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Compensation – what are the principles?

Well-meaning initiatives to achieve 'more fish in the water' are being stifled by the uncertainty about whether compensation is payable to fishing quota owners if the Minister of Fisheries reduces commercial catch levels to enable higher allowances for the public.

Current legislation leaves the determination of this vexed question to the courts. But, to date, no case has come before the courts to clearly establish the principles behind any notion of compensation. It is imperative these principles are clarified because without such clarity it is unlikely we will see healthy and abundant inshore fisheries in our lifetime.

Interestingly, the fishing industry's original counterclaim to the High Court during the Kahawai Legal Challenge argued compensation, but unbeknownst to the recreational parties, both the Crown and industry agreed to not pursue further argument just prior to stepping into Court.

The lack of clear principles has had, and will continue to have, a major influence on Ministerial decisions that determine the levels of both the overall total allowable catch (TAC) and the total allowable commercial catch (TACC).

This is because quota owner lobbyists have stridently advocated that if commercial catch levels are reduced to enable increased non-commercial allowances then a claim will be made against the Crown for any consequential financial losses. Any such decision has been tagged as a "reallocation" of catch. (Notwithstanding that individual daily bag limits are unlikely to change.)

Despite being cast as a court of principle the Supreme Court, when making its decision in the Kahawai proceedings, failed to deliver to the fisheries Minister any solid principles to guide decisions on 'allocation' matters, including compensation.

Instead, it kicked for touch by suggesting the Minister has wide discretionary powers bounded only by reasonableness. In other words, if a party does not believe a decision is "reasonable" then recourse is through judicial review – back to court again.

This scenario is hardly reasonable given the hefty investment required by cash-strapped non-commercial fishing representatives.

The heart of the matter is:

- ⇒ What principles apply if the TACC is reduced to allow for increased non-commercial allowances?
- ⇒ Should any TACC reductions made for this purpose trigger payments to TACC shareholders?
- ⇒ Are the property rights of these TACC shareholders so strong and explicit that a public liability arises when the level of public catch requires commercial catch to be reduced?

Mismanagement of a national resource
Our fish stocks are one of the last wild food sources available to the community, and there is a clear public expectation of accessibility to these resources.

To achieve this accessibility our fisheries need to be managed sustainably, using best practice, to ensure abundance and availability of fish for present and future generations.

Undoubtedly our fisheries are a national resource that ought to be subject to public control.

However, through poor implementation of an experimental quota management system commercial fishers, especially the large corporates, effectively have a stranglehold on our coastal fisheries. They are able to exert considerable influence over the way the Minister and Ministry of Fisheries manage our fish stocks. Their impact is particularly evident in the fisheries where too much quota has been allocated for too few fish, and in inshore fisheries where the allowances are set at a level well below historic and current catch levels.

Is the Crown liable for compensation?
When the QMS was introduced in 1986 over $40 million was paid by the government, on behalf of the public, to commercial fishers to reduce their fishing effort in inshore waters. Successful lobbying by commercial interests seems to have convinced fisheries managers that Crown liability still exists today.

There have been several attempts by MFish to avoid the potential compensation liability of allowing for greater recreational catch. Versions of the same theme have emerged in various Ministry proposals, including Soundings, Shared Fisheries and more recently Vision 2030.

The success of these proposed reforms are dependent on the principle of capping (reducing) recreational catch and only allowing for increases by purchasing more quota on a willing buyer/willing seller basis.

Willing buyer/willing seller
At first blush the principle of willing buyer/willing seller may have a ring of reasonableness to it, but that is a convenient illusion.

The application of such a principle is that public catch can only increase with the blessing of commercial quota owners, making both the Minister and public dependent on purchasing quota from a company with a no-sell policy.

This very principle empowers quota owners to determine the success of recreational fishing!

This is an abhorrent outcome because the responsibility of sustainably managing fisheries and enabling people to provide for their social and cultural well-being through fishing rests solely with the Minister of Fisheries.

The principle of willing buyer/willing seller is invalid and needs to be rejected.

Limited liability
Threats for compensation due to any “reallocation” of the total allowable catch remain largely unsubstantiated. The government’s liability, if any exists, remains limited. It is certainly not as hefty as some are making it out to be; but given the incessant demands for compensation it would be in the interests of all involved, and the sustainability of our fisheries, to determine what

principles underpin the concept of compensation and under what circumstances, if any, that liability exists.

In the Supreme Court the Chief Justice asked the Solicitor General, when mulling over the matter of allowing for recreational catch, if the notion of compensation was used by quota owners "in terrorum," that is, used in a threatening or intimidating way? His evasive reply, *"I wont say yes and I wont say no"(page 110),* confirmed she had just hit the bulls-eye.

Information principles

Section 10 of the Fisheries Act 1996 sets out the information principles that the Minister must apply when making fisheries management decisions. Essentially, Ministerial decisions need to be based on the "best available information" and the Minister must act cautiously if there is uncertainty, inadequacies or the information is unreliable.

Given the legislation, the obvious need to increase allowances to reflect public interest in the fisheries, and potential claims from TACC shareholders, it would be reasonable to assume that the Crown would be obliged to clarify the extent of liability for compensation when the Minister is making decisions about where to set the total allowable commercial catch.

MFish advise that their latest proposal, Vision 2030, is all about providing **certainty,** mainly for quota owners to help them make decisions about investment and activities. The least that tangata whenua and stakeholders should expect from this high level "strategic direction and goal setting" work that the Ministry is investing so heavily in, is the resolution of the most fundamental and long standing **uncertainty** surrounding compensation. But the silence is deafening.

While the notion, and threats, of compensation for quota owners lives on without any guiding principles the Minister cannot claim to be using best information when making management decisions for our fisheries.

Worse still, the ongoing absence of any compensation principles to guide decision-making makes a mockery of our much-vaunted 'world leading' quota management system, fisheries managers and the Fisheries Act.