recreational policy work which was conducted in the mid and late 1980's. The plea overreaches itself.

The second (argued) contention is open on the facts. As discussed, it is likely MAF "sold" the QMS on a basis the TAC would only be reduced for biological/sustainability reasons. That, indeed, was the underlying concept. That, plus the entitlement to compensation which originally existed, would have been highly persuasive. I accept there would have been an expectation generated, in fact, that this would be the approach under the legislation.

This immediately raises an interesting question whether that expectation in fact can be brought within recognised "legitimate expectations" doctrine. On current trends, particularly ***R v Ministry of Agriculture ex p Hamble (Offshore) Fisheries*** (1995) 2 All

ER 714; and ***R v CIR ex p Unilever*** (1996) STC 681, there seems increasing recognition of enforceability of legitimate expectations of a *substantive* character in appropriate circumstances. I note also, in passing, the judgment of Thomas J (dissentient) in ***NZ Maori Council v AG*** (1996) 3 NZLR 140, 183. There are incidental pronouncements and academic writings. Counsel for industry accepted present facts "moved to the line between substantive and procedural". That is an understatement. The present facts move squarely into the substantive area. However, I do not rule the claim out on that ground, if otherwise appropriate.

So far as the expectation may have been as to shape of and performance under intended legislation, no claim could be open. The courts will not attempt to control questions of introduction, content, passage, or amendment of legislation. That is political country, and Parliament's world. As to policy, I note ***Rothmans of Paul Mall (New Zealand) Limited v AG*** (1991) 2 NZLR 323, 328; and ***Te Runanga o Wharekauri v AG*** (1993) 2 NZLR 301, 308. Once the legislation is passed, the courts will strictly enforce its terms as finally set down; but that is a different exercise. So far as political promises which preceded it go, and which are not contained in the legislation, the remedies for perceived breach can only be political. Fishers may have been told pre QMS that under proposed QMS legislation biological risk/sustainability would be the only basis for reduction. That may have generated expectations accordingly. The courts, today, can only look to the legislation. To the extent that does not help, fishers must look to the political process.

So far as the expectation may have been as to administrative action under proposed legislation, the problem is resolved by the present facts. I have no doubt the preponderant reasoning behind the presently relevant cuts was sustainability. The Minister was conscious of a need to allow a "modest" increase in recreational CPUE, but it was at most a minor aspect. Brood representations are to be interpreted broadly. They should not be looked upon as breached by this incidental. If promises of the character concerned can indeed be enforced in law, there was no breach.

This head cannot succeed.

IX.
LAWFULNESS: RELEVANT CONSIDERATIONS: NEED FOR, BENEFITS OF, TACC REDUCTION

Preliminary

Final submissions for the industry selected and ran together claims under various administrative law headings which shared a common thesis. This was that the SNA1 fishery has been, and is, producing a yield indistinguishable from MSY; with a corollary that there is no need for, or material benefit from, reduction in the TACC. These headings comprised:

(1) failure to have regard to relevant considerations (in those respects)

(2) mistake of fact i.e. that yield was below MSY and reduction in the TACC would lead to significant increase

(3) ***Wednesbury*** unreasonableness given that

(i) the Ministry's own advice to the Minister was that SNA1 fish stock at current level already was producing a sustainable yield at 92% of MSY

(ii) the 8% increase in yield said to be produced on the Ministry's assessment of MSY is theoretical only, and improved yields at the larger stock size would not be detectably different

(iii) there was failure to undertake "detailed assessment or quantitative analysis" of benefits said to be derived from a TACC reduction and which would otherwise justify a 39% reduction in TACC. "Most of" the benefits said to be derived

(particularised as to source) are "minimal", while others have negative consequences.

Identification of "MSY"

The 1983 Act refers to "maximum sustainable yield" in the course of defining the TAC, but does not separately define MSY itself. This opens the door to technical disputes as to meaning. One school, exemplified by the Ministry's Dr. Sullivan, takes a literal approach: "maximum" means "maximum" in the sense of "greatest". MSY is the greatest possible yield (which is sustainable). Another school, exemplified by Professor Hilborne and Mr Starr, take a broader approach. I refer to Figure 1 below:

Yield when plotted against biomass produces a curve. On that curve 90% of MSY lies between approximately 11% and approximately 44% of virgin biomass (B_o). Towards the top, yield is a very gentle curve. This approach proceedes on to note that pragmatic difficulties in measurements of stock, and continual fluctuations in stock, mean that the pinnacle "B_{msy}" is treated as a merely theoretical concept. Proponents treat the curve within the 90% boundaries as "MSY", and all points within the curve as B_{msy}. Hence, the assertion that the SNA1 fishery, producing presently 92% of MSY, is producing a yield "indistinguishable" from MSY.

There are often problems when statutes import imprecise technical jargon with a view to a precise use. Technicians in the field, who personally espouse one meaning rather than another, can be less than impressed with judicial outcomes arising from adopting the contrary. Eruptions which have occurred over the meaning of "dominant" within the Commerce Act 1986 well illustrate. The same is happening here. One school says yield is not at "MSY". Another says it is.

It is a question of statutory interpretation. One approach to resolution would be to recognise that the phrase is derived from UNCLOS through the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, and to search back into UNCLOS negotiations and understandings to assess the most likely intention. That was not done in this case. It is possible, of course, it would be unproductive. Another is to search Hansard and Parliamentary materials. That has not assisted. Another approach is to take the words "maximum sustainable yield" at face value; and give the phrase the ordinary meaning, as used in the context of the statute, which it would have presented to the Parliamentarians involved. That may or may not accord with one or more technical understandings.

I adopt that latter approach. The phrase is "maximum sustainable yield". It means a "yield". It means the "maximum" yield. There is one qualification. That "maximum yield" is limited to the "sustainable". Subject to that, and consistent with UNCLOS, the yield in mind is the "greatest" yield which can be obtained: not "nearly the greatest", or "within boundaries either side of the greatest", but *the* greatest. Parliamentarians would have understood that seasons fluctuate, and sustainability

might demand something less to be taken from good years to allow for bad. Parliamentarians also would have understood fish counts are imprecise, and there would need to be some precautionary margin built in. Subject to those obvious points, however, I have no doubt the legislature intended "maximum" sustainable yield to mean exactly that: the "greatest" yield obtainable. It would be the highest point on a yield curve, and not some entire gentle curve either side of that highest point within 90% boundaries. I take some support for that analysis from the terms of the definition of "maximum sustainable yield" introduced by s 2 of the Fisheries Act 1996, which (notwithstanding technical differences to which I have referred) has at its heart "the greatest yield that can be achieved over time". There seems little doubt where public policy objectives lie.

Implications arising and remaining issues

This conclusion has one immediate adverse consequence for the industry approach. It cannot be said that present yield is "indistinguishable" from MSY. It is distinguishable. Present yield is put as 92% of MSY: 8% short. This is not to be glossed over as within some margin of error. When one sets out a framework as the device to determine a yield, one does not abandon its outcome, desired or not. The framework stands as a whole, or is demolished as a whole.

However that does not dispose of certain other issues raised. Present yield is not at MSY, but it is close. Despite that, due to the peculiarities of snapper breeding, it will be necessary nearly to double present biomass to reach B_{msy}. Industry, reasonably enough from its own present perspective, questions whether a proposed increase in biomass on that scale, involving as it does major cuts in the TACC, is warranted; particularly as present stock is stable. Industry develops this theme by pointing to Mfish advice to the Minister in 1995 that the stock was not in danger of "sharp decline", and that there was not a particular concern "as to the time frame to rebuild". It points (again) to asserted property rights involved, and a so called "extraordinary absence" of any cost-benefit analysis.

The Minister's answer starts from a frequently repeated obligation to move stock, over time, to B_{msy}. I have accepted that is correct as a matter of law; subject to the statutory (TAC definition) qualifiers. Looking at 10, 20 and 30 year timeframes, the Minister chose 20. He considered 10 would impose undue hardship; 30 was too long for credibility. The matter could not stop there, as the obligation to move to B_{msy} is subject to the statutory qualifiers. Economic and environmental factors were of obvious importance. It was open to the Minister to hold back from an increase in biomass, and yield, in the light of economic qualifiers such as minimal benefit and unacceptable social impacts, if conservation factors so permitted.

The Minister did not take that course. I accept that he identified and weighed benefits against cost. I accept from his affidavit as to the 1995 decision that he considered he should act forthwith to conserve the future of the fishery. Leaving stock at present levels was regarded by him as exposing stock to a "greater risk of decline in the long term"; and to not act now "involves more than deferring the issue to the future: it increases the risks involved in achieving a successful rebuild". The Minister, within that caution, was conscious of potential imprecision in stock assessments (even when agreed), instancing the infamous Newfoundland cod fisheries which "demonstrates the need for a precautionary approach". I accept from the tenor of his affidavit as to the 1996 decision that he was moved by similar longer term conservation concerns; although the latter affidavit, and indeed his decision letter of 26 September 1996, become somewhat buried in detailed rebuttals. Quite simply, his concern was "to achieve long term sustainability and optimal yields", and his belief was that "acting now to move this fishery towards biomass level which will support the MSY is the only means of confidently achieving this". As the decision letter explains, amidst a raft of other benefits great and small "the fishery will be more robust to major fluctuations in recruitment". The Minister took time in the latter affidavit to explain advice received that the fishery was not in "sharp decline", and there should be no great concern "as to timeframe to rebuild" as having been given in the context of a response to pressure from conservation and recreational groups for a 10 year rebuild, and not as indicating that there was "no need to be concerned about the fishery". He stated he accepted advice as to economic impact on commercial fisheries provided by industry, and was fully aware of economic hardships which would follow. However, he believed that "the

economic hardship is outweighed by the need to rebuild the fishery. There was no cost-benefit analysis as such, but the Minister had a view as to conservation benefits accruing, and was informed and weighed the costs as put forward on a worst case basis by the industry.

Standing back, the industry, understandably from its own perspective, puts the Minister's decision largely in yield and present stability terms. Increase in yield will be small, and increase in the present biomass is not seen as necessary. The Minister did not ignore that standpoint, but approached matters rather differently. He recognised an obligation to move yield to MSY, but was not mesmerised by increased yield aspects. Quite separately he took a view that as a matter of caution, and with an eye to the future, fish stock must be increased substantially, indeed to B_{msy}, starting forthwith. An increased buffer was considered warranted, given the uncertainties in all fisheries measurements and a need to protect the future. He knew economic costs. He considered protection of stocks for the future outweighed those costs.

The Minister did not fail to have regard to relevant considerations as to yield and present stability; was not mistaken in fact as to the relationship of yield to MSY or quantum of increase obtainable through rebuild; and there was a rational conservation basis for his decision. It was open to him. It is not open to review.

X.
FAIRNESS : CONSULTATION AND LEGITIMATE EXPECTATION AS TO NOTICE

Preliminary

Final submissions for industry selected and took together, under a heading "Fairness" pleaded breach of duty to consult, and breach of legitimate expectation as to reasonable notice of decision. The underlying thesis is that a consultative process was established as far back as 1990, as a concomitant of the then shift of biological

risk from Crown to industry. By 1995, it followed a well recognised pattern. Consultation was to be in terms of ***Wellington Airport*** doctrine, including allowing meaningful participation, and keeping an open mind. It was designed and required to be transparent. Further, as to notice, industry claims a legitimate expectation it would receive some advance notice that substantial cuts could occur, so as to provide some opportunity to prepare for drastic economic and social consequences.

Consultation, 1995 decision

The industry focuses upon two questions said to have undermined the 1995 consultative procedure, rendering it ineffective.

First, industry was left unaware until 15 August 1995, that major cuts were in prospect. Submissions trace the process, which involved concentration upon the alternative possibility of management controls. This commenced with indications by the Minister at the close of the 1994 consultation that he did not wish to use the "crude measure" (his words) of TACC reductions, and was looking for alternatives. The industry and others accordingly spend the succeeding eight months investigating the potential of matters such as abolition of MLS, closures, and like measures. The MFish IPP did not indicate thinking was in terms of significant TACC reductions, and that prospect was not raised in meetings through June and July 1995. That formed a contrast with some other fish stocks under discussion. The stock appeared to be, and to be stable at, approximately 50% B_{msy}. Modelling work at worst indicated modest TACC cuts would be necessary to maintain equilibrium. Then came the meeting of 15 August 1995. The Minister indicated he was contemplating rebuild programmes which would involve up to 70% TACC reductions; and declined to impose other measures even though supported by MFish. Industry attempts over following weeks to procure a change of mind were unsuccessful. The decision was announced on 21 September 1995, only 10 days before due to take effect.

Second, industry complains that recreational interests, through NZRFC, were given influential inside running, without knowledge of the industry or opportunity to

provide balance. A particular complaint centres on a meeting with NZRFC representatives on 6 July 1995 during which the Minister saw fit to disclose to NZRFC a proposal to make very substantial TACC cuts; and in which understandings were reached as to his rejection of "no MLS" and his bag limit reductions. Insult is added to injury by the Minister then refusing to meet industry representatives four weeks later, 14 July 1995, advising as a reason that such would reflect on the integrity of the TAC process by then formally under way. The industry is unimpressed by such formal procedural explanations. The industry's submission adds an assertion that subsequent modelling work undertaken at the request of NZRFC to ascertain timeframes for rebuild to B_{msy}. later formed the basis of the Minister's 39% TACC reduction; and that an increase in the new bag limit from 6 as proposed on 15 August 1995 to 9 followed approaches to the Minister by the NZRFC through MFish. Industry submits, in substance, that the Minister favoured NZRFC approaches, without giving opportunity to industry for rebuttal.

The Minister's affidavit as to 1995 is economical. He refers to indications by him in preceding years, to industry and others, that biomass needed to be increased above "risk zone", awareness (he asserts) on the part of industry that other controls introduced would not suffice to move stock to MSY as he intended; and an expressed belief "a TACC reduction has been expected".

Consultation : The 1996 decision

Industry submits the Minister approached the matter with a "closed mind". Industry points to asserted new developments

(a) 1996 advice that both stocks were now sustainable at the status quo (i.e. Mfish no longer advised a 600t cut was necessary)

(b) 1996 advice showed that even with the 39% cut a 20 year rebuild strategy could no longer be achieved without further controls on recreationals

(c) information that additional yield was available because of historical Japanese catches.

The Minister, it is said, did not give these weight. Moreover

(d) MFish refused to provide Final Advice Paper copies and refused initially to carry out modelling which showed the impact of constraining recreational catch.

This is said to demonstrate the mind set of those involved.

The Minister's affidavit as to 1996 passes even the Spartan. Despite a direct accusation of "closed mind" he makes no personal response. Perhaps that is due in part to accidents of timing in relation to affidavits filed. The two Ministerial affidavits are in relation to interim relief. There are signs of an intention ultimately to file a further substantive affidavit. If so, that never happened. I must reach my decision on the material before me; but allow myself the observation that the silence is surprising.

Consultation : Adequacy

Section 28D(2) directs that before varying a TACC the Minister "shall consult with" persons or organisations the Minister considers are representative of interests in the fishery and "have regard to any views expressed". Requirements for "consultation", as so directed, are spelt out in the ***Wellington Airport*** (supra) decision; and in terms which make the added direction to "have regard" redundant. However, it may have been intended to serve as emphasis.

I consider the Minister did discharge basic requirements of consultation.

As to 1995, I am not persuaded the industry knew in any reliable way that large cuts in the TACC were planned. It was, of course, always a possibility. Indeed, it had occurred in somewhat special circumstances, at a 25% level, back in 1992. However,

signals by the Minister had been more towards management controls as a preference, and that is where emphasis had been placed through early 1995. Far from being on notice of likely cuts, the industry can make a fair case it was somewhat lulled. The Minister is not shown to have had major cuts in mind before 6 July 1995, when the possibility was disclosed to the NZRFC. I say, without hesitation, that if the Minister's thinking was sufficiently formulated at that point to make disclosure to one interest, as it appears it was, that disclosure should have been general, giving maximum notice and opportunity to consider and rebut. That did not occur. In the result, the industry was taken more by surprise, on 15 August 1995, than was necessary. However, undesirable as that is, it does not conclude matters. The industry still had over five weeks before the Minister's decision was announced. It is a well organised and articulate body. No doubt additional time would have added additional polish, but it has not been shown industry did not still have an adequate opportunity to make its contrary views known, and for those to be considered. It did. They were. They were not accepted.

Again as to 1995, I am not persuaded any "inside running" given to NZRFC precluded adequate consultation with industry. I do not find anything particularly sinister in the Minister's dealings with this body, although it has not created appearances which might show it to have been unwise. What NZRFC wanted—the converse of the industry's aim—was known to industry, and answered as best industry could. The fact the Ministry met information requirements by NZRFC, and found some of the information useful, is no more an illustration of consultation processes at work. It is regrettable the Minister has not replied on this aspect in person, but actions speak in their own right. On the action side, he did not implement the 10 year rebuild sought by recreational interests. He allowed a 20 year period, with an eye to industry hardship. I am not prepared to find he listened only to recreational interests, and was not prepared to hear and consider industry views.

As to 1996 the position is a very close one. There is no doubt the Minister had a preliminary view. His letter to participants in June 1996 issuing a formal invitation to participate in consultation says as much; while emphasising that is not a final view. As to SNA1 that preliminary view is stated (in the IPP) as being "to keep the TACC at 3000t; to allow a "modest" increase in recreational catch rates while

acknowledging a need to constrain; and that until recreational research results are available it would be "premature to constrain" recreational fishers. The industry is correct in a contention that, with further modelling the 1995 recommendation of 600t reduction to maintain at least stability had disappeared. Industry is also correct that there was growing realisation recreational controls would indeed be needed long term; although that is less a revelation than a firming of opinion. It is also correct that the historic Japanese catch was new information. However, even with these factors, it was still well open to the Minister to confirm the preliminary view expressed. The longer term "buffer" for which he was aiming could still appear to be warranted; and recreational controls would still be a matter for a year or so hence after research, rather than immediately. I do not place particular weight upon reluctance to disclose Final Advice Papers in an atmosphere of suspicion and litigation as had developed; or upon the irritation of civil servants at late requests for further information, and the prospect of further work, interrupting timetables. I have rather more concern at the possibility of a very human mixture of Ministerial irritation and stubbornness; but in the absence of cross-examination must exercise restraint. It is unsatisfactory that the Minister has not answered certain contentions put forward; but it would likewise be unsatisfactory to make at least one seriously critical finding without benefit of proper exploration including at least an attempt at cross-examination.

Failure to consult on the basis advanced is not proved.

I turn to the question of notice.

The first point is that legitimate expectations, to be recognised in law, must stem from previous representations or previous settled practice. Reference once again to ***Hamble (Offshore) Fisheries*** (supra) and to ***Unilever*** (supra) will suffice. Industry must point to representations that it would have reasonable notice (or the specified periods of notice) between TACC decision and its actual operation, or a settled practice to that effect.

On the facts, industry cannot do so. Indeed, history points the other way. Consultation procedures customarily adopted the known target of a TACC set for

the approaching fishing year commencing 1 October. That was an accepted deadline. The procedures agreed involved professional work and discussions down to May, and then a process of consultations which would extend through June to about early August. There was never likely to be more than about 2 months notice; and given difficulties involved in protracted processes and Ministerial availability there was always the prospect of less. This, nevertheless, is the procedure into which industry entered in 1995 and 1996 without dissent. There is no suggestion at that time of deferring the effect of decisions reached beyond 1 October, or of staging. (There could indeed be real practical difficulties with either).

In these circumstances I do not consider it can be said there was a legitimate expectation of longer notice in 1995. If anything, the industry acquiesced in a timetable precluding notices now claimed. As it happens, of course, it hardly matters for 1995. Interim relief has prevented asserted short notice from having any detrimental effect; a powerful factor as to discretionary relief if matters were to come to that point.

Nor do I consider there could be a legitimate expectation of longer notice in 1996. There was no representation, and even less established practice to such effect. Once again, there was acquiescence in an awkwardly timetabled consultation regime, bound to lead to short notice. There is also, for 1996, an additional factor. Given the 1995 decision, and the Minister's resistance to a legal challenge mounted, and the Minister's expressed concerns, the industry would have been well aware through 1996 that there was at least a considerable risk of a decision in 1996 along the same lines. The industry was not bound to so assume. Moreover, allowances should be made for the need to take tactical stances not admitting any such possibility. It does not help to persuade a Minister to make a decision along a desired line if one openly admits a decision along the contrary line could be correct. However, as a matter of real life business planning the industry would have known it was at significant risk of a similar adverse decision, and should have been planning on a contingency basis. In that situation, short notice is not the burden it could otherwise be. Once again, 7 months onward, it might be thought difficult as a matter of discretion to invalidate the 1996 decision on grounds of short notice and surprise. Those who have not been

taking protective measures at least on a contingency basis are unwise. There are limits to allowances the courts should make for incurable optimists.

XI.
REASONABLENESS:
OUTRAGEOUS IMBALANCE OF COSTS BENEFITS

Industry submissions invoke ***Wednesbury*** doctrine, subsuming within that its other headings "substantive unfairness" and "proportionality". The submission draws upon the analysis of ***Wednesbury*** principles by Walker (1995) PL 556, put as postulating the test "this is completely unacceptable". The industry submission points to a number of features. Most have been touched upon already.

The First Applicant, for its own part, advances proportionality as a separate and distinct ground, relying very much upon the approach taken in de Smith Woolf & Jowell "Judicial Review of Administrative Action" 5th Ed. 13-070ff. That approach is controversial; c.f. Wade "Administrative Law" 7th Ed. 403, and Smyth "The Principle of Proportionality 10 Years After GCHQ" (1995) AJAL 189. I prefer the approach taken by Tipping J in ***Isaac v Minister of Consumer Affairs*** [1990] 2 NZLR 606, 635-6, which declines to recognise proportionality as a separate ground, treating it as an aspect of ***Wednesbury*** doctrine.

With only this passing mention made of "substantive unfairness" I can leave resolution of the contrasting views expressed in ***Thames Valley EPB v NZ Pulp and Paper Limited*** (1994) 2 NZLR 641 to some future appellate decision. For my own part, I do not dismiss the concept of "substantive fairness" out of hand. Caution is needed, but why should courts fear to be fair?

I approach ***Wednesbury*** unreasonableness in its classic expression; as, eg, in ***Webster v Auckland Harbour Board*** (1987) 2 NZLR 129; ***Wellington City Council v Woolworths NZ Limited (No 2)*** [1996] 2 NZLR 527; and see also ***Roussell Uclaf***

Australia Pty Ltd v Pharameceutical Management Agency Limited (CA 297/96, 3 March 1997).

Submissions for industry invoke (a) "expectations and representations" (b) disregard of "property rights" and absence of cost benefit analysis (c) a disproportionate share of TAC cut imposed upon ITQ holders and (d) economic "pointlessness" of a 40% cut to achieve an 8% yield gained in 20 years time. It then adds in asserted (e) absence of credible risk to SNA1 sustainability (f) lack of effective constraints on recreational catch, and (g) absence of "significant or proportional analysed benefits from the cuts". It asserts the "massive" cuts amount to "reallocation" and an "extraordinary and unjustified" interference with ITQ holders property rights. Overall, it is said, this is "completely unacceptable"; and thus "unreasonable" in the ***Wednesbury*** sense.

The reference to "expectations" and "representations" centres in large part upon MAF statements made before the QMS designed to encourage industry support. I have already reviewed content. While these do not generate enforceable "legitimate expectations" as such, I accept they form one part of an entire background which can have relevance when assessing ***Wednesbury*** unreasonableness. They do not come near to carrying the day in their own right. What matters more is the significance, if any, of the content of the representations and expectations concerned; in this case the integrity of the QMS system and the need for controls to at least some degree on recreational fishers.

Remaining heads advanced can be covered briefly. They have been touched on already. Property rights in ITQ are qualified in character: they are subject to reduction without compensation and properly can be approached accordingly. The Minister saw benefits in enhanced future security for the fish stock, and was aware of the considerable costs which will arise. It was a balance which was open. Burden, said to be disproportionate, passed on to ITQ holders is considerable; but there is the intention and genuine prospect of balance by additional recreational constraints so far as needed in the foreseeable future after necessary research. The decision reached is only "pointless" if construed strictly in "yield" terms. It is not pointless in the context of perceived needs to safeguard the fish stock into the future.

Absence of "credible risk" is a matter of judgment. There may be no known risk to date, but few do not pay insurance premiums. A stock at only 10% of virgin biomass, and 50% of B_{msy}, might not be regarded as prudent management. The extent to which constraints on recreational catches will be effective is a matter of judgment. There is room for belief it can be improved over time to whatever levels may be necessary. Benefits to be gained in terms of safeguarding the future are not necessarily insignificant or disproportionate to cost. "Reallocation", in the sense of conscious transfer of catch, and interference with "property rights" (with or without the epithets added), are covered within this totality.

The ***Wednesbury*** ground is not made out, whether in classical terms or within the Walker recast. It is always a difficult threshold, and it has not been crossed.

The final ground is not established.

XII.
TREATY OF WAITANGI FISHERIES COMMISSION AND AREA 1 MAORI FISHING CONSORTIUM/ NGAPUHI FISHERIES LIMITED CLAIMS

Preliminary

By the end of argument, these two claims swam together, with the Commission representing the general interest and Area 1/Ngapuhi a local interest. For convenience, and with no disrespect to Area 1/Ngapuhi, I will refer to both as the "Commission". They are claims in respect of commercial interests. They adopt the entirety of industry claims already reviewed, but add a distinctively Maori dimension. The Commission directly attacks only the 1996 decision. Area 1/Ngapuhi appear to attack both.

The Commission's case

As pleaded and presented, there are two elements.

The first centres upon alleged failure to take into account, as relevant considerations, the Treaty and Settlement based nature of ITQ held by the Commission, on-going Treaty obligations which relate to it, and impact upon the Commission of the proposed TACC cuts.

On this first element, the Commission starts by pointing to claims made for traditional Maori commercial fishing rights; the Maori Fisheries Act 1989; the Settlement Deed; and the Settlement Act. It points to the source of considerable ITQ which it holds as being in exchange for traditional rights protected by the Treaty. For convenience I will term these "Treaty rights" (while not ignoring possibilities such pre-dated and were simply protected by the Treaty). The Commission does not claim ITQ held is, on that account, exempt from reduction for biological reasons. It does not claim ITQ which it holds, is, on that account, entitled to some preferential preservation as compared with ITQ held by others. However, given the asserted Treaty source, and the Crown's ongoing duties to uphold the settlement, and the Crown's protective duties under the Treaty, it asserts ITQ should not be reduced unless "absolutely necessary", and should not be reduced as part of some "reallocation" to recreational fishers. (The Commission accepts Maori traditional fishers have a priority). As to the asserted applicability of ongoing Treaty duties, the submission admits the Fisheries Act 1983 does not contain a provision expressly applying the principles of the Treaty, but contends it is impossible for the Minister to make a decision under that Act without having regard to the principles of the Maori Fisheries Act 1989. The two Acts are put as "intertwined", forming a "comprehensive code", the key link in that respect being repeal of former s 88(2). It is said that the principle in ***Huakina Development Trust v Waikato Valley Authority*** (1987) 2 NZLR 188 applies. The Minister, taking into account the long title of the Maori Fisheries Act 1989, and the Settlement Act, is required to have regard to intention to make better provision for Treaty rights, and entry of Maori into commercial fishing. Accordingly, the Treaty source and Treaty duties are mandatory relevant considerations which the Minister must take into account when

considering reducing the TACC. The obligation to take these matters into account is not exhausted by the Deed or Settlement Act. The Minister, erroneously, was not advised to take the Treaty source, Treaty duties, and impact ($14.5 million) upon the settlement into account, and failed to do so.

The second centres upon defeated legitimate expectations as to manner of exercise of the discretion to reduce TACC. The Commission alleges legitimate expectations that ITQ so received would be protected, and would not be distributed without satisfactory justification or reasonable compensation; and that if TAC reduction was indeed justified, benefits would not be transferred to recreational fishers otherwise than on a proportionate basis. It is said the Minister's decision defeats those expectations. The submission is that legitimate expectations of a substantive character are now recognised in law, with authorities reviewed.

The source of the asserted legitimate expectations is not pleaded. It emerged, in part, from submissions for the Commission as being representations made during course of negotiations towards the settlement. To quote counsel for the Commission (in reply):

> "(d) Representations made at the time the settlement was being negotiated form the basis for legitimate expectations on the part of Maori that:
>
> (i) the TACC would not be reduced unless the Minister was satisfied it was absolutely necessary to do so for conservation reasons; and
>
> (ii) if the Minister was satisfied it was absolutely necessary to reduce the TACC for conservation reasons, measures would be implemented which reasonably attempt to reduce the recreational catch by at least the same percentage of (sic) any TACC reduction.
>
> (e) The Minister acted unfairly and unreasonably in defeating those legitimate expectations in that he:

(i) decided to reduce the TACC when no reasonable Minister could have been satisfied it was absolutely necessary to do so for conservation reasons; and

(ii) decided to reduce the TACC by 39 percent while implementing measures which he was advised were predicted to reduce the recreational catch by at best 18 percent;

(f) The evidence from Sir Tipene O'Regan as to the representations made at the time the settlement was being negotiated . . . is relied upon solely to found the basis of legitimate expectations as to the manner in which the Minister's discretion in relation to the administration of the QMS would be exercised."

Further, and from the same source:

> "The legitimate expectations pleaded in paragraph 71 of the Amended Statement of Claim arise from the following factors:
>
> (a) Representations that the QMS and ITQ afforded a just, honourable and durable means by which Maori commercial fishing claims could be settled;
>
> (b) As a result of the settlement, Maori were exchanging part of their rights as expressed by section 88(2) of the Fisheries Act;
>
> (c) The understandings of Maori expressed in the affidavits of Sir Tipene O'Regan which reasonably and logically resulted from (a) and (b)."

To identify any more precise character for these "representations" there is no escape from quotation from Sir Tipene's affidavit. Representations (and understandings) now relevant appear to be within the following:

> "5. An issue which was the subject of debate at the time the Deed of Settlement was being negotiated was whether the Quota

Management System ("QMS") itself, or the manner of introduction (which ignored the possibility that the allocation of individual transferable quotas ("ITQ") violated existing Maori fishing rights secured and guaranteed by the Treaty), were fundamentally inconsistent with the principles of the Treaty. The way in which it was explained to my fellow negotiators and me at the time by Crown representatives was that the QMS and ITQ afforded a just, honourable and durable means through which Maori claims to commercial fisheries interests could be settled. Those claims had been brought by Maori as a consequence of breaches of Maori fishing rights under the Treaty over the years."

6. Given that the rights guaranteed by Article II of the Treaty are both ancient and in perpetuity, and given that the purpose of the negotiations was to pursue, in good faith, a permanent settlement of Maori commercial fishing rights and interests under the Treaty, it was crucial that the compensation offered by the Crown should be equally as durable. The Maori Fisheries Negotiators therefore closely examined the qualities of ITQ with a view to determining whether or not it was a durable form of compensation. We decided ITQ was a durable form of compensation for the following reasons:

6.1 it is a property right with perpetual term;

6.2 an express purpose of allocating ITQ was to give security to ITQ holders which would allow them to plan and invest with greater confidence;

6.3 we concluded that the objectives and management instruments of the QMS were capable of ensuring the ecological sustainability of the fisheries within which ITQ was allocated. One of the reasons for arriving at that conclusion was the importance given in the QMS to ensuring ecological sustainability of the fisheries in the Total Allowable Catch ("TAC") and Total Allowable Commercial Catch ("TACC") setting process.

7. In the course of negotiations with the Crown on either 22 or 23 September 1992, I personally was particularly emphatic about the danger to Maori interests of acceptance of the QMS. I was very aware of the danger to Maori interests of a unilateral Crown change to the QMS which might destroy or damage the outcome of the settlement we were contemplating. I received a clear assurance that the QMS would remain in its then current form and would not be changed without the consent of Maori. There was a clear understanding to this affect between the negotiating parties. It was for these reasons that I was able to provide the endorsement of the QMS recorded in s 4.2 of the Deed of Settlement.

8. The other negotiators and I were led to believe by Crown representatives that ITQ was a secure and durable proprietary right. That belief was fundamental to ITQ being acceptable to me and the other negotiators as a component of the compensation given under both the 1989 and 1992 Settlements ("the Settlements"). It was also fundamental to the decision by the Commission to use monetary compensation given under the Settlements to purchase ITQ. There is no such security or durability if an increase in recreational fishing can result in a reduction of the TACC without compensation. If I had known during the settlement negotiating process that there could be such a result under the QMS, I would have rejected ITQ as an acceptable form of compensation in the settlement of Maori claims under the Treaty.

9. I would also have refused to endorse the QMS on the basis that Maori interests were subservient to those of recreational fishers. The fact they are conflated in section 28D of the Fisheries Act as "non-commercial interests" under the TACC setting process does not establish that they are indistinct. Neither does that conflation establish that the differences in nature and extent of Maori fishing rights and recreational interests should be ignored by the Minister when setting TACCs. It was always my understanding that Maori non-

commercial or traditional fisheries interests were superior in priority, and distinct from, the recreational interests provided for in the legislation. This assumption was founded on the fact that such Maori interests were derived from the Treaty.

10. It was accepted at the time of negotiating the Settlements that it was possible that some time in the future, the TACC for a particular fishery, and so the value of a component of the compensation given to Maori under the Settlements, could be reduced if it was necessary to do so in order to ensure the ecological sustainability of that fishery. In such a case, a decision by the Minister to reduce the TACC, while leaving recreational fishing unrestrained, would be completely contrary to the spirit in which, and understanding under which, the Settlements were negotiated. In other words, any reduction to a particular fishery should be shared by recreational and commercial interests proportionately, and should not be borne by commercial interests alone."

"4. In paragraphs 17-19 of his affidavit Graham suggests that during the negotiations there was never any doubt that under the existing legislation the proportion of the total allowable catch ("TAC") for each of the commercial and recreational sectors could vary from time to time and that in entering into the settlement Maori accepted that risk. It is correct that no express commitments were given that any decrease (or increase) in allowable catches would be proportional. That is because it went without saying and was implicit that such decreases/increases would be at least proportional (in the sense that, as a minimum, any reduction in the TACC would be mirrored by a relative reduction in the recreational catch, which is also what I mean when I use the word "proportionately" in paragraph 10 of my first affidavit). Maori were agreeing to the commercial fishing rights provided for under Article II of the Treaty of Waitangi (which were recognised and given absolute priority by section 88(2) of the Fisheries Act 1983) being converted into proprietary rights in the form of ITQ. To require commercial fishers to take a greater proportion of any TAC cut than recreational fishers is,

> in effect, to give priority to recreational fishes. It results in the transfer of fishing rights from a sector which holds proprietary fishing rights to a sector which does not. It is inconceivable that Maori would have agreed to their commercial fishing rights being converted into ITQ if such a result was contemplated at the time of the settlement negotiations. To do so would, in effect, be to agree to its commercial fishing rights being converted from rights which had absolute priority to rights which were inferior to the rights of recreational fishers."

Submissions for the Commission are at pains to emphasise the representations in issue are not relied upon as an aid to interpretation of the Deed or legislation, or as going to passage or content of legislation, but "solely to found the basis of legitimate expectations *as to the manner in which the Minister's discretion in relation to the administration of the QMS would be exercised"* (italics added).

The Minister's case

As to the first head, the Crown rejects contention the "Treaty" source of ITQ held by the Commission has any impact upon decisions under the Act concerning the TACC, or that there is any Treaty based protective duty. The Commission, apart from a specific entitlement to consultation (s 28D(2)), is "simply a quota holder just like any of the other quota holders". Despite representations asserted by Sir Tipene (disputed as to fact and as to admissibility) "Had Parliament intended Maori ITQ was to have some additional quality above other quota holders, it would have expressly said so". In a settlement intended to move from uncertainty to certainty "Maori got a defined corpus or bundle of rights i.e. ITQ and cash—beyond that their rights are no different from other commercial fishers". There is no "Treaty clause" (such as in s 4 Conservation Act 1987) in the Fisheries Act 1983. Duties arise solely from the Act, Maori Fisheries Act 1989, and Settlement Act; or, put perhaps somewhat differently, "while the Crown's general Treaty duties are not discharged, its past, present and future duties in respect of Maori commercial fishing are fully and finally settled satisfied and discharged" by s 9(c) of the Settlement Act. The scope of the Treaty duties has been defined by the Settlement Act. Any duty on the part of the

Crown in respect of commercial fishing is defined in that Act, and cannot exist independently. The Minister submits there is no obligation to take Maori fishing rights, or impacts, into account in relation to a reduction of the TACC. It was not a relevant consideration, and moreover, was not drawn to the Minister's attention by the Commission. The Minister does not dispute the $14.5 million figure as an approximation as at December 1996, or the fact of a considerable economic impact on the Commission; but protests this information was not previously provided by the Commission, despite requests.

As to the second head, the Minister contests the availability in law of legitimate expectations as to substantive outcomes. The Minister contests, as a matter of fact, existence of representations by Government that any TACC reduction would be pro-rata. It is said there is no evidence to that effect, and it is "inherently unlikely". Submissions contend that assurances given prior to the Deed cannot amount to legitimate expectations and, moreover, legitimate expectations cannot survive, or affect interpretation of, legislation. Legitimate expectations could not survive the "no warranties" clause in the Deed, albeit "a political compact". Matters in issue were fully settled by the Settlement Act, and duties are limited to the legislation. There is no room, in that light, for expectation that benefits would not be reduced by allocations to recreational fishers; although the existence of "reallocation" is denied, the decisions being put as based on sustainability and need to move to a biomass level that would support B_{msy}. To any extent "that there could be a legitimate expectation from the pre-contractual discussions", "that has been met". No more could be expected than expressed in the Deed. In particular Sir Tipene's subjective beliefs are not, in themselves, a basis for legitimate expectations.

Treaty based rights and obligations : relevant criteria?

There is a special history and special legislation involved in this matter. It is not an area for unthinking generalities.

I start with the Settlement Act. It at least is law. That Act recites a history of claims, contest to the QMS, litigation, negotiation, interim measures by way of the Maori

Fisheries Act 1989, and settlement by the Deed. It recites that claims were settled by the Crown funding Maori (to the tune of $150 million) into involvement in commercial fishing, providing 20% of quota for new species brought into the QMS, and making certain non commercial fishing provision. The Deed in itself is merely a political compact, but it is essential background to any proper understanding of the Settlement Act. Section 3, indeed, requires an interpretation of the Settlement Act which best furthers the content of the Deed. Against that background, s 9 of the Settlement Act provides:

> **"9. Effect of Settlement on commercial Maori fishing rights and interests–**It is hereby declared that–
>
> (a) All claims (current and future) by Maori in respect of commercial fishing–
>
> (i) Whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
>
> (ii) Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
>
> (iii) Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal,–
>
> having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled; and accordingly
>
> (b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori referred to in paragraph (a) of this section; and
>
> (c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori in commercial

> fishing are hereby fully and finally settled, satisfied, and discharged."

In short, obligations of the Crown to the Maori in respect of commercial fishing are "discharged". The Settlement Act then proceeds to a related repeal, and a related amendment. Section 33 repeals s 88(2) Fisheries Act 1983 which had provided that nothing in the latter "shall affect any Maori fishing right". Section 24 amended s 28D(1)(a)(i) of the Fisheries Act 1983 by repealing the required Ministerial reference to "Maori, traditional, recreational, and other non commercial interests" and substituting the present "non-commercial interests". There was no longer specific reference to Maori interests *per se*. (An obligation under s 28D(2))to consult the Commission was added).

Interestingly, despite intended acquisition by the Commission of ITQ on a large scale, and despite attention so directly focused on s 28D, there were no other relevant amendments. There was no provision added identifying ITQ held by Maori or by the Commission as in any way preferential. There was no provision added to the effect the Minister should have regard to source of ITQ through surrendered claims to traditional Maori commercial fishing rights. There was no express direction to the Minister to have regard to principles of the Treaty in the exercise of s 28D discretion; or generally in relation to the Act. Beyond displacement of a reference to specifically "Maori" non commercial interests, and the involvement of the Commission as a required consulting party, there was no change to the express mandatory considerations as already standing.

In my view, Parliament's intention was that Maori who had agreed to take quota (through the Commission at outset) in settlement of claims to fishing rights were to be treated exactly like any other quota holder. That was the focus of resolution to which Maori had agreed, and—in absence of any statutory signs to the contrary—Maori would have the same advantages and disadvantages as any other. In particular, Maori would not have any unique protection against risk. There is nothing on the face of the section, left quite unamended, which would indicate Maori were to be protected against TACC reductions on biological grounds and the commercial losses which might well follow. It is even more improbable that

Parliament intended to protect Maori, but to avoid preference by giving the benefit of Treaty based protection across the board to non Maori without distinction. The mind boggles at shared Treaty protection for some other players in the industry. There was no Parliamentary intention that the threshold for reduction of TACC somehow would be raised to "absolutely necessary" in view of Treaty based Maori involvement. Ownership of ITQ does not alter biological facts. The Minister was not to be further or specially constrained. There was one concession only; and it might have reassured Parliament any more could be dispensed with. A special entitlement to consultation was granted to the Commission. Along with the statutory FIB it is the only named body so privileged. If there were matters Maori bearing on commercial fishing, it could be anticipated the Commission would raise them. That would not exclude general Treaty matters, and if such were raised the Minister would have regard to those along with all views expressed. There was that much indirect room left for Treaty matters bearing on commercial fishing.

I respect the ingenuity of the ***Huakina*** submission advanced, but am not persuaded. Certainly, Acts in cognate areas should be read together, so as to give effect to an overall Parliamentary intention. They are not to be regarded as warring Departments. However, it is at heart a matter of Parliamentary intention, and when one looks at the careful—and carefully limited—amendments made to the operative section (s 28D), and to the inherent commercial and administrative probabilities, it is not a place for forcing in wider generalities. Long title principles are not intended to dilute this very particular wording.

There is one qualification. The Settlement Act does not seek to repeal the Treaty itself in relation to fisheries. Much clearer words would be needed for that sensational development. Its provisions, and principles, live on. Such was intended by the Deed, and may well be implicit in recital (l)(viii) of the Settlement Act when it speaks of "implementation of the Deed through legislation and the continuing relationship between the Crown and Maori". The continuing relationship is to live on, taking its place alongside legislation. Perhaps at some point in the future Treaty obligations inherent in the "continuing relationship" could warrant revisitation or adjustment of what has been done. Present heresies can become future necessities. However, for the present, the s 28D die is cast.

I am not persuaded that the source of ITQ held by the Commission, or Treaty obligations, as pleaded, were relevant considerations which the Minister was obliged to take into account in his decisions.

Whether or not impact on the Commission was, strictly speaking, a relevant consideration, I am satisfied the Minister did take that into account so far as practicable. He was aware the Commission held significant quota, and would have been well aware it had significant value. To the extent his knowledge was general, the Commission must take some responsibility. The Minister sought economic advice from the Commission. The Commission declined to supply; simply referring the Minister to industry data. If the matter were to come in the end down to discretion, it would be hard to allow the Commission to blow cold then hot.

Legitimate expectations

The first question is factual. What, if any, relevant representations were made? I distinguish for present purposes between "representations" (things uttered) and "understandings" (things thought). The Commission must be able to point in the first instance to Crown "representations", not merely its own (or Maoris') subjective thoughts. Sir Tipene identifies representations (1) "QMS and ITQ afforded a just, honourable and *durable* means" (2) the QMS would remain in its current form and would not be changed without the consent of Maori (3) (arguably) some being "led to believe by Crown representatives" that "ITQ was a secure and durable proprietary right". That is all that is identified by way of words spoken. Sir Tipene accepts specifically "no express commitments" were given that changes in "allowable catches" would be "proportional" as between recreational and commercial interests; but explains this as "going without saying" in the circumstances, given the nature of the rights being surrendered. The Minister in Charge of Treaty Negotiations, for the Crown, gives only brief assistance. So far as directed to actual representations made, the Minister (1) does not respond to alleged representations as to ITQ "durability", beyond the observation Crown actions since

have not in his view undermined security or durability, and (2) responds to asserted promises the QMS would not be changed by these words:

> "15. . . . Sir Tipene alleges that during the negotiations he received a clear assurance that the QMS would remain in its then current form and would not be changed without the consent of Maori. The negotiations were certainly predicated upon the acceptance by Maori of the QMS as the means of ensuring the conservation of New Zealand fish stocks, a scheme to which the Government remains committed. I do not recall but consider it possible that the future management of New Zealand's fisheries was discussed. Certainly the Government then and now supports the QMS regime and has no proposals to alter it, but no undertakings relating to the permanence of the levels of total catch could have been given because it was accepted that that would depend on fishing stocks from time to time. The legislative scheme already provided that, as conservation needs changed, total allowable catches and total allowable commercial catches would be varied."

Neither Sir Tipene nor the Ministers were cross-examined. The onus of proof is on the Commission.

So far as actual representations by the Crown are concerned, I accept the Crown represented the QMS and ITQ were a "durable" means of settlement, and that the Crown would not (at least for the foreseeable future) change the existing QMS scheme. Both are likely within the admitted possibility of some discussions as to plans for future management. I accept there was no discussion of reductions in the TAC being borne between recreationals and commercials on a proportionate basis. There were discussions directed to the protection of Maori customary non commercial fishing, which was another specific focus, but beyond that discussions were at a very macro-level. I do not accept proportionate reduction "went without saying" as some common assumption. The imposition of enforced reductions on recreational fishers as a trade off for this Maori fishing settlement could have had considerable political implications, which would have needed careful appraisal. I am not at all persuaded silence on this point is to be taken as consensus. Maori were to

enter into a QMS left basically unchanged, and Maori would be subject to lawful TAC and TACC changes, upward and downward, like all others.

The previously recognised requirement for clear and unambiguous representations as a basis for (representation—founded) legitimate expectations has been moderated somewhat by the ***Unilever*** case. However, it goes much too far to seek to found a legitimate expectation of the character now alleged simply on a general representation of "durability" or "security", even when surrounded by comfortable companions such as "just" and "honourable". That is particularly so when the real nature of the right—ITQ subject to reduction at Ministerial discretion on biological grounds and subject to no more than limited express controls—was known to the representee. I do not believe for a moment Maori were unaware that ITQ could be subject to such reductions. The Maori negotiators were not tyros. Indeed, such innocence is not claimed. It was well known to them that risk existed; and pleasant generalities such as "durable" were to be weighed accordingly. References to "durability" were as to the continuation and continued shape of the QMS. They were not focused on details of the routine operation of that QMS, such as the present matter. I am not critical. Concentration on difficult details in the tense atmosphere of an important negotiation can wreck the prospect of broader agreement. However hindsight must not be allowed to rewrite history.

There were no sufficiently focused representations made for a legitimate expectations attack.

A final word, to reduce risk of misunderstanding. I am speaking of representations by the Crown, not independent expectations or assumptions by Maori. I do not need to reach findings upon the existence or absence of the latter subjective thinking as alleged. It is not sufficient for redress at law. The fact we expect something to happen, or consider it should happen, does not in itself give us the right to have it happen. The situation which Maori claim may, or may not, provide a basis for arguments based on fairness at an extra-legal and Treaty level. That is not a matter for me.

The Commission's decision based on legitimate expectations cannot succeed.

XIII.
HAURAKI CLAIMS

Preliminary

The Hauraki claim is advanced for both non commercial (customary) and commercial interests. For non commercial interests, it challenges the Maori customary allowance of only 300t compared to recreational and commercial allowances. For commercials, it joins in challenge to reduction of the TACC. In both cases there are some associated and deeply felt concerns as to matters of rangatiratanga, tikanga and kaitiakitanga. I accept the Fifth Applicant Board represents individual Hauraki, both customary and commercial; and while not (at least yet) owning SNA-1 ITQ, leases a considerable quantity, particularly from the Commission. No doubt individual Hauraki also fish as recreationals. Hauraki does not purport to represent a recreational interest. Hauraki supports in a general way the Commission's position as to the commercial fishery.

The claim as mounted asserts obligations to protect "rights and interests existing and arising under" tikanga Maori, the Treaty, common law and equity, international law, the Deed, Settlement Act, and Fisheries legislation. Resultant obligations are wide ranging.

An initial pruning is necessary. This is a Court of law. I am not in a position to engage in direct enforcement of tikanga Maori, the Treaty, international law, or the Deed (which is an unenforceable political compact) in themselves. Those sources may have indirect significance in the course of correct approaches to matters raised under the law of the land, but no more.

I confine myself in the first place to common law (and equity, in its technical sense), and the Settlement Act and Fisheries legislation). The 9 individual obligations which Hauraki assert existed are to be considered accordingly.

Customary (non commercial) fishery : Hauraki claim

The Hauraki submission asserts the existence and nature of a customary fishery within its rohe; put as Tikapa Moana. This includes Hauraki Gulf but is said also to extend down the East Coast of the Coromandel Peninsula to the Bay of Plenty. It is of course only a portion of QMA1 and the SNA1 fishery. I do not automatically assume Hauraki attempt to speak for iwi outside the rohe. The submission then asserts a continued status for Maori non commercial rights down to present time; with references to Article II and taonga status. In light of admissions on the pleadings I need not enlarge down to this point.

The submission then refers to the division in the 1992 Settlement between "commercial" and "non commercial" rights through clauses 5.1 and 5.2 of the Deed, and ss 9 and 10 of the Settlement Act. While commercial rights are said to be presently settled, non commercial rights are expressly reserved. The submission cites in support clauses 3.5, 3.6 and 5.2 of the Deed, and s 10 Settlement Act. It notes the legislative scheme provides for development for both "regulations" and "policies" disjunctively. There is a particular focus on s 10(a) and (b) which read:

> "**10. Effect of Settlement on non-commercial Maori fishing rights and interests** - It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 -
>
> (a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto
>
> (b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall-
>
> (i) Consult with tangata whenua about; and
> (ii) Develop policies to help recognise -

> use and management practices of Maori in the exercise of non-commercial fishing rights;"

Then comes the key submission:

(1) Section 10 expressly makes development of regulations and policies subject to Treaty principles, and reviewable in the courts: "policies may be separately reviewed by the courts to determine the extent to which they are consistent with the principles of the Treaty".

(2) ". . . the Minister in making an allowance for the first time of a specific quantity of 300 tonnes for the Maori customary take in SNA1 (and indeed for the very first time in the 10 year history of the QMS) has in effect set in place a policy to help recognise the use and management practices of Maori in the exercise of non-commercial fishing rights. In doing so, he was required to act in accordance with the principles of the Treaty of Waitangi under s.10(a) and consult with tangata whenua under s.10(b)(i)".

The submission is that the Minister breached that statutory obligation in both respects.

First, failure to act in accordance with principles of the Treaty. The Minister is said to have failed to carry out the duty to actively protect Maori interests in their fisheries; in particular by failure to recognise an asserted priority for Maori customary non commercial fishery interests over all other interests, recreational and commercial. That asserted priority arises from "unextinguished customary non commercial rights under Article II and existing under aboriginal title", citing in particular ***Te Weehi v Regional Fisheries Officer*** (1986) 1 NZLR 680 and indeed further authority through to ***Te Runanga o Wharekauri Rekohu Inc. v Attorney-General*** (1993) 2 NZLR 301. These rights remain "extant under the Treaty and under customary law", and on that basis are "to be accorded priority over other stakeholders" as a matter of fiduciary obligation. They are not so changed by repeal of s 88(2) and the settlement as to lose that priority. Counsel met certain

observations in a decision of my own in ***Roach v Kidd*** (unreported, High Court, Wellington, 12 October 1992, CP 715/91), as to possible "shared pain" in case of short resource by accepting Maori customary take might in some circumstances be varied or reduced, but to a *lesser* degree. In support of claimed priority in these terms counsel reviewed a line of Canadian cases namely ***R v Sparrow*** (1990) 70 DLR (4th) 385, ***R v van Der Peet*** (1996) 137 DLR (4th) 289, ***R v Gladstone*** (1996) 137 DLR (4th) 648; and ***R v Gardner : R v Jones*** (1996) 138 DLR (4th) 204.

The claim by Hauraki to customary right priority did not go so far as a claim to sole and exclusive use of the fishery. In counsel's words Hauraki are "happy" to share with commercial and recreational sectors, but with the protection of a first priority which should then be followed, in order, by commercial and (lastly) recreational.

The Minister, it was said, had not taken that priority into account. He did not carry out the necessary balancing exercise against other factors. The 300 tonnes "arbitrary" allowance made (without consultation) did not fulfil Treaty duty to recognise the priority concerned. The MFish deponent indeed had denied the existence of priority. Hauraki submit that the allowance of 300 tonnes, as against 2300 tonnes and 3000 tonnes, indicates in fact a customary take given *last* priority. Associated with the failure to recognise priority, the Minister did not take into account Hauraki tikanga in relation to kaitiakitanga involving, as it does, the concept of tribal regulation of the resource.

As something of a fallback, the submission added this. Even if rights had been lawfully extinguished, the "substituted rights" embodied in the Deed and Settlement Act suffice to maintain the priority. It survives "as a recognised principle of the Treaty which the Minister of Fisheries was obliged to act in accordance with". Counsel invoked preference given to Ngai Tahu for whale watching on the basis of linkage, notwithstanding such was not a taonga or within contemplation of the Treaty. Hauraki puts its position, blessed as it is with taonga, as stronger.

Second, breach of duty to consult. Hauraki point to an asserted implied duty to consult under s 28D(1)(a)(i), and express duty under s 10(b)(i) Settlement Act. It is admitted there was no consultation in relation to the non commercial aspect. The

submission contests the view of Crown deponents that consultation would have been highly unlikely to have led to an allowance greater than 300t. It rejects a "quantum only" criterion, pointing to the possibility of management by other measures (rahui and the like); asserts a customary priority; rejects guidance by "low" level of customary permits issued under present regulations; rejects as unfounded information from "other iwi"; recasts fishing ostensibly as recreationals so as to be fishing in fact on a customary basis; and points to lack of information on customary take as occasioned by the Minister's very failure to consult. It is submitted that only after efforts made can the Minister proceed on to a "best estimate" as envisaged in ***Roach v Kidd*** (supra).

The non commercial submission also advances failure to impose adequate management controls on the recreational sector, breach of legitimate expectation as to proper procedure and substantive outcome, substantive unfairness, the relevant and irrelevant considerations approach and ***Wednesbury*** unreasonableness. All are very much roads leading to the same end. Further exposition is not necessary.

Customary (non commercial) fishery : Minister's submission

I tabulate submissions made, to assist summary and clarity.

(1) Maori customary rights are governed by s 10. Section 10 after providing for Treaty principles, consultation and development policies, and regulations, provides that Maori non commercial rights are of no legal effect (expect to the extent recognised in such regulations).

(2) (Oral submission) Treaty rights are narrowed to s 10(b) and (c), which are exhaustive.

(3) The Minister's TAC/TACC decision is not a s 10(b)(ii) "policy". (The resulting implication, of course, is that the Minister is not required on a s 10(b) basis to observe Treaty principles, and in particular to recognise priority and to consult).

(4) The decisions concerned are not a "policy" within s 10(b) because (i) There is no actual resulting effect on Maori customary take. The concept of "policy" requires an actual substantive impact on rights, interests, or status; citing ***Auckland Regional Council v North Shore City Council*** (1995) 3 NZLR 18, 23 dictionary references. The decisions do not involve any such "course of action". Maori rights are no different before and after. (ii) Decisions do not restrain a Maori customary take. (iii) There was no total cap on catch. (iv) The decisions do not purport to be a constraint, and (v) The decisions do not affect the "quality" of exercise of rights, not interfering with Maori customary use and management practices. In the course of this submission, albeit without emphasis, it was noted the Minister's 300t level was "arbitrary".

(5) Even if the decision is a "policy" in the abstract, it is outside the scope of s 10(b) policy, as it has nothing to do with, and no effect on, "use and management practices of Maori in the exercise of non-commercial fishing rights". The decision was simply a "tool" to help set the TACC; and did not bind non commercials.

(6) Even if the decisions are a "policy" within s 10(b), and are to do with "use and management" as required, "Hauraki is statute barred from bringing any claim based on those rights by s 10(d) which provides that . . . such claims . . . shall have no legal effect except to the extent that rights or interests are provided for in s 89 regulations". The disabling "no legal effect" is enough in itself; but the submission "for completeness" is that s 10(d)(i) "which declares that Maori non commercial fishing rights or interests are not enforceable in civil proceedings, excludes judicial review except of s 89 regulations". Accordingly, "development of regulations and other policies, which are subject to Treaty principles are not separately reviewable by the courts".

(7) The submission then turns to deny the existence of Maori customary fishing right priority in any event. It is said (i) the Treaty right is not directly

enforceable, not being incorporated in the Fisheries Act 1983. Nothing as to priority is contained in s 10; which likewise does not create a fiduciary obligation, (ii) the nature of the rights concerned has been fundamentally changed by repeal of s 88(2), and by the Deed and s 10, (iii) reference to "Maori" in s 28D has been repealed, with reference to "non commercial" substituted. There is no longer an obligation to allow separately for "Maori" and no implied duty to give priority, (iv) in particular, there is no customary priority which requires lesser degree of "shared pain", (v) North American cases, arising in a different context, are not in point.

(8) It then is said, if a priority right exists, Hauraki are not in fact restrained by the 300 tonnes allowance. Hauraki can fish as recreationals, and under customary permits within Regulation 27. The fact the recreational allowance is larger not material. The 300 tonne figure is neutral as to fishing practices.

(9) Kaitiakitanga obligations are not affected; it being "highly unlikely " the 300 tonnes figure will be exceeded, judged by customary permit levels to date.

(10) Turning to consultation, (i) s 10(b) is limited to consultation before making regulations, as under s 10(d) rights and interests are unenforceable except so far as embodied in regulations, (ii) even if an implied duty to consult existed under s 28D(1)(a)(i) or s 10(b)(i), it would be impracticable for the Minister to consult a large number of iwi on a national basis, particularly as the number and status of iwi is "contentious". Consultation with the Commission should suffice, as it does for commercial interests, (iii) Hauraki never formally requested consultation, (iv) the Commission did consult "all iwi", and felt able to express a view.

(11) Finally, turning to other avenues of claim, the Crown submitted there was no s 20 Bill of Rights breach, the 300 tonne allowance did not interfere with rights to enjoy minority culture; there was no legitimate expectation as to recognition of priority; and was no unfairness or ***Wednesbury*** unreasonableness.

Commercial fishery : Hauraki submissions

I do not need to repeat elements adopted from the Commission's case. In addition, however, after noting the importance of its leased commercial snapper quota, Hauraki protest

(1) The decision undermines the integrity of the settlement and its value to Hauraki. It is not a "just and honourable" solution within preamble J of the Deed, and is unfair when without compensation. As to compensation counsel cites ***Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*** [1994] 2 NZLR 20, 24.

(2) The decision is a substantial reallocation of Hauraki commercial rights to the recreational sector, due to insufficiency of controls on the recreational sector. Controls could be by way of permits, catch returns, and the like.

(3) Decisions involved failure to consult Hauraki within s 28D(2) requirements. While the Minister need not consult every lesee, Hauraki's status as an ultimate recipient of quota, and as kaitiaki, so required.

(4) The decisions failed to take into account kaitiakitanga responsibilities on the part of Hauraki.

(5) Economic impact on Hauraki.

Commercial fishery : Minister's submissions

(1) Arguments as to erosion of the value of the settlement are precluded by s 9.

(2) Arguments as to reallocation are met by general submissions denying that outcome.

(3) There was no obligation to consult Hauraki individually. It was sufficient to consult the Commission, which in fact performed the necessary role. Hauraki did not own quota, and "which iwi will be the ultimate recipient of quota is a contentious issue". With a large number of iwi through the country it would be impracticable for the Minister to consult all on an annual basis.

Hauraki Customary (non commercial) allowance

I prefer to start with s 28D. It may not be the most comfortable beginning for a Maori case, but it is the section which directly governs the decisions in question.

Under s 28D(1)(a)(i) the Minister was required to allow for "non commercial interests" in the fishery. One should not be diverted by the 1992 repeal of express reference to "Maori" interests. There is no doubt in a 1995 and 1996 context what is meant by "non commercial". It certainly includes both Maori customary fishing and recreational fishing. I do not totally exclude other possibilities, e.g. purely academic research, but they need not be explored. Maori customary fishing is a recognised factor, at least within s 10 Settlement Act and present Regulation 27. The Minister is not to be taken as hallucinating when making an allowance so described in 1995. It is clear the Minister, when "allowing" for "non commercial" catch must have regard, within that, to the existence of some Maori customary component. He must, somehow, form a view of an appropriate quantum.

How? What does the law expect?

I put aside for the moment the question of envisaged 28D(2) consultations. The first question for the Minister is the true shape and character of this Maori customary right which he is obliged to take into account.

Again, one starts with the law. The Minister will look to s 10, the current central provision governing status of Maori customary fishing rights. It has a distinctive

structure, which should be read as a whole, with each subsection interacting with the others.

The Minister will note "claims" in respect of non commercial fishing (a) shall in accordance with the Treaty "continue to give rise to Treaty obligations". If there is a claim—e.g. by Hauraki to an allowance intended to preserve some proportion of yield to cover Hauraki customary fishing—it will give rise to Treaty obligations. There will be the obligations of good faith, protection, consultation and the like. The Minister will see that "in pursuance thereto" (i.e. pursuant to those Treaty obligations) he is under two requirements, (b) and (c). Under requirement (b) the Minister (again and perhaps redundantly, required to act in accordance with the principles of the Treaty) is to consult "tangata whenua" about policies, and to develop policies to help recognise use and management practices of Maori in exercise of customary fishing rights. It is a policy making role, directed to assist customary fishing. Under requirement (c) the Minister is to promote regulations under s 89 recognising and providing for customary fishing, with particular reference to places of importance. It is a regulatory role, designed to facilitate.

The Minister will ask himself whether that is to be regarded as the limit of Treaty obligations recognised in s 10(a). In my view, it is not. When there is a general obligation, and pursuant to that obligation one takes certain steps, those steps do not inevitably exhaust the obligation. It all depends on circumstances. There can be an obligation to drive with reasonable care; and also numerous specifics as to speed, lights, and the like, but the general obligation is not exhausted. The Treaty, and Treaty obligations, are of importance; and are not to be treated as lightly exhausted. The Minister will be obliged to recognise residual Treaty obligations under s 10(a) may remain. It may perhaps be that when policies are developed, and regulations are in place, that residual Treaty duty can properly be seen as theoretical or at most small; but as at 1995 and 1996 the Minister would know there was not yet any such protective development, and would be aware that the generality of Treaty duty was still very much applicable.

The Minister will then turn to s 10(d). Claims give rise to Treaty obligations, and requirements to develop facilitating policies and regulations; but under s 10(d) the

rights or interests giving rise to such claims, whatever the putative foundation of those claims (including aboriginal title and the Treaty), basically "have no legal effect". That is not an unknown concept in the law. For example under the Contracts Enforcement Act 1956 and Limitation Act 1952 there can be a right which is unenforceable. It stems indeed from clause 5(2) of the Deed containing provisions both that rights are "not extinguished", and that such will not be enforceable in Court proceedings. Certain consequences of absence of "legal effect" are then spelt out : non-enforceability in civil proceedings, and non-availability as a defence in criminal or other proceedings. Then there is an important exception. Enforceability, and availability as a defence, *will* exist to such extent as the rights or interests giving rise to claims in respect of Maori customary fishing are recognised in regulations made under s 89.

In short, it is to be a "Treaty obligations" matter; without customary rights having effect at law, except to the extent such customary rights may eventually be recognised in regulations. The Minister would know, as at 1995 and 1996, that the only such regulation was the limited interim measure contained in Regulation 27 Fisheries (Amateur Fishing) Regulations 1986, as amended as part of the Settlement. He would know that further regulations were intended, but were not yet available.

In the result, when the Minister in 1995 and 1996 contemplates a s 28D(1)(a)(i) allowance for a Maori customary component within "non commercial", he sees something with Treaty recognition and surrounding Treaty obligations. It is a Treaty animal. Under Treaty obligations policies are to be developed and facilitating regulations issued, but that has not yet happened. The customary right does not have "legal effect" in the sense of enforceability through the Court (subject to Regulation 27), but that is usual in the case of Treaty rights.

Does the Minister ignore the Treaty-clothed character of this component? The Minister is not expressly obliged to take principles of the Treaty into account when exercising discretion under s 28D. There is no "Treaty clause" requiring him to do so. But when, in the exercise of that discretion, the Minister must consider how to provide for a certain item—here the Maori customary take—it is proper, and I have no doubt Parliament envisaged, that he would have appropriate regard to its Treaty

based character and to the Crown's ongoing Treaty obligations in deciding how, as a particular item, it properly should be treated. To illustrate from a different field, if the Minister has discretionary power to expend a fund in preservation of works of art, and there is not enough to go around, and some are taonga which under Article II the Crown has Treaty obligations to protect, then even if there is no express statutory direction to apply principles to the Treaty, it would hardly be open to the Minister totally to ignore that Treaty background and that character as a taonga. It might be that other pressing demands in the end would outweigh the Treaty character of the taonga, but its wrapping in that obligation is not without any importance whatsoever. The Crown should protect, so far as the Crown on balance properly can do so.

And so it is here. The Maori customary fishing right is a Treaty based item. The Maori customary take is a taonga. The Crown has accepted obligations to work up policies and pass regulations for its better protection. They are not yet in place. Apart from narrow Regulation 27, there is no legally enforceable measure through which Maori themselves may protect the rights concerned. I have no doubt the Minister, when considering the position to be given to this Treaty based customary fishing right, was intended to bear in mind Treaty protections due to it. It was not just *an* allowance. It was an allowance reflecting Treaty rights. It deserved handling accordingly.

What of the power in s 10(d)? It does not apply. The disability of "no legal effect", and bar to enforceability or use as a defence in legal proceedings, is directed at Court proceedings. It does not prevent regard being paid to the matter, particularly as it has Treaty significance, in the course of administrative decisions outside Court rooms. "No legal effect" does not mean "does not exist". Pre-eminently , as s 10(b) bears witness, it is intended to exist.

I do not regard exercise of s 28D discretion as intended to fall within s 10(b)(ii) direction to "develop policy". When enacting s 10(b) Parliament had an eye to general matters: general policies to help recognise use and management practices as a whole. The words are wide enough to include *general policies* as to determination of "allowances" for Maori commercial fisheries under s 28D. It could "help

recognise" Maori use and management of customary fishing to formulate underlying policies as to provision within TAC of fish to be caught. However, Parliament did not have in mind as within such "development policies" the individual determination, ad hoc, of a particular TAC allowance, in a particular place, for a particular year. It was thinking on a much more general plane. One cannot force the particular 1995 and 1996 s 28D decisions into s 10(b)(ii) as "development" of "policy" so as to render principles of the Treaty a directly applicable control.

The question as to priority of Maori customary fisheries is an interesting and difficult one.

I do not adopt the historical approach which identifies the Maori customary right as the original right still preserved by Article II; and which then assumes that genesis still gives priority. I also decline to be drawn into comparison with the common law (or Magna Carta) right of access to sea fisheries ostensibly imported with European arrival, or the perhaps suspect findings in ***Waipapakura v Hempton*** (1914) 33 NZLR 1065 and ***Keepa v Inspector of Fisheries*** [1965] NZLR 322. If one proceeded from an older history, and chose to tail off before recent developments, one could still have a law subjugating women. I prefer to start with the law as it stands (and stood in 1995 and 1996).

Section 28D does not use the word "priority", or any synonym. It assumes the determination of a TAC (MSY, controlled by qualifiers). It then directs the Minister, after "having regard" to the TAC, to "allow for" (now) "non commercial interests". The shift in wording is to be noted. The Minister does not merely "have regard to" non commercial interests. He is to "allow for" non commercial interests. At risk of fatuity, "allow for" means "make an allowance for". No express guidance whatever is given as to any relative priority between Maori customary take and recreational take comprised within "non commercial".

Is there any direction as to priority between the whole of "non commercial" and "commercial"? If so, does that help? There is an ambiguity in the word "allow". It could mean "allow for *the whole of*", or it could mean "make *an* allowance, whether for whole or less". I do not think Parliament intended to bind the Minister to "allow

for" the *whole* non commercial (mainly recreational) interest as a first priority, regardless of impacts on commercials. Parliament in 1986 was not operating with a clean slate. There was an established industry, and reduction in catches could have severe economic effects (this proceeding exemplifies). A recreational policy was being worked up. It postulated priorities in some popular spots, but no general priority direction. Nor was there a clean slate in 1990 or 1992. It is likely Parliament intended to leave a discretion to the Minister to adjust any resource shortage as between the competing interests as the Minister saw fit at the time; and "allow for" is to be construed as meaning "allow for in whole or part".

That provides a context for the internal "non commercial" allocation question, to which I return. If the Minister was to have flexibility between commercial and non commercial, it would not be surprising if like flexibility was intended within non commercial. Possibly, the whole of non commercial could not be allowed for in light of commercial requirements. In that case, one or more components of non commercial (notably Maori customary or recreational) may necessarily suffer. In the absence of express direction, I see no reason why that should not be a matter for the Minister to weigh likewise. If anything else had been intended, one would expect something to be said.

However, that is not the end of the matter. In weighing the matter up, and as at 1995 and 1996, it would have been proper for the Minister to take into account the Treaty obligations, including protection, associated with Maori customary fishing. It would be appropriate to give *some* weight to that component; but all would depend upon the particular circumstances of time and place, and the extent to which other demands were compelling. I find myself back, by a different route, to the position taken years ago in ***Roach v Kidd*** (supra). It could also be that in a situation of "shared pain", the Maori customary component could warrant a greater weight than the merely recreational; but again, all would depend upon circumstances to be weighed by the Minister at the time.

Whatever the historical niceties, the modern statute does not confer *priority* within s 28D discretion; but the Minister should consider any *weight* that should properly be

given in light of derivation and Treaty obligations associated with the Maori customary catch.

I return to the additional question of s 28D consultation. The Minister, after having regard to the TAC, is required to "allow for" non commercial interests. If considering a reduction, as here, the Minister must also consider whether or not reduction could be achieved by other controls, and by shelving. The Minister must consult with the Commission, the FIB, and "such other persons or organisations as the Minister considers are representative of persons having an interest in the fishery".

A very strong focus in any proposed reduction of TACC will be upon direct effects upon the commercial side—holders of ITQ—as distinguished from the non commercial side. Hence, no doubt, the direction to consult the FIB. It is a statutory incorporation involving representatives of various branches of the industry, with exclusively industry-orientated functions (Fishing Industry Board Act 1963, s 3 and 10). Hence also direction to consult the Commission. The Commission likewise is commercially orientated. Any reading as a whole of its constituting provisions within the Maori Fisheries Act 1989 well illustrates. Clearly, however, something is intended for the Commission beyond that general industry orientation, particularly as the Commission is given a powerful representation within the FIB. Was the right to separate consultation within s 28D(2) intended, at least in part, as a voice for Maori non commercial interests? I am not so persuaded. It is understandable Maori commercial interests might wish to retain a separate and distinctive voice through the Commission, as well as taking a seat at the general industry table in the FIB. That not only would be a matter of mana, but would be wise, given the statutory obligation under s 12 of the Fishing Industry Board Act 1983 upon the FIB to comply with the "general policy of Government". I am not persuaded power conferred under s 5(a) to facilitate entry of Maori into, and development by Maori of "the business and *activity*" of fishing was intended to create a dichotomy between "business" (commercial) and "activity" (non commercial). It is at least as likely to have been intended to emphasise the Commission would be going past mere passive investment in fishing, and would be encouraging the actual "activity" of fishing by Maori fishers on the water, an

employment-related feature which was a significant aspiration. There is, moreover, a potential conflict between the Commission's commercial orientation, which potentially could seek to keep Maori customary take in check, and that customary fishing orientation; albeit that does not arise on present attitudes. Further, the same 1992 Settlement Act which introduced the Commission as a consulting party envisaged the (prompt) development of policies and regulations governing Maori customary fishing. Those regulations, in all probability, will recognise kaitiaki, or equivalent, who could serve as points of reference. It is perhaps also notable that consultation in relation to development of regulations was not to be with the Commission, but by consultation with "tangata whenua". Clearly the Commission was not regarded as a focal point in relation to customary fishing matters. The Commission has, in fact, had something brief to say as to Maori customary fishing, when consulted in relation to the two decisions concerned, but I am satisfied that was not pursuant to any intended s 28D function.

So far as non commercial interests are concerned, the Minister was under implicit obligation through s 28D(2) to identify, to his satisfaction, any persons or organisations he "considers" are "representative" of persons having an interest in the fishery as Maori customary fishers. Identification was not difficult in relation to the different sector group comprised in recreational fishers. The NZRFC fell very naturally into that role. It was a single, national, and articulate organisation. It was potentially much more difficult for the Minister in relation to Maori customary fishers. Subject to possibilities presented by Paepae / Taumata 2, (to which I will refer further in course of decision on the claim made by that body) there was no single recognised national body. It was (and is) far from clear just who and where these Maori customary fishers were. How did one tell whether a Maori sitting in a boat, or on a rock, was fishing on a customary basis or as a recreational? There is always a distinct possibility of disputes between iwi, and indeed between hapu, as to who may speak for which particular fishing grounds. Offence is easily given. Mandates for individual QMA could be controversial. Hauraki, for example, could speak, and possibly through the Fifth Applicant Board for part of SNA1; but clearly not all. There was of course one point of clearly traditional and local contact through Regulation 27 permit procedures; but they were on a very small scale, and hardly a sufficient basis for mandate covering the whole of SNA1. These typical difficulties

would have been known in 1992 when s 28D(2) received Parliamentary attention. No specific solution was attempted. No general spokesperson was designated. I think it likely that Parliament regarded the customary fishing question as a relatively minor one, and hopefully a temporary one. The Maori customary take would warrant separate consultation, but would be relatively small (vide the Minister's 1995 SNA-1 300 tonne "arbitrary" estimate). There were to be, and it would have been thought promptly, regulations governing customary matters; which process might well have been regarded as likely to furnish information and a solution before long. I think it probable Parliament simply intended the matter of customary fishing consultations, and suitable representatives if any, to be left to the good sense of the Minister, judged in the circumstances of time and place.

The 1995 SNA1 exercise : customary fishing elements

First, the Treaty-derivation. Final advice, in its general introduction covering all areas) simply was to make "adequate allowance" for "non commercial" fishers. While some reassuring noises were made as to consultation, and recognition of poor information, there was no signal any Treaty based weighting or recognition should be given to Maori customary elements. The Minister appears to be alert, nevertheless, to the significance of the allowance concerned. As noted, I have considerable reservations as to reliance upon notes of meetings between the Minister and others as produced in evidence, but it does appear that at a meeting with officials the next day (15 August 1995) discussions included the following:

> "Maori catch/customary? accepting higher bounds of recreational survey—some recognition of customary catch—2600 currently . . . increasing consciousness of Maori fishing rights—4925, 1500 + 2300 + Maori ? ? = 2500".

The Minister's 1995 decision simply said, on its face, he had "made a specific allowance of 300t for Maori take". His affidavit, to which I give weight, goes further. It bears repeating:

> "23. The non-commercial catch portion of the TAC is only an estimate. However by identifying the estimated amount of catch available for customary Maori, I have provided for the recognition of Maori as a Treaty partner of the Crown and of their interest in SNA 1. Customary Maori fishing rights will be provided for in the Customary Fishing Regulations soon to come into force. The figure of 300 tonnes was an arbitrary figure adopted by me as there is presently little information on the quantity of catch taken. This will improve when the Customary Fishing Regulations come into force. The 300 tonne estimate is conservative but I considered it crucial to take into account the exercise of Maori customary fishing rights and to be seen to be giving effect to these rights."

I am satisfied that in 1995, in his own thinking, the Minister *did* indeed operate on a basis that Maori customary fishing rights were to be approached with their Treaty basis and Treaty duties kept in mind. It was not spelt out to him as his obligation, but that was—or in effect was—the course which he ultimately took. His discretion was approached correctly in law.

Second, consultation. It is clear there was no direct consultation with Hauraki. That is admitted. There was no request to that effect in 1995. Final Advice (general, all stocks) referred to obligations to consult, and noted a "stronger" interest for "extractive users'; naming the industry, "Maori", and recreationals. There was no differentiation between Maori and other extractive interests. The Minister was advised that where "groups", which included "Maori" by name, have a current interest "their views from the consultation are included". Indeed, it was said specifically (paragraph 2.7) " . . .MFish recognises the interests of Maoris, in particular, in management changes for any fish stocks in New Zealand and any changes have been discussed with non commercial representatives". Clearly, whatever may have been intended, the words used overstated the position in relation to SNA1. Consultation, on the evidence before me, was restricted to submissions from and dealings with the Commission. The Commission, whether or not required or empowered, stated on 31 July 1995 it had included, where known, the views of iwi. Its submission was limited to complaint over the "explosive" rate of increase in recreational catch, "to the detriment of Maori interests in both the

customary and commercial area". An attempt was made in the evidence of one Crown witness to bring in information allegedly received from Hauraki and "other iwi" as well as customary fishing returns. When particularised, this additional material was ephemeral, and hardly can be labelled consultative.

I do not regard consultation with at least the major iwi groups with an interest in the Maori customary fishery in SNA1 as posing any major problem for the Minister, although it may have been administratively inconvenient and politically unwelcome given other considerations. The Minister's statutory obligation was to consult with those—and I add "if any"—who he considered representatives. Whatever may be true of other times and places, it would not be unduly difficult to contact those iwi, and to invite views as to a proper Maori non commercial allowance. It would have been for the Minister to consider how far to take matters, and within what time limits. It was a statutory decision, to be reached within a tight statutory time frame, and consultation need not necessarily have involved numerous and protracted hui. As I have said on another occasion, Maori sometimes must adjust traditional and preferred methods of decision making and communication to modern necessities. Or risk not being heard. It would not have been difficult, at a minimum, to invite written submissions if relevant iwi cared to do so. That step was not taken. I have some concerns the Minister may have been lulled, through the terms of the Final Advice, into a belief more had been done than in fact was the case, or strayed into belief the Commission would suffice. That could explain, but does not exonerate.

I am constrained to find there was not the required s 28D(2) consultation with organisations (iwi) which the Minister, if he had properly turned his mind to the point, inevitably would have been satisfied were representative of persons having an interest in Maori customary fisheries within SNA1.

What should follow? Judicial review is discretionary, and I do not propose to overturn the 1995 decision on this single point. There are four particular factors which persuade me. First, the Commission (assuming the mantle) stated a key Hauraki objection in powerful terms: recreational assumption of Hauraki entitlements. The point did not go unstated. Second, I accept the Minister appreciated the Treaty significance of customary Maori fisheries. Third, Hauraki

have been delightfully vague, right down to hearing, as to the actual quantum of customary Maori fishing. There is room for a view that quantum is not the only consideration, but certainly it is of high importance. It may be, of course, that Hauraki do not (yet) know. I have no reason to believe representations by Hauraki would have resulted in any significantly greater allowance than the 300 tonnes made, whatever may be meant by "conservative". Fourth, it is a relatively small matter on which to cause the dislocation and expense which would ensue; and is a matter which can be revisited within months for the 1997/1998 year.

A point is made for the future, but I decline relief based on customary Maori fisheries consultation deficiencies for 1995.

The 1996 SNA1 exercise : customary fishing elements

The 1996 decision was reached against a background of claims made in this proceeding, launched late in 1995, and knowledge of concerns so expressed.

First, the Treaty derivation point. Final Advice was comparable to 1995. Once again, there was no separate report of a customary Maori fishing viewpoint. The Minister's decision, this time, and without further explanation, simply allowed 2600 tonnes for "non commercial" interests. There was no express identification of 300 tonne for Maori. The Minister's affidavit as to 1996 is not particularly enlightening. Overall, however, both on pleading and from evidence, it is plain the Minister ultimately adhered to the 1995 decision, and (now implicit) allowance of 300 tonne for Maori customary fishing.

It is a new decision, but I see no reason to believe his appreciation of Treaty background, and appropriate weighting, had changed. If anything, these proceedings (commenced by Hauraki 17 November 1995) are likely to have emphasised the point in his mind.

Second, consultation. The factual background has some differences from 1995. The Final Advice Paper for SNA1 did not contain preparatory material including

potentially misleading passages previously noted. The Commission stated there had been only "minimum consultation processes" by the Commission with iwi for all species, and spoke of a "compelling need" to define and enforce shares for the customary—traditional fishery; recreational fishery; and commercial fishery. Otherwise, and subject to the advent of claims made in this proceeding, history is much as before.

Again, I consider the Minister should have at least invited views from relevant iwi. Again, however, I am not minded to overturn the 1996 decision on this single ground, and for the same three reasons plus one other. It is this. The Minister knew, in a general way, the views of Hauraki from proceedings previously issued. They had expressed their view to him in a dramatic way already. It is not a form of consultation which was envisaged, but Hauraki had their say. Notably, it produced no solid quantum information. That continues to be so.

Again, the point is made, but I decline relief based on consultation deficiencies for 1996.

Hauraki commercial case

Much of the case made for Hauraki follows that presented for the Commission. I will not repeat findings already made. As to additional matters raised or emphasised:

(1) The Minister's decisions do not undermine integrity of the settlement. Maori (including Hauraki) took quota on the basis of legislation which allowed developments of those sorts to occur. The legislative scheme excludes compensation. Questions of unfairness, and compensation at common law, do not arise.

(2) There is not a "reallocation" to the recreational sector given a tenable view, taken by the Minister, as to the possibility of reduced levels of recreational

catch within the immediate future; and recreational controls following research, when needed.

(3) Consultation with the Commission, envisaged by s 28D(2), was sufficient in relation to the commercial catch matters.

(4) There was no error of law in the matter of kaitiakitanga. Regard to that traditional status was sufficiently subsumed in consideration given to Treaty background, obligations, quantum of allowance, and future controls.

PART XIV.
PAEPAE/TAUMATA 2 CLAIMS

Preliminary

Paepae/Taumata 2 are a body mandated by hui a iwi to "develop the customary fisheries regulations" envisaged under s 89(mb). I put the matter in that broad way for the present. Questions as to actual, and ostensible, scope of that mandate will need further examination. In terms of s 89, the envisaged regulations could only be made by the Governor General in Council, with an expectation in terms of s 10(c) Settlement Act of prior recommendation by the Minister. Clearly, Maori were aware that "development" would be a joint Maori and Crown affair involving discussion with the Minister or his representative.

Paepae/Taumata 2 have taken a wide view of the issues arising under that mandate, even indicating that statutory amendments may be necessary. Issues are claimed to include questions of s 28D(1)(a)(i) allowances for the Maori customary fishery and (inevitably with that) recreational fishing. The Crown has taken a narrower view of the scope of discussions. It has sought to keep its options open as to the relevant boundaries; specifically declining to sign an initial Memorandum of Understanding prepared by Maori, accepting it instead as a "guide" and "terms of reference" for the independent chairman. Unsurprisingly, differences have emerged between the

parties whether s 28D allowances are a relevant issue, or lie outside the envisaged discussions and regulations.

Paepae/Taumata 2, a national body, supports submissions made by local Hauraki as to customary fishing, determined as above, but add additional matters. I will confine myself, so far as practicable, to the latter.

Case for Paepae/Taumata 2

Paepae/Taumata 2, like Hauraki, postulate a wide range of sources of obligation, and of obligations said to follow. As with Hauraki, I recognise only common law (and equity), and the Settlement Act and Fisheries legislation as direct sources of obligation, with other items consigned to indirect relevance.

At a general level Paepae/Taumata 2, as representatives of the tangata whenua including Hauraki, assert a general Crown obligation "to protect their non commercial customary rights and interests" arising under the stated sources; and then specific obligations:

> "(1) to actively protect the rangatiratanga rights of tangata whenua represented by Paepae/Taumata 2 to their customary non-commercial fisheries as guaranteed under Article II of the Treaty of Waitangi;
>
> (2) to act in accordance with the principles of the Treaty of Waitangi when developing policies to help recognise use and management practices for Maori in the exercise of non-commercial fishing rights and interests;
>
> (3) to consult with Paepae/Taumata 2 as representatives of tangata whenua when developing such policies under (2) above;
>
> (4) to consult with Paepae/Taumata 2 as representatives of tangata whenua when making an allowance for non-

commercial interests in the SNA1 fishery under section 28D(1)(a)(i) of the Fisheries Act;

(5) to consult with Paepae/Taumata 2 as representatives of tangata whenua before varying the TACC under section 28D(2) of the Fisheries Act;

(6) to have proper regard to the sustainability of the SNA1 fishery and in relation thereto:

(a) develop and implement effective management controls on the recreational fishing sector;

(b) to acknowledge and have regard to the traditional role of tangata whenua represented by Paepae/Taumata 2 as kaitiaki of the fisheries resources including SNA1.

(7) not to confiscate the commercial and non-commercial customary fishing rights or interests of tangata whenua represented by Paepae/Taumata 2 in SNA1 and re-apportion those rights and interests to the recreational fishing sector".

Paepae/Taumata 2 then advances causes of action. I summarise these simply as pleaded at this point.

(1) Failure to recognise and protect, in accordance with those obligations, "priority of the customary fishing rights and interests" of tangata whenua in SNA1.

(2) Breach of principles of "natural justice" and of s 27 of the New Zealand Bill of Rights Act 1990 through "failure to provide Maori customary non commercial fishermen an opportunity to be heard". Tangata whenua are major non commercial users; the 300 tonne allowance was an "arbitrary decision"; made by the Minister without opportunity for "Paepae/Taumata 2 or tangata whenua" to be heard on the issues.

(3) Breach of duty to consult Paepae/Taumata 2. This is pleaded in a particular way:

(i) Ministerial duty under s 28D(2) to consult with persons whom the Minister considered to be representative of persons having an interest in the fishery

(ii) Paepae/Taumata 2 "is an organisation representing" customary fishing interests in SNA1.

(iii) failure to consult Paepae/Taumata 2 "as representatives of tangata whenua" (clearly enough particularised as tangata whenua having a customary fishing interest in SNA1). This is put as an implicit obligation under s 28D(1)(a)(i) and an explicit obligation under s 10(b)(i) Settlement Act. Particulars, or ostensible particulars, go on to identify Paepae/Taumata 2 as the only nationally mandated group representing Maori customary non commercial fishing interests; a group which had been negotiating "content and context" of customary regulations since 1994; and to assert "the negotiations have consistently focused on the TAC and TACC's". It is said that if there had been such consultation, "with reasonable notice" Paepae/Taumata 2 would have provided "relevant and important information regarding the extent of the Maori customary take in SNA1". Effects of non consultation are a recreational allowance 7.5 times greater than customary allowance; and a risk that higher customary take will result in over-utilisation, contrary to kaitiaki responsibilities.

(4) Breach of statutory duty to impose, by regulation if necessary, adequate management controls on recreationals attempting to limit take to the TAC level.

(5) Mistake of fact that measures in place or being implemented would or could limit recreational take to the 2300 tonne allowance.

(6) (a) Failure to recognise, as a relevant consideration, priority for Maori customary rights under Article II

(b) Failure to take into account potentially negative effects on biomass of setting allowance for Maori customary take below what "a more informed and accurate assessment of the Maori customary take might be". Particulars state that account so taken "may have resulted" in greater allowance.

(c) Failure to take account, as a relevant consideration, of "the Maori customary fishing practice of kaitiakitanga". Over utilisation would be contrary to that practice; and the Minister knew or ought to have known this would "act as a restraint" on exercise of Maori customary practices. It followed the 300 tonne limit would be seen as an "arbitrary limitation" of their customary rights. Perhaps of more immediate importance, if kaitiakitanga had been taken into account this "may" have resulted in a greater allowance and adequate provision.

(7) Breach of legitimate expectations:

(a) By tangata whenua represented by Paepae/Taumata 2 that customary rights would not be adversely affected by increase in the recreational catch post QMS.

(b) Of Paepae/Taumata 2 and tangata whenua that no material decisions would be made "regarding Maori customary non commercial fisheries management" until after agreement on the customary fishing regulations. Negotiations have concentrated on permits and use of information. That information is vital to effective dealing (including "prioritisation") with Maori customary interests before allocation to other sectors. Paepae/Taumata 2 legitimately expected no material

> decisions would be made before an agreed scheme had been formulated.

I will take each of these in turn, to the extent new material is raised. The Minister's defences can be conveniently noted point by point.

(1) Priority for customary take.

Paepae/Taumata 2 supports the case presented by Hauraki. As far as that goes, my previous findings apply. Submissions went rather further.

It was submitted an applicable "statutory scheme" provides "framework and background to development of customary fishing regulations". The "statutory scheme" so asserted (with context items added) comprises s 88(2) (repealed), the Memorandum of Understanding of 27 August 1992 paragraph 5(k); Deed Recitals K, L and N; Settlement Act of 1992 Short Title (b) Recitals J and L(8), and ss 3 and 10(c); Fisheries Act 1983 s 89(1)(mb), (1C), (2), (3A) and (3B); Regulation 27; Fisheries Act 1983 Part IIIA (Taiapure particularly s 54A). While not specifically cited, it is likely this scheme was intended to include s 89(3)(b) in addition to (3B).

Counsel drew from this "statutory scheme" (i) the obligation to recommend, and powers to make, regulations providing for customary food gathering and special relationship to places of customary food gathering importance (ii) power to declare the regulations "shall prevail over" general and Taiapure fishing regulations (s 89(1)(c)(a)) (iii) concerns with sustainability (s 89(1C)(b) and (c)), said therefore to make TAC considerations relevant (iv) powers to declare regulations shall empower Maori institutions to make bylaws restricting or prohibiting taking of fish (s 89(1C)(d) and (e), put as applying even outside Mataitai areas) (v) application of such bylaws "generally to all individuals" (s 89(3B)(a)); (vi) provision that regulations "may apply special conditions or confer special rights in relation to non commercial fishing by specified communities" (s 89(3)(b)), prevailing over even s 28B(5) QMS declarations (s 89(3A)); (vii) Regulation 27 recognition of customary rights (although Regulation 27 was dismissed as generally ignored in practice, with reliance placed on the customary right itself) (viii) s 54A reference in relation to Taiapure, to making "better

provision for recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi". This statutory scheme, and these features, were said to support argument that "the Article II Treaty right to customary fisheries remains extant and the Minister, acting on behalf of the Crown, has continuing statutory and fiduciary obligation to protect those interests". I venture the view that there seems to be a tacit assumption the Article II Treaty right implies "prior" right.

Further non statutory arguments are added. The "priority rights of indigenous peoples" to customary fishing has been recognised in USA and Canada, citing particularly ***United States v State of Washington*** 384 F. Supp 312 (1974) and ***R v Gardner*** (1996) 138 DLR (4th) 204. The recognition, within the statutory scheme, of "a right of tribal self management to (sic) their customary fisheries" (customary regulations, Mataitai reserves, Taiapure provisions, s 89(1C)(a)) " is itself a recognition of the prior customary rights of Maori". The "tribal right to regulation of resources as an expression of rangatiratanga" has been recognised by the Waitangi Tribunal (Motunui, Manukau, Muriwhenua, Ngai Tahu and Mohaka River reports), and by other authorities, not least the classic decision of Greig J ***Ngai Tahu MTB v Attorney General*** (supra). There are, therefore, "customs as found by the Waitangi Tribunal and the Courts relating to the rights of Maori to self regulate their customary fisheries through the institution of rangatiratanga and kaitiakitanga". In consequence "the customary regulations are the manifestation of the right of tribal self regulation of customary fisheries by maori". That view is supported by requirements the Minister act in *accordance with* Treaty principles in developing the regulations. Then comes the final step: "the customary priority is a necessary corollary to a right of tribal self regulation, so recognised as a relevant Treaty principle". It is a mandatory relevant consideration, to which the Minister failed to have regard. As expanded orally, "The Minister was required to have regard to the custom of self regulation in making the allowance of 300t: he knew of the regulations' making, knew the TAC and TACC was a vital element, but did not have regard to it, a major omission."

Submissions for the Minister do not accept s 89(1C) goes so far as to allow, or recognise, maori customary fishing interests as having priority over other interests.

Priority suggested in s 89(1C) only arises if specifically provided for in regulations: "This is not a recognition of an inherent priority for customary, non commercial Maori fisheries. It is simply a power to declare such a priority in circumstances where it would not otherwise exist". Further, the effect of s 89(1C) is that regulations have no special status until there is a declaration of priority. Indeed, the Minister submits inferences are against the Paepae/Taumata 2 submission. If priority for customary fishing does already exist, there would be no need for priority created by regulation. The same applies with s 54A (repealed) and Taiapure areas: without declaration, special conditions are not relevant.

As to s 10(b), with its requirement to act in accordance with the principles of the Treaty, the Minister submitted this "does not add a lot" to requirements in (i) and (ii). It "ensures that recognition is given to Article II rights of tino rangatiratanga, but also recognises the Government's right to make laws for the good of all New Zealanders under Article I". It "imports duties of good faith and reasonableness on the part of both Treaty partners". (I hesitate to lower the tone, but this seems to distil to recognition Maori have Treaty rights of self regulation of customary fisheries, but these are overridden by legislation, and both sides must be reasonable). Tribal self regulation, as a principle of the Treaty, and (semble) customary priority as a corollary, are "not a principle that has been developed by the Courts at all". It "may be implicit in rangatiratanga", but "the Crown nevertheless has an overarching duty to make laws for the good of all": ***NZMC v Attorney-General*** [1987] 1 NZLR 641, ***Ngai Tahu MTB v D-G of Conservation*** [1995] 3 NZLR 553, 558 (penultimate).

Finally, and put shortly, Maori customary fishing was said not to be accorded a priority over recreational and commercial fishers as "this is not supported by the legislation". The scheme of the legislation is that any priority to be given to Maori is to be addressed through s 89 regulations, not the TACC setting process".

I remain of the view the correct starting point is in the terms of s 28D itself, rather than a historical review or by reference to collateral legislation or beliefs.

As previously found (Hauraki claim) s 28D does not lead to a conclusion Parliament intended to confer a *priority* interest within the process setting the TACC. In his 1995 and 1996 decisions it was proper for the Minister to give appropriate weight to the Treaty basis of that customary interest, but "weight" is different from "priority". Whether by good judgment or good fortune, that was done.

The "legislative scheme" carefully analysed by counsel does recognise the existence of a Treaty protected Maori customary claim, and Treaty obligations to help recognise its use and management practices. There is indeed some associated recognition (littoral and estuarine areas) of the propriety of making better provision for rangatiratanga and the right secured by Article II (s 54A 1983, now s 174 1966). The legislation does not, however, recognise more than a potential for general priority. Section 89(1C) and (3) empower regulations which prevail over others, and which confer special rights upon specified communities, but do not require that regulations so prevail. Likewise for Taiapure. As the Crown submits, existence of priority is subject to regulations which so declare.

That declaration had not occurred in 1995 or 1996. In that light, it would not have been right for the Minister to have pre-judged the question, and effectively recognised a legal priority which may or may not ultimately be granted. It was not logically inevitable such priority would be granted. The matter might be left (much as at present) to the Minister's sense of appropriate weight. By September 1996 the Minister might, indeed, have had some doubts whether joint development of regulations would succeed at all; diminishing the real life prospects of priority yet further. It was not just a matter of saying the Treaty requires it; and therefore it is so. In the eye of the law, unless and until regulations were passed prescribing priority under s 10(d) it was *not* so; and the Minister was well justified in awaiting the regulations Parliament had envisaged rather than operating under s 28D on some other extra-legal basis. The "scheme of the legislation" did not require the Minister, at that time, to recognise some accelerated certain priority.

I reserve the position which may arise in the future if and when regulations prescribing priority in relation to reserves do issue. At least from "relevant

considerations" and ***Wednesbury*** angles, additional considerations might at that time arise. That is for another day.

That same special legislative context as to priority undercuts submissions based on Waitangi Tribunal reports, overseas jurisprudence, and the asserted right of tribal self regulation. (That last question is one of considerable general significance, and I very deliberately refrain from unnecessary dicta). Quite simply, generalised claims of this character as a basis for asserted priority cannot stand in this particular and special legislative context existing as at 1995 and 1996 (and indeed as at the date of this judgment). Such general claims, if valid at all, are displaced by the particular.

(2) & (3) Breach of natural justice and s 27 New Zealand Bill of Rights Act; Breach of duty to consult.

It is convenient to take these two causes of action together, as did counsel. Emphasis was upon the latter.

It was submitted for Paepae/Taumata 2 that the Minister was under an implied obligation stemming from s 28D, and express obligation under s 10 Settlement Act. The reference to "implied" obligation needs care. The essence is that the s 28D(1)(a)(i) issue implies an obligation to consult in terms of s 28D(2); which latter of course states express obligations. The Minister has admitted he did not consult Paepae/Taumata 2, and that Paepae/Taumata 2 represents "tangata whenua" in SNA1. Those pleadings also need care, as will emerge. The matter is not left on that Q.E.D. basis. Counsel (properly) took time to rebut pleadings alleging Paepae/Taumata 2 declined opportunities to be consulted on matters other than customary fishing regulations. To the contrary, the factual submission was that Paepae/Taumata 2 had indicated "it did have a role in the TAC and TACC setting process" which was "fundamental to the development of the customary fishing regulations"; and was "plainly on the table". That lack of consultation is contrasted unfavourably with "extensive consultation" with recreational and environmental groups. Maori customary interests were "simply excluded from the consultative meetings", even after a meeting with the Minister on 27 February 1996. They were

"not invited". Submissions contest arguments that consultation would not have produced anything useful; and dismiss any reliance upon limited Regulation 27 reports. The decisions are put as a "significant policy development" in respect of which the Minister was bound to consult either tangata whenua in SNA1 or Paepae/Taumata 2 as representatives.

It was also submitted Paepae/Taumata 2, as mandated representatives, fell within the s 27(2) reference to persons whose rights and interests "had been affected by a determination of . . . a public authority". If the Minister had consulted tangata whenua within SNA1 directly that would have discharged the obligation; but he had not done so.

The Minister repeats submissions made regarding consultation in respect of the Hauraki non commercial interest. There was no obligation to consult under s 10. Section 10(b) relates only to other management methods (e.g. fish methods, limit bags, seasons and the like). The 300 tonne allowance in fact made was "extremely generous", and could not be said to limit or interfere. Maori non commercial fishers may feel they are exercising customary rights, but many (frequently) fish as ordinary recreationals, and can be counted in that way. The 2600 tonnes non commercial allowance reflects this reality. Concern over the increase in recreational take was said to ignore this "blurred" distinction. There was no breach of duty.

The Minister denied breach of s 27 New Zealand Bill of Rights Act 1990; Paepae/Taumata 2 not being persons whose rights were "affected". As expanded orally, the emphasis was on such "affect".

I do not accept any obligation arose to consult through the provisions of s 10(b). The point has been discussed already. The determination of an individual customary fishing allowance, in an individual fishery, for a particular year, does not fall within s 10(b)(ii) development of policies.

Likewise, I do not accept there is any "implied" obligation stemming from s 28D. Section 28D(1)(a)(i) raises the issue of Maori customary allowance. This is a matter for the Minister to determine. Section 28D(2) then addresses consultation as a

distinct issue. Consultation on that issue of proposed customary allowance will be appropriate, but the obligation is an express one in terms of s 28D(2), which is exhaustive. I will concentrate upon this latter provision.

Section 28D(2) requires the Minister to consult with the Commission, FIB, and "such other persons or organisations *as the Minister considers* are *representative* of persons having an interest in the fishery" (italics added).

Two points emerge. First, the test is phrased subjectively: the Minister must "consider" representative capacity exists. Second, "representative" is not used as some entirely general term. Undoubtedly it is to be construed as "representative in relation to present s 28D purpose". The Minister would not be obliged to consult a group of persons appointed to promote the health or education needs of tangata whenua. The Minister will consider who might be representative for the particular s 28D customary fishing allowance purpose actually in hand.

The Minister's statement of defence is somewhat coy on these two points. The Minister responds to a pleading of s 28D(2) subjective obligation, and a following pleading of "representing non commercial customary fishing interests in the SNA1 fishery", by admitting the former, and admitting that Paepae/Taumata 2 "represents" some of that customary interest. It is possible, in view of the way the pleadings are framed, to view this "represents" as an admission of objective fact, but not as extending to admission of subjective belief. I do not take that approach, which was not the thrust of argument. The Minister responds to other pleading that negotiations focused on the setting of TAC and TACC's by an admission negotiations dealt with developing a management system "that could incorporate in future years Maori customary non commercial harvest information", but the admission does not go further. General denials take over. The Minister's position, within pleading and as expressed in submission, is that "the primary purpose of Paepae/Taumata 2 as decided in its own Framework of Understanding was to develop a draft set of regulations. It was not charged with matters related to suitability and the setting of the TAC and TACC's". Counsel added, orally "It purports to do so in the Framework of Understanding: but the Minister's response shows not all in the Framework of Understanding was accepted". Submission continued by introducing

a related point "Paepae/Taumata 2 is a national body set up to look at customary regulations on behalf of all Maori. It would be unreasonable to impose a duty on the Minister to consult with such a national body on every variation made to a local fishery such as SNA1".

I accept these were views which were open to the Minister. He could "consider" Paepae/Taumata 2 "representation" did not extend past the development of customary regulations, and in particular did not extend to these specific 1995 and 1996 SNA1 customary allowance decisions.

Was that view in fact held by the Minister? I am not at all helped by silence in the Minister's affidavits. The topic of Paepae/Taumata 2 is not mentioned. Nothing is said either way. On the other hand, so far as any inferences from silence may go, the point was pleaded by the Minister and no effort was made to obtain leave to cross-examine. One must look elsewhere..

It is clear Paepae/Taumata 2 sought to raise TAC and TACC matters, in a general way, amidst a multitude of other points as part of preparation of the customary fishing regulations. A desire in that regard is clear from the Framework of Understanding, and indeed, from a letter to the Minister of 22 August 1994, very early in the process.

Clearly, the Minister was diffident over any unreserved commitment to that Framework of Understanding. One can understand why. It demanded priority for Maori customary take, and even stipulated for unspecified statutory amendments. It had a certain crusading quality. It was accepted as a "guide", and "terms of reference" for the Chairman. The Minister did not unequivocally accept that matters put forward by Paepae/Taumata 2 in that document were appropriate for its function.

Clearly, the Minister was not willing to discuss the question of setting the TAC and TACC in SNA1 with Paepae/Taumata 2 in February 1996. That unwillingness is to be considered in light of complications possibly ensuing from proceedings which by then issued, but is consistent. Paepae/Taumata 2 did not produce a separate

mandate from SNA1 iwi confirming special representation in respect of the particular SNA-1 customary fishing allowance to be determined. Likewise, Paepae/Taumata 2-despite pleading that with "reasonable notice" consultation would have provided the Minister "with relevant and important information regarding the extent of the Maori Customary take in the SNA1" - did not produce anything of that sort backing up such ability or possibility. That remains the case. In that light, the Minister could well have had doubts as to particular authority, and real ability, to assist.

In my view, there is a likelihood the Minister in fact considered Paepae/Taumata 2 were not representative of customary fishing interests in the SNA1 fishery at the time, beyond their admitted general representative capacity relating to preparation of customary regulations. Paepae/Taumata 2 have not proved the Minister considered, or on administrative law principles should have considered, that Paepae/Taumata 2 had the requisite representative character.

I turn to the Minister's alternative approach, which received some emphasis. It was argued that the 300 tonne allowance, and right to fish within the 2300 tonne recreational allowance, did not limit or interfere with Maori customary fishing rights. At heart, this can only be treated as an application for exercise of discretion as to relief. If consultation was due, and omitted, relief must follow; unless discretion points a different way, as with Hauraki.

One must always approach such submissions with caution. The usual principle is that where there has been a wrong, there should be a remedy. However, it is in the end a matter of the interests of justice, and within that the public interest. There is no point in imposing the dislocation and expense involved in setting aside a decision, and directed reconsideration, unless something appreciable is likely to be gained. A balancing exercise can be warranted.

The Minister has a fair case that nothing, in fact, would be gained. The 300 tonne and recreational right are a significant provision. On the state of information at present available, limited although it is, it is as likely to be as adequate for the 1996 year as any other sensible figure. If inadequate, there is room to spill over into

recreational fishing. It is not clearly the case that the totality will endanger the resource, if recreational fishing remains stable for the immediate future, as may well be the case. It is not shown that following a setting aside, and "reasonable notice" Paepae/Taumata 2 would in fact be able to provide "valuable" new information. It is claimed, but the claim is not backed up. The 1996 fishing year has only five months to run. By the time information was gathered (particularly on "reasonable notice"), consultation had taken place, and an informed reassessment made, there might well be little if anything of the fishing year left. A new decision for 1997/1998 would be imminent in any event. The 1996 year largely would be history. Overall, orders sought create a significant risk of major disruption and expense, for little if any private and public benefit. In that situation, the interests of justice can point to the recognition of a right, which will be significant for the future, but against present relief. I so find.

Accordingly, as a further matter (relevant if the previous factual finding as to Ministerial consideration of representative capacity is in error), I exercise discretion against relief.

I turn to the associated natural justice and s 27 points. They were only briefly argued. The Crown did not specifically dispute room for these concepts. I have some doubts whether s 28D(2) situations do raise such questions, but in the absence of argument to the contrary will so assume. If that be so, I exercise discretion against relief on both grounds for the reasons just outlined, which are equally applicable.

(4) & (5) Statutory duty to control recreational catch : mistake of fact measures could limit recreational catch.

I refer to previous discussion. To any extent there is such a duty, whether directly or indirectly through restraint on other actions, it has not been breached. The view is open that recreational catch will be static for the immediate future; and can be subjected to further management controls, after benefit of interim research, if needed in the future. For like reasons, there is no actionable mistake of fact.

(6) Failure to take into account relevant considerations:

(a) failure to recognise as a relevant consideration priority for Maori customary rights.

(b) failure to have regard as a relevant consideration to effects of setting the allowance too low.

I refer to previous discussions. There is no "priority" in a s 28D context, but only appropriate "weight"; weight which in fact was given.

I am satisfied officials, and ultimately the Minister, did have regard to implications of possibly setting the Maori customary take at a level which was too low. The 300 tonne allowance was considered by the Minister to be "conservative". While "arbitrary", its propriety was given thought. It was linked with a larger non commercial allowance of 2300 tonnes for recreational fish. It was considered much which was "customary" could also be "recreational", and any spill over of customary fishing would find room in recreational allowances. There is of course room for debate whether that is a proper approach. It is interesting in that connection that Paepae/Taumata 2 go no further than a claim that more accurate assessments "may" have resulted in greater allowance, and that probably puts matters at their highest. Clearly, however, it cannot be said that biomass implications were not even taken into account.

(c) failure to take kaitiakitanga into account as a relevant consideration. I am not persuaded, this was a relevant consideration in the s 28D(1)(a)(i) decision within CREEDNZ doctrine. Matters of regulation of Maori customary fishing, and within that of kaitiakitanga, were consigned by Parliament to development of regulations not yet completed. Sustainability certainly was relevant. That sufficiently covered the field meantime, without any implicit

necessity to take into account the additional complications of kaitiakitanga. However, the point may be academic. It is clear the Minister in fact was aware of, and gave weight to, general Treaty protected duties concerning the SNA1 Maori customary fishery. Within that, he inevitably gave some weight to kaitiakitanga in the sense of Maori concepts of rights and duties of guardianship and sustainability, and restraint where necessary. Labels matter less than substance. It is not demonstrated any greater regard would have resulted in different outcome. Again, Paepae/Taumata 2 plead no higher than a "may".

(7) (a) legitimate expectation customary rights would not be adversely affected by increased recreational catch post QMS.

Legitimate expectation does not simply mean "belief" or "hope". I refer to previous discussions. There is no sufficient foundation for actionable legitimate expectations, even under latest ***Unilever*** principles.

(b) legitimate expectation there would be no material decisions regarding management controls before agreement on customary fishing regulations.

There is room for a view the convening and emphasis upon the joint working party on customary regulations could create a legitimate expectation that its work would not be pre-empted abruptly by alternative outside action. I say no more than "room", as under s 10(b) the Minister could consult but then proceed to develop policy independently, so long as observing the principles of the Treaty. That was always a possibility, particularly in the event an impasse was reached. However, even on that favourable premise, I do not accept 1995 and 1996 decisions as to customary allowances in SNA1 were "material decisions" with adverse effect. They recognised a Treaty dimension (which hardly would have been cause for complaint), but

beyond that were "arbitrary". They decided nothing in principle. The Minister's affidavit shows he was looking toward assistance from the proposed regulations in the future, at least so far as information was involved. There was no reason why the Minister should refrain from exercising power under s 28D(1)(a)(i) until those regulations were completed. Perhaps delay could have been justified if it were no more than brief and finite, but certainly by 1996 that was not the prospect. Sustainability considerations must be catered for as they arise. Political and drafting arguments sometimes must take second place to the realities of nature.

XV.
DISCRETION

I would not grant relief in relation to the 1995 decision affecting the fishing year commencing 1 October 1995 in any event. The year is over. Under interim relief, commercial interests have obtained the full benefit of the 4900t TACC which this proceeding set out to maintain for that year. Relief, even declaratory, would be an irrelevancy.

XVI.
INTERIM ORDER : CONTINUATION

Counsel for the industry sought 14 days continued protection in the event of adverse decision. That is reasonable in principle, if appeal rights are to have meaning. However, it is a matter of grave concern that decisions made by a Minister best placed to decide whether a fishery is at risk can be thwarted in the way which has occurred for not just one fishing year, but for more than half the next one as well, simply by application of interim relief and the laws' delays. Progress by Applicants has not always been rapid. The snapper are not somehow protected by magic

meantime. Given that background, the question whether interim orders should extend further should be one for the Court of Appeal itself, which is the only entity able to decide when an appeal might be heard and judgment given, and whether in light of such further delay continued protection in these special conservation circumstances would be warranted.

The industry, and it follows all parties, will be given protection for a further 14 days from the date of this judgment as above. Beyond that period, any further applications for extended protection should be directly to the Court of Appeal.

XVII.
COSTS

Costs will be reserved. There are features of this proceeding which cause some concern, and a careful exploration may be necessary. Exchanged memoranda may be submitted after appeal time has expired, or after appeal outcome, as the case may be. A fixture may then be obtained.

XVIII.
DECISION

(1) All claims by all Applicants and Plaintiffs in the consolidated proceeding are dismissed, with judgment for all Respondents, and Defendants.

(2) Costs are reserved. Exchanged memoranda may be submitted after appeal time has expired, or after appeal outcome as the case may be, and a fixture obtained.

(3) The interim order relating to the 1996 fishing year decision continues in effect for 10 days from and after the date of this judgment as above, applications for

extended protection thereafter pending any appeal hearing to be made directly to the Court of Appeal.

.....
R A McGechan J