

option4 Update #125

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Compensation: The One That Got Away?

An issue left unresolved by the *kahawai* court proceedings is whether the Crown is liable to pay compensation for any reduction in the total allowable commercial catch (TACC) that benefits recreational fishers. This unresolved issue continues to hinder efforts by recreational fishers to achieve a fair and balanced approach to decisions under the Fisheries Act 1996.

In the *kahawai* proceedings the commercial fishers, represented by Sanford and Sealord Group, lodged a counterclaim seeking declarations that in the event a TACC for a fish stock is reduced for reasons other than ensuring sustainability, and the TACC is "reallocated" to non-commercial fishing interests (by an increase to the recreational and customary allowances) then the Crown has a legal obligation to pay compensation to quota owners for a reduction in the TACC.

Recreational fishers opposed this declaration. Unfortunately the issue was not argued in the High Court because the commercial fishers did not pursue this aspect of their counterclaim. Instead, both the commercial fishers sought to have the High Court endorse comments made by the Select Committee on the Fisheries Bill 1994. In reporting to Parliament on the compensation issue, the Select Committee said:

“... we agree that, when taking steps ...that significantly impact on the ability of commercial fishers to take their ACE for the purposes of ...competing claims between fishing sectors, *the possibility of compensation should ...not be excluded.*”

The High Court in *kahawai* declined to endorse the Select Committee's comments without full legal argument.

Crown protection from compensation

Section 309 Fisheries Act 1996 protects the Crown against any compensation claim for decisions made to ensure sustainability. However, section 309 Fisheries Act 1996 does not expressly protect the Crown against any compensation claim where the decision is not about ensuring sustainability. It is the total allowable catch (TAC) decisions that ensure sustainability. After the TAC is set, the TACC decisions then allocate the available fisheries stock between the commercial and non-commercial fishing sectors.

Nature of commercial fishing rights

Section 309 leaves open the question of whether reallocation of the TACC between the fishing sectors would, in law, give rise to Crown liability to the commercial fishing sector. The answer to this question depends on the nature of the fishing rights held by commercial fishers.

Broadly, the quota management system provides for quota shares that are transferable (i.e. sellable) and held in perpetuity to catch a specific proportion of the volume of fish permitted for commercial purposes in a defined quota management area. Quota therefore represents a proportional share of the total allowable commercial catch (TACC), which is set annually.

Once the TACC is set, this generates an annual catch entitlement (ACE). The ACE represents a right to catch a specific tonnage of the fish species during that fishing year. The ACE catching right may be bought or sold, but ACE expires at the end of each fishing year, usually 30th September.

It can be strongly argued that any increase for recreational interests (not proportional to any change for the commercial sector) does not amount to any "taking" of quota, or of ACE. This is because the nature of

commercial fishing rights under the quota management system are expressly subject to variation, including variation as may favour the recreational fishing sector.

If there is a reduction in quota and in ACE, and that reduction is otherwise lawfully made, it can be argued this does not affect any "property right" as the commercial fishers claim. In other words, it is the nature of the commercial fishers property rights that they are subject to variation.

By leaving the door ajar to potential compensation claims for reallocation of the TACC, the current drafting of section 309 Fisheries Act 1996 is highly unsatisfactory.

Advice ‘screwing the scrum’

So long as the Crown is not expressly protected for claims of this type, and the Courts have not ruled on the issue, commercial fishers can continue to threaten claims of compensation against the Crown.

The threat of compensation claims by the commercial fishing industry has been highly effective in maintaining the Ministry of Fisheries’ "catch-history" policy over the years.

Any risk of potential Crown liability provides a ready rationale for the Ministry to advise the Minister that there is a treasury risk, even though the prospects of success for such a claim appear to be remote. For example, the Ministry advice to the Minister for the *kahawai* decisions made numerous references to the risks of varying the TACC on a non-catch-history basis, and how this may be subject to compensation claims by commercial fishers against the Crown. This advice screws the scrum since the commercial sector could be the only beneficiary of any compensation - if any at all.

Moreover, a consequence of not clarifying the issue is a possible continuation of MFish’s ‘preferred policy’ of applying proportional reductions and justifying them on the grounds of taking a precautionary approach for sustainability reasons, particularly when there is limited information and high uncertainty. The application of proportional reductions was one of the catalysts for the Kahawai Legal Challenge.

Possible resolution

How can this issue be resolved? There are two ways. Either a court declaration could be sought, or section 309 Fisheries Act could be amended so as to shut the door to these threats by the commercial fishing sector.

The commercial fishing industry presents a powerful lobby group against legislative change on the issue. Since the Ministry of Fisheries may not have an interest in bringing proceedings, any court declaration may have to be brought by non-commercial fishing interests.

Unless any group was prepared to pursue declaration proceedings, it seems unlikely this vexed issue will be resolved anytime soon.