**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA163/07**
**[2008] NZCA 160**

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| BETWEEN | SANFORD LIMITED, SEALORD GROUP LIMITED AND PELAGIC AND TUNA NEW ZEALAND LIMITED<br>Appellants |
| AND | THE NEW ZEALAND RECREATIONAL FISHING COUNCIL INC, AND NEW ZEALAND BIG GAME FISHING COUNCIL INC<br>First Respondents |
| AND | MINISTER OF FISHERIES<br>Second Respondent |
| AND | THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES<br>Third Respondent |

Hearing: 26 and 27 February 2008

Court: William Young P, O'Regan and Arnold JJ

Counsel: B A Scott and G T Carter for Appellants
A R Galbraith QC and S J Ryan for First Respondents
A E L Ivory, P A McCarthy and S J Ritchie for Second and Third Respondents

Judgment: 11 June 2008 at 11.30 am

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**JUDGMENT OF THE COURT**

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**A The appeal and the cross appeal are both allowed in part.**

**B The declaration made in the High Court is amended so that it now reads as follows:**

**A declaration is made that the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister:**

**(a) failed to have particular regard to ss 7 and 8 of the Hauraki Gulf Marine Park Act 2000 when fixing the Total Allowable Commercial Catch for Quota Management Area KAH1;**

**(b) failed without giving any or proper reasons to consider advice from the Minister of Fisheries to review bag catch limits for recreational fishers.**

**C We quash the direction made by the High Court that the Minister reconsider his 2005 decisions to take account of the High Court declaration. We substitute a direction that when next setting the Total Allowable Catch and the Total Allowable Commercial Catch for kahawai, the Minister must take account of the declaration in B above.**

**D We make no award of costs.**

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## REASONS OF THE COURT

(Given by O'Regan J)

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## Quota management of the kahawai fishery

[1] This appeal arises out of the decisions of the Minister of Fisheries in both 2004 and 2005 setting the Total Allowable Catch (TAC) and the Total Allowable Commercial Catch (TACC) for the kahawai species. Kahawai is a shared fishery, that is both recreational fishers and commercial fishers seek to maximise their access to the fishery, and are effectively in competition with each other for such access.

[2] The present case began as an application by the first respondents, representing recreational fishers, for judicial review of the Minister's decisions setting the TAC and TACC in both 2004 and 2005. The appellants, representing commercial fishers, counter-claimed in the High Court, also seeking judicial review of aspects of the Minister's decision.

[3] The setting of both TACs and TACCs is undertaken on a regional basis, and in the case of kahawai there are six "quota management areas" (QMAs). These are known as KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10. While a number of the grounds on which judicial review was sought challenged the TAC and TACC for all QMAs, there was particular focus in relation to one such area, KAH1, because it includes the Hauraki Gulf. That is an area of particular interest to recreational fishers and because there is a marine park in the area which creates particular legal requirements under the Hauraki Gulf Marine Park Act 2000 (HGMPA).

*High Court case*

[4] The case came before Harrison J in the High Court. He found that the Minister had erred in some respects in setting the TACCs for all QMAs in both 2004 and 2005. He also found that the Minister had failed to take proper account of relevant provisions of the HGMPA when fixing the TAC for KAH1. In addition, the Judge found that the Minister had failed to consider advice from the Ministry of Fisheries (MFish) to review bag catch limits for recreational fishers. He declined to quash the Minister's decisions, but granted declaratory relief (see below) and directed the Minister to reconsider or review his 2005 decisions forthwith to take account of the declarations. He rejected numerous other criticisms of the Minister's decisions made by both the recreational fishers and the commercial fishers. The Judge's decision is *New Zealand Recreational Fishing Council Inc v Minister of Fisheries* HC AK CIV 2005-404-4495 21 March 2007.

[5] The declaration granted by the Judge was in this form:

> A declaration that the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister:

(a) fixed the TACCs for kahawai for all KAHs without having proper regard to the social, economic and cultural wellbeing of the people;

(b) failed to take any or proper account of ss 7 and 8 Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH1;

(c) failed without giving any or proper reasons to consider advice from MFish to review bag catch limits for recreational fishers.

[6] Subsequently, in a decision dated 11 July 2007, Harrison J ordered that his judgment be stayed pending determination of the present appeal.

*Minister has not appealed*

[7] An unusual feature of this appeal is that the Minister, who was the subject of the declarations and orders made in the High Court, did not appeal to this Court. Rather, the appeal is brought by the commercial fishers and, although that appeal seeks to uphold the decisions of the Minister relating to the TACC (and the TAC for KAH1) which were found by the High Court to be in error, the Minister himself accepts the High Court judgment and acknowledges certain errors identified by the High Court Judge in the 2004 and 2005 decisions. Neither the Minister nor any other party challenges the finding by the Judge with regard to the Minister's decision relating to bag limits (para (c) of the declaration). The Minister does, however, take issue with some aspects of the Judge's reasoning on the TACC issues and those relating to the HGMPA.

*Commercial fishers' grounds of appeal*

[8] The commercial fishers have appealed against the following aspects of the High Court judgment:

(a) The finding that the Minister set TACCs for all KAH areas without having regard to the social economic, and cultural wellbeing of the people;

(b) The finding that the Minister set the TAC for KAH1 without proper consideration of the HGMPA;

(c) The refusal to grant a declaration that the Minister had failed to implement measures to monitor recreational catch of kahawai.

[9] A number of other grounds of appeal were not pursued by the commercial fishers, after they reached agreement with MFish that the Minister will reconsider all aspects of the kahawai TAC, TACC and recreational fishing limits in the light of the High Court decision and that of this Court.

*Recreational fishers' cross appeal*

[10] The recreational fishers' cross appeal concerns the Judge's finding that the HGMPA did not apply to the Minister's TACC decision for KAH1.

[11] The positions of the commercial fishers and recreational fishers respectively on the matters at issue in this appeal bear out the comment made by the High Court Judge in the introduction to his decision that the Minister "walks a tightrope between two powerful interest groups" whenever he or she fixes the TAC and TACC for any shared fishery. The High Court Judge was critical of the conduct of the High Court case because he was presented with reams of material on numerous aspects of the decisions, including some minor factual matters, as if the case were an appeal. We agree with him that that was not appropriate given the limited scope of judicial review proceedings.

**Issues**

[12] The disposition of the appeal and the cross appeal requires us to address the following issues:

(a) Whether the Minister's TACC decisions for all KAH areas in 2004 and 2005 involved proper application of the statutory criteria;

(b) Whether the Minister correctly applied the requirements of the HGMPA in making the TAC and TACC decisions for KAH1 in 2004 and 2005;

(c) Whether the Minister failed to implement reasonable measures to monitor and assess the recreational catch in both 2004 and 2005 and whether the Court should grant a declaration requiring him to do so.

[13] The close relationship between the TAC decision and the TACC decision, and the criticisms of aspects of the Judge's decision upholding the TAC decision make it necessary for us to consider the TAC decisions for both 2004 and 2005, even though those decisions are not challenged by any party.

[14] Before we address the above issues, we will briefly explain the statutory context and the factual background to the Minister's decisions.

**Statutory background**

[15] Kahawai is a species of fish which is subject to the quota management system established under Part 4 of the Fisheries Act 1996. The quota management system has been described in numerous decisions of the High Court and this Court, and we do not propose to set out the statutory framework in detail. For species subject to the quota management system, the Fisheries Act envisages that the Minister will set the TAC for that species in each QMA, and, having done so, will then set the TACC for that QMA. When setting the TACC, the Minister is required to first allow for Māori customary non-commercial fishing interests and recreational interests, and other mortality to the species of the stock caused by fishing. Essentially the difference between the total allowances made for those factors and the TAC is the TACC.

[16] Quota held by commercial fishers is a form of property right entitling the fisher to catch the relevant species in a particular fishing year in a particular QMA. Quota are not expressed in absolute amounts, but as proportions of the TACC for the relevant QMA. For this reason, any reduction in the TACC diminishes commensurately each quota holder's property right. The interests of commercial fishers are to keep the TACC at the highest possible level and, as the TACC is a proportion of the TAC, to also keep the TAC at the highest level, though fishers taking a long term view presumably accept that the TAC and TACC should not be so high as to threaten the sustainability of the fishery.

[17] On the other hand, it is in the interests of recreational fishers to keep the TACC as low as possible so more of the TAC is accessible to them. Because the recreational catch for kahawai is currently not monitored, the interests of recreational kahawai fishers are also served by a lower TAC. This is because the TACC is a proportion of the TAC and if the TAC is low, then the TACC will itself be lower (unless the reduction in the TAC is not shared commensurately by recreational customary and commercial fishers, and that has not happened to date). Their focus on the recreational aspect of fishing means that they have an interest in large fish numbers and more mature (and therefore larger) fish in the inshore fishery, which is made more likely by a reduced catch by commercial fishers. It is therefore in their interests that a fishery is managed at a level of stock well above that which can produce the maximum sustainable yield (see [23] below).

[18] The purpose of the Fisheries Act is set out in s 8, which provides:

> **8 Purpose**
> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
> (2) In this Act—
> **Ensuring sustainability means**—
> (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
> (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:
> **Utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing.

[19] The notable feature of this provision is the tension between the provision for utilisation of fishery resources and the ensuring of sustainability which is inherent in s 8(1). That can be contrasted with the more single minded purpose provision in s 5 of the Resource Management Act 1991, where the purpose is stated to be the promotion of the sustainable management of natural and physical resources. The reference to enabling people to provide for their social, economic, and cultural wellbeing echoes a similar form of words used in the definition of "sustainable management" in s 5(2) of the Resource Management Act. A similar form of words is used in s 5(b) of the Hazardous Substances and New Organisms Act 1996, which sets out the principles relevant to the purpose of that Act. Other similar provisions appear in the Local Government Act 2002 (ss 3(d) and 14), the Civil Defence

Emergency Management Act 2002 (s 3) and the Energy Efficiency and Conservation Act 2000 (s 6).

[20] Section 8 is followed by two provisions dealing with principles to be applied by those exercising powers under the Fisheries Act. Section 9 deals with environmental principles, and s 10 with information principles. For the purposes of this appeal, the most important of these is s 10(a), which requires decision-makers (the Minister in this case) to take into account the principle that "decisions should be based on the best available information".

[21] Section 13 provides for the setting of the TAC for a species in respect of a particular QMA. Of particular importance to this appeal are sub-sections (1) – (3) of s 13, which provide:

> **13 Total allowable catch**
>
> (1) Subject to this section, the Minister shall, by notice in the *Gazette*, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.
>
> (2) The Minister shall set a total allowable catch that—
>
> (a) Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
>
> (b) Enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered—
>
> (i) In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and
>
> (ii) Within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock; or
>
> (c) Enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.
>
> (3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) or paragraph (c) of subsection (2) of this section, the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.

[22] Section 13 appears in Part 3 of the Fisheries Act, which is entitled "Sustainability measures".

[23] The concept of maximum sustainable yield is an important component of the Fisheries Act. It is defined in s 2 as follows:

> **Maximum sustainable yield** in relation to any stock, means the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.

[24] The term "maximum sustainable yield" is often abbreviated to "MSY". The MSY for a species is measured by reference to the biomass that can produce the MSY: the term $B_{MSY}$ is used to represent that concept. This equates to the concept referred to in s 13(2). Calculation of $B_{MSY}$ requires an assessment of the current size of the stock of the species and its capacity to sustain itself, given the proposed level of the TAC.

[25] New Zealand's international treaty obligations, particularly arts 61 and 62 of the United Nations Convention on the Law of the Sea, drive the focus of the Fisheries Act on exploitation of fishery stocks within sustainability limits. This is reflected in s 5 of the Fisheries Act. Counsel for the commercial fishers told us that, in cases of fisheries which have not been subject to extensive fishing, reaching $B_{MSY}$ may involve an initial substantial reduction in the volume of the stock by heavy fishing until the equilibrium inherent in the concept of maximum sustainable yield is reached.

[26] Section 20, which appears in Part 4 (entitled "Quota management system") provides for the setting of the TACC for a particular species. Section 21 specifies the matters to be taken into account in setting the TACC. Section 21(1) provides:

> **21 Matters to be taken into account in setting or varying any total allowable commercial catch**
>
> (1) In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for—
>
> (a) The following non-commercial fishing interests in that stock, namely-
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> (i) Maori customary non-commercial fishing interests; and
>
> (ii) Recreational interests; and

(b) All other mortality to that stock caused by fishing.

[27] Section 21(5) requires that, when allowing for recreational interests under s 21(1), the Minister must take into account any regulations prohibiting or restricting fishing in any area.

**Factual background to the setting of the TAC and TACC for kahawai**

[28] The history is well summarised in the judgment under appeal at [8] – [13]. Reference should be made to that judgment for the detail.

[29] The Minister made a determination to bring kahawai within the quota management system (under s 17(b) of the Fisheries Act) in 2003, and the required notice was given under s 18 on 1 October 2003: The Fisheries (Declaration of New Stocks Subject to the Quota Management System) Notice (No.2) 2003. That notice also specified the six QMAs for kahawai.

[30] Section 12 of the Fisheries Act requires the Minister to consult interested parties before setting the TAC for a species. A similar obligation is imposed by s 21(2) in relation to the setting of the TACC. MFish undertook an extensive process of consultation on the Minister's behalf in both 2004 and 2005. In both 2004 and 2005 MFish prepared an initial position paper (IPP) which was the basis of consultation and, following consultation issued a final advice paper (FAP). The Minister's TAC and TACC decisions in both 2004 and 2005 followed his receipt of MFish's advice in the FAP.

[31] In the course of argument in this Court there was extensive reference by counsel to the IPP and FAP for both the 2004 and 2005 decisions, because much of the focus of the argument was on the advice given to the Minister by MFish, and its impact on the decision which the Minister ultimately made. In each of 2004 and 2005 the Minister also issued a formal letter of decision setting out the reasons for his decision as required by s 12(2) of the Fisheries Act (in relation to the TAC decision) and s 21(3) (in the relation to the TACC decision).

[32] The Minister who made the 2004 decisions was Hon David Benson-Pope. The Minister who made the 2005 decisions was Hon Jim Anderton. We will refer to "the Minister" in this judgment without identifying the holder of the office at a particular time. In both years, the Minister reduced the TAC from the level of TAC then in force. Consequentially, the amount of kahawai which each quota holder could catch was reduced in each year.

[33] We now turn to the issues identified at [12] above.

**Did the Minister's TACC decisions for all KAH areas in 2004 and 2005 involve the proper application of the statutory criteria?**

[34] As noted earlier, the High Court Judge found that the Minister's decisions setting the TACC for all KAH areas in 2004 and 2005 were unlawful, and made a declaration to that effect. However, a similar challenge to the TAC decisions in both years failed. Although there was no challenge to the Judge's finding that the TAC decision in both years was lawful, that decision still featured in the arguments for all parties because of the contrast in the Judge's approach to that aspect of the case and his approach to the TACC decisions.

*High Court approach*

[35] The Judge began his consideration of the Minister's decisions by differentiating the TAC decision from the TACC decision. He said at [43] that different considerations applied to each: the TAC decision is a sustainability measure, while the TACC decision is a mechanism for allocating a resource between competing interests, where utilisation principles had a direct bearing.

[36] The recreational fishers' challenge to the TAC decision in the High Court was founded on their argument that the Minister's decision was tainted by his reliance on MFish's advice which used catch history data as the primary criterion, to the exclusion of people's "social, economic and cultural wellbeing". Harrison J said that social, economic and cultural wellbeing was not a mandatory statutory guideline for the fixing of a sustainability measure, and the Minister was obliged only to have

regard to such social, cultural and economic factors which he considered relevant, and then only in structuring the return of the kahawai stock to maximum sustainable yield, not in setting a level of the TAC itself. He found that the Minister had satisfied the obligation to have regard to such social, cultural and economic factors as he considered relevant.

[37] The Judge's analysis of the TACC decision drew on his earlier finding that the TACC was a utilisation, rather than a sustainability measure (at [55]). He considered that this meant that, when the Minister considered what allowance to make for recreational interests, the criterion set out in s 8(2) of enabling people to provide for their social, economic and cultural wellbeing was a mandatory consideration. He said that the allowance for recreational interest reflected in the level of TACC should appropriately recognise the extent to which kahawai provides for the wellbeing of recreational interests, which he said meant the state of people's health or physical wellbeing. He said people provide for their wellbeing either by catching kahawai or by purchasing it from retail outlets.

[38] Later the Judge considered the application of s 8(2) in relation to commercial fishers. He noted that commercial fishers provided for the wellbeing of the New Zealanders who do not fish recreationally by supplying enough fish to satisfy consumer demand. He also said at [57] that the utilisation of a fisheries resource provides for the economic wellbeing of commercial fishers whose livelihood depends on income from that activity. However, he said that that step could not be undertaken in a vacuum based solely on the stock's financial value, whether for commercial or recreational users: allowances must be made for other values. He said that this requires a qualitative or non-quantitative assessment of the type suited to the Minister's exercise of judgement: at [58].

[39] The Judge identified some of these qualitative factors at [59] as follows:

(a) Recreational fishers' progressive loss of access to other, more highly prized, financial species, especially snapper. He noted that kahawai fishers are said to fish frequently and for eating purposes from jetties or platforms rather than boats, and to have lower than average

expenditure on fishing. They were less able to afford to fish for other species in deeper waters;

(b) Kahawai's minimal value to people other than recreational fishers, as reflected in its small retail market. The evidence was that the commercial value of kahawai catch was relatively low (much of the kahawai catch is caught as a by-catch of other species) and much of the catch is exported for use as bait or pet food;

(c) The recreational fishers common law rights to fish;

(d) Patterns and levels of recreational catch history. However, he said this last factor, which had significant influence on the Minister's decision, was not decisive.

[40] The Judge then undertook a review of the advice given by MFish in the 2004 IPP, which he said involved an evaluation of social and cultural wellbeing as an exclusively economic exercise, involving solely quantitative or economic measures as the index for assessing the requisite social or cultural value of kahawai to recreational fishers. He said this error was compounded in the 2004 FAP. He noted that the advice given by MFish did not refer to the Minister's statutory obligation to take account of the utilisation principles in s 8(2). He said that MFish recognised that the s 8(2) utility or wellbeing concept applied to the allocative process and favoured recreational fishers, but instead of recommending its adoption (which he said was mandatory), it preferred its IPP method of estimating utility value. Ultimately the utility value approach was rejected for lack of certainty and instead MFish advocated its policy preference for an approach based on catch history, which the Judge said could not take precedence over a mandatory requirement to adopt the utilisation approach: at [67].

[41] The Judge's conclusions are summarised at [72] – [74] of his decision as follows:

> [72] In summary, when setting a TACC for kahawai, the Minister must have regard first to the TAC and then allow for non-commercial fishing

> interests in the stock. This is an exercise in judgment, to be carried out by weighing up and balancing the recreational fishers' right to provide for their social, economic and cultural wellbeing by fishing for kahawai against the extent, if any, to which the people's, in the sense of the wider general public, wellbeing is served by commercial interests in satisfying consumer demand. Also relevant, in this latter respect, is the extent to which commercial fishing for kahawai provides for the wellbeing of employees; but this factor will assume little significance if the volumes of the resource at issue are unlikely to imperil employment.
>
> [73] Adoption of financial modelling to assess the qualitative factors of cultural and social wellbeing, such as the hypothetical marginal willingness of a recreational fisher to pay for the stock, might provide assistance as a reference point but it is neither exclusive nor determinative. An analysis of catch history falls into the same category, especially where there is evidence that current levels of use do not satisfy need. Self-evidently, the characteristic availability and value of the particular species will be very material; the approach to setting the TACCs and allowances for kahawai will differ from other species. There are no truly reliable objective criteria. Whether the results of the Minister's review are the same as, similar to or materially different from the current TACCs and allowances will depend upon the Minister's subjective evaluation of all relevant factors.
>
> [74] The Minister's 2004 and 2005 letters were silent on the utilisation requirement to allow for the recreational fishers' interests by reference to the right to provide for their wellbeing when allowing for their interests in the TACs, and I must infer from his wholesale adoption of MFish's advice and the terms of his decisions that he did not separately consider this issue. In my judgment the Minister, acting on MFish advice, erred materially when fixing the TACCs for 2004 and 2005.

[42] The High Court did not quash the 2005 TACC decision, even though it found the Minister had erred in certain respects. The 2004 decisions are no longer of any practical significance. Because the Minister and the other parties are agreed that there will be a revisiting of the 2005 decisions after the completion of this litigation, allowing the Minster to take account of the High Court decision and this decision, it is not necessary for us to undertake a detailed factual analysis of the basis on which the 2005 decision was reached, in order to determine whether it ought to be quashed. For this reason we do not propose to undertake a detailed evaluation of the factual basis for the decision, as was necessary in the High Court. Rather we will deal with the issues at a level of principle, which will hopefully provide guidance to the Minister and MFish in relation to the 2008 decisions, and provide a framework within which submissions can be made by the recreational fishers and commercial fishers respectively in the course of the consultation process leading up to the 2008 decisions.

*Commercial fishers' submissions*

[43] Counsel for the commercial fishers, Mr Scott, challenged the High Court finding in relation to the TACC decision on the following three bases:

(a) He argued that the Judge's finding that the TAC decision was valid but the TACC decision was unlawful was inherently inconsistent. In that respect he challenged the High Court Judge's view that the TAC was a sustainability decision whereas the TACC was a utilisation decision;

(b) He argued that the Judge placed too much emphasis on s 8 in relation to the TACC decision. He submitted that focus should have been on s 21(1);

(c) He also challenged the Judge's finding that the Minister had not, in fact, had regard to qualitative factors affecting recreational interests in relation to the TACC.

[44] We will consider these arguments in the above order.

*Is the TAC decision inconsistent?*

[45] At the heart of this argument is the Judge's separation of s 8 into two discrete limbs, one that concerned sustainability and the other utilisation, and his further characterisation of the TAC decision as a sustainability decision and the TACC decision as invoking utilisation principles: at [43]. This appears to have led the Judge to conclude that, when making the TAC decision, the Minister had to have regard to the sustainability purpose of s 8(2). As it is the utilisation purpose in s 8(2) that brings into play the need to provide for social, economic and cultural wellbeing of people, that factor was not relevant to the TAC decision. The utilisation purpose in s 8(2) was said to be relevant only to the extent that it could be shown that the TAC decision frustrated or prevented compliance with the complementary objective of providing for and allocating current utilisation of the stock: at [46].

[46] On the other hand, the Judge considered that the TACC decision, as a utilisation decision, did require a focus on the utilisation purpose in s 8(2), and therefore the social, economic and cultural wellbeing factors came into play and were, in fact, mandatory relevant considerations. Although he accepted that there was a relationship between the two purposes, as without sustainability today there could not be utilisation in the future, the Judge viewed the TAC and TACC decisions as giving effect to different purposes and therefore importing different considerations from s 8.

[47] We will deal with the extent to which s 8 needs to be brought to bear in any decision under the Fisheries Act later. For present purposes all we need to say is that we do not agree with the Judge that the TAC and TACC decisions can be categorised as sustainability and utilisation decisions respectively. Nor do we agree that the s 8 purpose can be subdivided in this way: s 8(1) describes the purpose as involving an inherent balancing exercise between sustainability and utilisation, and we do not see that as being subdivisable.

[48] We agree with Mr Scott that the TAC decision has utilisation as well as sustainability aspects to it. In effect, the TAC determines the total level of harvest which will be permissible, and that in turn affects the issue as to whether the stock will be managed above or below $B_{MSY}$ and, if above or below, by how much. We do not think it assists the analysis to subdivide these two factors the way that the High Court Judge appears to have done.

[49] In general terms, therefore, we accept there is some inconsistency in the Judge's approach to the TAC and TACC decisions respectively. The recreational fishers did not appeal against the Judge's finding in relation to the TAC decision, so that inconsistency carries over to their position as well. However, because of the view we take about the general application of s 8, it is not necessary for us to engage further with this argument.

*What is the relationship between ss 8 and 21 in relation to the TACC decision?*

[50] The Judge's starting point when analysing the TAC decision was s 13. As ss 2 and 11 defines a TAC as a "sustainability measure", the Judge saw the TAC decision as requiring consideration of the sustainability purpose as defined in s 8(2) rather than the utilisation purpose. However despite the utilisation purpose in s 8(2) not being engaged, social, economic and cultural factors were relevant to the TAC decision because of the potential application of s 13(3), which expressly refers to those factors. Section 13(3) is limited in scope. It comes into play only where the Minister is considering the way in which and the rate at which a stock is moved towards or above $B_{MSY}$. It requires only that the Minister consider such of those factors as he or she considers relevant. And there is no reference to the wellbeing of people as there is in s 8(2). The Judge saw these as creating significant distinctions between the TAC decision and the TACC decision. We do not consider that they do.

[51] When setting the TACC under s 21 the Minister is required to "make allowance" for recreational and customary interests. The criticism made of the High Court Judge's approach by the commercial fishers is that the Judge effectively allowed s 8 to trump s 21, when it is the latter, not the former, which is the provision which has primary relevance to the TACC decision.

[52] This argument requires us to consider the role of s 8 in the context of decisions under the Fisheries Act, which, at a more generic level, leads to a consideration of the role of purpose provisions in legislation in relation to specific decisions made under specific provisions of the legislation.

[53] The precise role occupied by s 8 in the scheme of the Fisheries Act has not been the subject of any detailed consideration in earlier decisions of this Court. In *Kellian v Minister of Fisheries* CA150/02 26 September 2002, the Court commented at [38] that the Fisheries Act provides a range of ways of achieving the purpose set out in s 8. That appears to envisage that s 8 sets out a broad purpose which the Fisheries Act, and the mechanisms within it is designed to achieve.

[54] Section 8 was described by Richardson in "Sustainability in the Fisheries Act 1996: Protect in the Interests of Prosperity?" (1998) 2 (11) Resource Management Bulletin 125 as:

> Essentially a statement on government policy, to guide decision-makers and assist Courts in interpreting the detail of the Act.

That accords with our understanding of the provision.

[55] The statutory history also supports this view. Initially the purpose provision (cl 6 of the Bill as introduced) defined "sustainable utilisation", rather than defining "ensuring sustainability" and "utilisation" separately. This was changed as a result of a recommendation from the Primary Production Select Committee apparently to deal with a concern expressed by recreational fishers that the term "utilisation" would create a bias towards commercial fishing activities. The Committee also introduced into what is now s 13(3) the requirement for the Minister to have regard to relevant social, cultural and economic factors when considering the way in which and the rate at which a stock is moved towards or above a level that can produce maximum sustainable yield (in the context of a TAC decision). It is hard to imagine that the Committee would have seen this as a necessary measure if it had envisaged that the reference to those factors in s 8(2) was a mandatory consideration in any event.

[56] The Committee also changed the provision which has now become s 21, which is described as specifying "the matters that the Minister must have regard to and allow for before setting or varying the TACC for any stock". The wording of the Bill as introduced required that the Minister "have regard to" non-commercial interests, and the Committee changed this to "allow for" to make it clear that non-commercial interests had priority.

[57] In our view the Judge overstated the significance of s 8(2) in the context of a TACC decision. The primary provision guiding the Minister's TACC decision-making is s 21, which requires the Minister to allow for recreational and customary interests. The section does not provide further guidance, but the use of the term "allow for" does require that the Minister deal with the demands of recreation and

customary fishers before determining the TACC. That does not mandate any particular outcome (it can be imagined that for some species the Minister would determine that there should be little or no allowance for those interests, while for others the allowance may be all or a substantial proportion of the TAC). However, it does make it clear that the Minister must direct his or her mind to the extent of the allowance which should be made for the non-commercial interests before setting the TACC. He or she cannot determine what the commercial interests are and then simply say there is nothing left for non-commercial interests and therefore it is not necessary to consider those interests.

[58] At the end of the day, the decision which the Minister makes must, to use the words of Keith J in *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 (CA), "bear in mind and conform with the purposes of the legislation". That, in our view, is a different thing from saying that the specific provisions of s 8(2) are mandatory relevant considerations in relation to individual decisions. A similarly global approach to purpose was taken in the context of the Resource Management Act in *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 at [25] (CA).

[59] When the Minister does apply his or her mind to the issue of whether a proposed decision conforms with the purpose of the Fisheries Act, the purpose to which the Minister must have regard is the utilisation of fisheries resources while ensuring sustainability i.e. that expressed in s 8(1). The definitions in s 8(2) of course guide the application of s 8(1), but the reference in the definition of utilisation to enabling people to provide for their social, economic and cultural wellbeing is not expressed as a purpose of the Fisheries Act itself, but rather as an object of the conserving, using, enhancing and developing of fisheries resources. If Parliament had wished to require that the Minister, in the course of making allowance for recreational fishers, had to direct his or her mind to their social, economic and cultural wellbeing, to the exclusion of the social, economic and cultural wellbeing of any other sector of society, it needed to say so explicitly.

[60] Mr Scott argued that the Judge had wrongly limited the scope of the reference in the definition of "utilisation" in s 8(2) to enabling people to provide for their

social, economic and cultural wellbeing. He said the Judge had effectively excluded the interests of commercial fishers from consideration. We accept that the principal focus of the Judge's decision in relation to the TACC was on the factors identified at [59] of the Judge's decision (summarised at [39] above). The Judge qualified those factors by adding at [60] that another relevant factor was "tangible value of the stock for commercial interests to the extent that they provide for people's wellbeing for employment". If that was intended to indicate that the social, economic and cultural wellbeing of commercial interests was limited to that of their employees, then we would respectfully disagree. However, we doubt that that is in fact what the Judge meant, because at [57] he had expressly said "utilisation of a fisheries resource provides for the economic wellbeing of commercial fishers whose livelihood depends on income from that activity" and at [56] he had acknowledged the importance of commercial fishers to New Zealand consumers.

[61] Rather than dwelling on what the Judge did or did not mean, we simply confirm our view that the reference to enabling people to provide for their social, economic and cultural wellbeing in the definition of "utilisation" in s 8(2) does not exclude any sector of society, does not favour any particular interest (for example recreation over commercial), does not limit the relative weight which the Minister may give to the interests of competing sectors and does not indicate any priority of one interest over the other. Of course, the interests of commercial fishers are not just the economic interests of the proprietors of the fishing businesses, but also include those of employees, consumers who are able to purchase the fish as a result of the commercial catch being sold at retail, fish merchants, suppliers to the commercial fishers and others affected by any relevant downstream effects of the location of fishing businesses, such as processing businesses in particular geographical locations. That is a non-exhaustive list. As with most aspects of the decision-making role played by the Minister, the consideration of the wellbeing factor requires a balance of competing interests, especially in the case of a shared fishery such as kahawai.

[62] Our view of the relative importance of ss 21 and 8 is consistent with that expressed by this Court in *New Zealand Fishing Industry Association (Inc) v*

*Minister of Fisheries* CA82/97 and CA83/97, CA96/97 22 July 1997. The parties all referred to this case as "the *Snapper* case" and we will do the same.

[63] In the *Snapper* case, the Court dealt with the requirement to make allowance for recreational interests under s 21(1) in the following terms:

> To take recreational fishers as an example, the "allowance" is simply the Minister's best estimate of what they will catch during the year, they being subject to the controls which the Minister decides to impose upon them e.g. bag limits and minimum lawful sizes. Having set the TAC the Minister in effect apportions it between the relevant interests. He must make such allowance as he thinks appropriate for the other interest before he fixes the TACC. That is how the legislation is structured … If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover it, subject always to his obligation carefully to weigh all the competing demands on the TAC before deciding how much should be allocated to each interest group … What the proportion [between interests] should be, if that is the way the Minister looks at it from time to time, is a matter for the Minister's assessment bearing in mind all relevant considerations.

[64] There was no reference in that analysis to s 8(2) being a mandatory relevant consideration, nor was there any reference to the need to have regard to social, cultural and economic factors. This can be contrasted with the Court's comments in relation to the decision to fix the TAC under s 13, where the Court said that s 13(3) imposed on the Minister "a clear obligation to move the stock towards MSY and when deciding upon the timeframe and the ways to achieve that statutory objective the Minister must consider all relevant social, cultural and economic factors". It noted later that the question of which factors were relevant was prima facie for the Minister, but that his or her assessment in that regard could be subject to review on *Wednesbury* principles.

[65] In the present context it is notable that there is no expressed reference to social, economic and cultural factors in s 21(1) in contrast to s 13.

[66] In the present case, although the Crown did not challenge the High Court decision, its counsel, Mr Ivory, did suggest that the Judge could have taken the recreational interests more directly into account by starting with s 21. That point was generally accepted also on the part of the recreational fishers, who accepted that the starting point was s 21, but argued that the Judge had been right to say that the

Minister's discretion was not wide, and that he was bound to consider social, economic and cultural wellbeing when allowing for recreational interests in the stock. In argument, counsel for the recreational fishers, Mr Galbraith QC, did, however, accept that the reference in s 8(2) to social, economic and cultural wellbeing had to apply equally to commercial interests. Both Mr Ivory and Mr Galbraith accepted that, if the Judge had meant to indicate that commercial interests were not to be taken into account, then that was wrong.

[67] The recreational fishers argued that the *Snapper* case wrongly excluded s 8 factors, and reduced the making of an allowance for recreational interests to a mathematical formula based on an estimate of recreational catch. They argued that these comments in the *Snapper* case were obiter and that we should not follow them. We see no reason not to follow them. The comments were made after full argument by a Full Court, and we see no reason to depart from them. Having said that, we disagree that they imply that a purely mathematical exercise is called for.

[68] We also accept Mr Scott's submission that, contrary to the observation by the High Court Judge (see [39](c) above), the common law right to fish should not have been seen as a right which related to recreational fishing only. The common law right to fish was not limited to fishing for any particular purpose.

[69] Drawing all these threads together, we conclude that the Minister's decision in relation to TACC is a decision which must be made in terms of s 21(1). The Minister must, having set the TAC, make allowance for recreational (and customary) interests. The Minister is required to determine what allowance must be made for recreational fishers before setting the TACC, but there is nothing in s 21(1) which indicates that in making that allowance the Minister must take into account the social, economic and cultural wellbeing of recreational fishers to the exclusion of, or in preference to, the social, economic and cultural wellbeing of commercial fishers and those who depend on them. The decision which the Minister makes under s 21(1) must conform with the purpose of the Fisheries Act as expressed in s 8(1), but the governing provision is s 21(1), not s 8(1).

*Did the Minister have regard to qualitative factors?*

[70] The commercial fishers argue that the Minister must have had regard to the factors which the recreational fishers say were relevant, the qualitative factors, because the allowance which he made for recreational interests was essentially that for which the recreational interests had contended (with a variation of less than 10%). It is factually correct that the recreational interests got substantially what they had contended for, and so are not well placed to complain about the result. But we recognise that the case was argued at a level of principle. We do not see this sort of reverse engineering of the Minister's decision as helpful, particularly now that this judgment is essentially an exercise in providing guidance for future decision-making. The Minister could have reached a (broadly) correct decision by an incorrect process of reasoning. We intend to focus on the basis on which the Minister expressed his reasoning (and the advice contained in the IPP and FAP which provides a backdrop to that reasoning).

[71] The recreational fishers' criticism of the Minister was that his allowance for recreational fishers was based substantially on catch history, and did not have sufficient regard to the fact that recreational fishers value kahawai much more highly than commercial fishers for whom it is a low value catch (it is, however, an important component in the purse seine fishery, being one of a number of species caught by that fishing method).

[72] All parties were agreed that MFish advised the Minister on qualitative factors and that he was therefore well informed of those factors. The difference between the parties is as to whether MFish's advice led the Minister to believe that he was entitled to disregard those factors and rely on catch history only. That was strongly argued by Mr Galbraith. On behalf of the Crown, Mr Ivory accepted this criticism of the advice given by MFish to the Minister and accepted that the Minister had been led to believe he could, and therefore did, exclude qualitative factors and rely only on catch history.

[73] The Minister was entitled to have a policy preference for catch history as the basis for the TACC decision: it is not unlawful for the decision-maker to have policy

preferences so long as the Minister does not allow the preference to fetter his discretion: *Westhaven.*

[74] The High Court considered that following the preferred approach had led to the Minister proceeding "on the premise that quantitative measures [allocation by reference to previous catch history] also served to provide an exhaustive measure of intangible or qualitative factors" and that MFish's analysis of social and cultural wellbeing was solely a quantitative exercise: at [63].

[75] The question for us, given our conclusion on the role of s 8(1), is whether adopting the catch history (or "claims based") approach led the Minister to make allocations of the TAC to recreational, customary and commercial fishers which failed to "bear in mind and conform with the [s 8] purposes of the legislation" (to use the words of Keith J in *Westhaven*).

[76] Mr Galbraith said recreational fishers' past catch was depressed by the effects of commercial fishing in the past, so it was a poor indicator of the value of the fishery to them. On the other hand, Mr Scott said the commercial catch history reflected restrictions from purse seine catch limits and voluntary restrictions on the commercial catch which had existed for 15 years.

[77] A potential problem with basing allocations on qualitative factors (or "utility value") is the difficulty in obtaining accurate information and in finding a way to measure those factors for the purposes of undertaking the exercise of weighing the competing claims of recreational, customary and commercial interests in the TAC.

[78] Recreational fishers pointed to a study which suggested that the value placed on kahawai by recreational fishers was 11 to 16 times greater than that of commercial fishers. They accept that this and other information about recreational fishers' concerns (particularly their concerns about reduced numbers and size of kahawai caught by recreational fishers) was set out in the IPP and FAP for both years. Those concerns must have been factors in the Minister's decision in both years to reduce the overall level of the TAC. But they say that the reduction in the TAC should not have been proportionately reflected in the TACC and recreational

allowance, and would not have been so reflected if the Minister had taken into account these qualitative factors. They argued that MFish's concern about possible compensation claims from commercial fishers was an underlying cause of its preference for the catch history approach.

[79] One of the difficulties in evaluating these contentions is the sheer length of the IPP and FAP in each of the relevant years. Each party pointed to extracts from these reports which were said to support its case. Having read these documents in the round, we consider that MFish's advice was such that the Minister was fairly apprised of the qualitative factors which recreational fishers emphasised, informed of MFish's preference for a catch history approach and the reasons for that preference, and left with the option of deciding which approach he favoured. His choice of the catch history approach was reasonable given the inherent lack of precision in the available information and the difficulty of attributing a value to the qualitative factors for the purpose of weighing those against factors relating to commercial use. He was advised in the FAPs for both 2004 and 2005 that the allocations proposed by MFish, derived from catch history reflected "competing [recreational and commercial] demands [on the fishery], current use in the fishery, and the socio-economic effects of current versus reduced use". We cannot say that a decision made on this basis failed to conform to the purpose of the Fisheries Act as set out in s 8(1). Having said that, we consider that it would also have been open to the Minister to proceed on the basis of a proper evaluation of the qualitative factors referred to by the recreational fishers (appropriately balancing those against the relevant interests of commercial fishers).

[80] We do not agree with the High Court Judge that a "utilisation approach" (i.e. one based on subjective evaluation of qualitative criteria) is mandatory. Nor do we agree with his criticism of MFish's attempt to evaluate the extent of the qualitative factors by economic modelling. Leaving the decision-making criteria to a subjective evaluation of unquantified and unquantifiable wellbeing factors relating to recreational fishers, which would then have had to be weighed against similarly vague commercial factors, would not have necessarily led to a better quality decision than that actually taken. The reality is that the Fisheries Act requires decisions about fisheries to be made in circumstances where the available information is often

limited and unreliable. In those circumstances the Minister is entitled to take an approach to the allocations leading to the setting of a TACC which reflects catch history if he is satisfied that that provides a reasonable basis for the assessment of the interests of the competing claimants to the TAC. On the other hand, he should not adopt as an inflexible rule a catch history approach: each decision must be made on its merits in light of the best available information.

[81] We are conscious that the Minister's counsel conceded error on the Minister's part. It was conceded that the Minister was advised by MFish that he could assess the recreational interests on the basis of a catch history approach and did so, thereby excluding from the decision the detailed information the Minister had about recreational interests. We consider that the decision to allocate on a catch history basis was made only after consideration of the qualitative factors (which influenced his decision to reduce the TAC in both years) and on the basis that the allocation of the reduced TAC on a catch history basis would, on a broad brush basis, provide for those qualitative factors.

[82] We would not make a declaration to the effect of para (a) of the High Court relief (see [5] above). As the Minister has agreed to revisit both the TAC and TACC decisions, this may be of little significance. If the Minister is of the view that, contrary to what we have said, a catch history approach excludes from consideration relevant matters, he can bring them to account when reconsidering the position.

[83] For the above reasons, we allow the commercial fishers' appeal against the Judge's decision to make a declaration that the 2004 and 2005 decisions were unlawful to the extent that the Minister fixed the TACC for each KAH area without having regard to the social, economic and cultural wellbeing of the people.

**Did the Minister correctly apply the requirements of the HGMPA in making the TAC and TACC decisions for KAH1 in 2004 and 2005?**

[84] This aspect of the case concerns the decisions on the TAC and TACC for KAH1 only. That area includes the Hauraki Gulf, though the Gulf makes up only a

small portion of the area covered by KAH1. The TAC and TACC decisions for all other areas are unaffected by this argument.

[85] In the High Court, Harrison J found that the Minister had failed to have regard for the HGMPA's provisions when setting the TAC for KAH1 in 2004 and 2005. He said that the Minister was obliged to pay particular regard to the social, economic, recreational and cultural wellbeing of the people of the Hauraki Gulf, and in particular to maintain and enhance its physical resources in the form of kahawai stock: at [81]. He said that a self-contained enquiry was necessary by express reference to the wellbeing factors relating to the people in the Hauraki Gulf: at [82]. However, he found that there was no requirement to have regard to the HGMPA when fixing the TACC for KAH1: at [76].

[86] The commercial fishers appeal against the Judge's decision that the Minister failed to have regard to the HGMPA in setting the TAC for KAH1. They seek the quashing of the High Court declaration to that effect.

[87] The recreational fishers cross appeal against the Judge's finding that there was no requirement to have particular regard to the HGMPA when fixing the TACC for KAH1. They seek a declaration that the Minister failed to meet that requirement.

[88] Three issues therefore arise:

(a) Was the Minister obliged to have particular regard to the HGMPA when setting the TACC for KAH1?

(b) Did the Minister fail to have regard to the HGMPA when setting the TAC for KAH1?

(c) Did the Minister fail to have particular regard to the HGMPA when setting the TACC for KAH1?

[89] We will deal with (a) first, then deal with (b) and (c) together.

*Was the Minister obliged to have particular regard to the HGMPA when setting the TACC?*

[90] We can deal with this issue briefly. The commercial fishers and the Minister concede that the recreational fishers are right that the HGMPA must be considered in the context of the TACC decision. We agree. Section 13 of the HGMPA applies. That section says that persons exercising powers or carrying out functions for the Hauraki Gulf under any Act specified in Schedule 1 (as the Fisheries Act is) must, in addition to any other requirements specified in those Acts, have "particular regard" to ss 7 and 8 of the HGMPA. We therefore allow the cross appeal of the recreational fishers to this extent.

*Did the Minister have regard/particular regard to the HGMPA in setting the TAC and the TACC?*

[91] Sections 7 and 8 of the HGMPA provide:

> **7 Recognition of national significance of Hauraki Gulf**
>
> (1) The interrelationship between the Hauraki Gulf, its islands, and catchments and the ability of that interrelationship to sustain the life-supporting capacity of the environment of the Hauraki Gulf and its islands are matters of national significance.
>
> (2) The life-supporting capacity of the environment of the Gulf and its islands includes the capacity-
>
> (a) to provide for -
>
> (i) the historic, traditional, cultural, and spiritual relationship of the tangata whenua of the Gulf with the Gulf and its islands; and
>
> (ii) the social, economic, recreational, and cultural well-being of people and communities:
>
> (b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation:
>
> (c) to maintain the soil, air, water, and ecosystems of the Gulf.

**8 Management of Hauraki Gulf**

To recognise the national significance of the Hauraki Gulf, its islands, and catchments, the objectives of the management of the Hauraki Gulf, its islands, and catchments are—

(a) the protection and, where appropriate, the enhancement of the life-supporting capacity of the environment of the Hauraki Gulf, its islands, and catchments:

(b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments:

(c) the protection and, where appropriate, the enhancement of those natural, historic, and physical resources (including kaimoana) of the Hauraki Gulf, its islands, and catchments with which tangata whenua have an historic, traditional, cultural, and spiritual relationship:

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand:

(f) the maintenance and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments, which contribute to the recreation and enjoyment of the Hauraki Gulf for the people and communities of the Hauraki Gulf and New Zealand.

[92] The Minister must have *particular* regard to ss 7 and 8 of the HGMPA in relation to the TACC, but is required only to have regard to ss 7 and 8 of the HGMPA in relation to the TAC decision. The reason for this discrepancy is that s 11(2) of the Fisheries Act (as amended by the HGMPA) requires that, before setting or varying any sustainability measure under s 11(1), the Minister shall have "regard" to ss 7 and 8 of the HGMPA for the Hauraki Gulf. There is no dispute that the TAC is a sustainability measure, as s 2 of the Fisheries Act defines it as such. The requirement in s 13 of the HGMPA to have particular regard to ss 7 and 8 of the HGMPA does not apply in relation to the TAC, because s 13 of the HGMPA does not apply if any of ss 9 to 12 (of the HGMPA) provide otherwise. Section 12 of the HGMPA does provide otherwise because it amends s 11(2) of the Fisheries Act in the manner referred to above.

[93] The result of all of that is that the requirement in relation to the TAC is to have "regard" (not "particular regard" as the High Court Judge said at [81]) to ss 7 and 8 of the HGMPA: s 11(2) of the Fisheries Act. In contrast, the requirement in relation to the TACC is to have "particular regard" to those sections: s 13 of the HGMPA.

[94] We think the requirement to "have regard" to a matter is readily understood. What is required is that the matter is considered, but not that it necessarily influences the decision. As Cooke P put it in *New Zealand Fishing Association v Ministry of Agriculture and Fisheries* [1988] 1 NZLR 544 at 551 (adopting the words of McGechan J at first instance):

> He is directed by s 107G(7) to "have regard" to any submissions made. Such submissions are to be given genuine attention and thought. That does not mean that industry submissions after attention and thought necessarily must be accepted. The phrase is "have regard to" not "give effect to". They may in the end be rejected or accepted only in part. They are not, however, to be rebuffed at outset by a closed mind so as to make the statutory process some idle exercise.

[95] We are content to adopt that formulation in the present context as well. The requirement is to give the matter genuine attention and thought, but it remains open to the decision-maker to conclude that the matter is not of sufficient significance to outweigh other contrary considerations.

[96] The requirement to have "particular regard" is more problematic. In *Takamore Trustees v Kapiti Coast District Council* [2003] NZRMA 433 at 455 (HC), Ronald Young J described an obligation to have particular regard to matters listed in s 7 of the Resource Management Act as creating "not just an obligation to hear and understand what is said, but also to bring what is said into the mix of decision making". In a similar context, Blanchard J in *Quarantine Waste NZ Ltd v Waste Resources Ltd* [1994] 12 NZRMA 529 at 542 (HC) approved a formulation by the Planning Tribunal that an obligation to have particular regard was one which put the Court under a duty to be on inquiry.

[97] The provisions in issue in those cases can be contrasted with the requirement of s 28A of the Matrimonial Property Act 1976 to have particular regard to the need

to provide a home for children of a marriage when deciding whether to order that a spouse be permitted to occupy the family home. That provision was said by Judge Inglis in the Family Court to require the Court not only to be especially careful not to overlook the matter, but also "to give greater weight to that factor in its determination than the 'other relevant circumstances' which the Court may take into account": *Wheeler v Wheeler* (1984) 2 NZFLR 385. That formulation was approved by Thorp J in *Sweeney v Sweeney* [1985] 2 NZLR 673 (HC).

[98] The above formulations reflect the importance of the context in which the requirement to have particular regard to a matter arises. In the *Wheeler* case, the requirement related to a single and self-evidently important factor in the overall decision. By contrast, in the present case the requirement is to have particular regard to a series of broadly expressed factors in relation to a range of decisions that may or may not have much connection with those factors.

[99] One would expect that the term "particular regard" has a meaning that involves a greater obligation on the decision-maker than the requirement to have "regard" to a consideration. Parliament must have intended that the former imported a more onerous obligation than the latter. Where the requirement is to have particular regard to a specific factor of obvious relevance, the *Wheeler* test is appropriate. But where the decision-maker is required to have particular regard to a number of factors of varying relevance, which are expressed as general purposes rather than specific criteria, the decision-maker must be permitted to discount those which are not relevant and give varying weight to those that are. In those circumstances, the requirement to have particular regard requires the decision-maker to satisfy himself or herself that the decision meets those of the purposes which are of most relevance, to the extent that that can be achieved in harmony with other relevant considerations applying to the decision.

[100] The recreational fishers submitted that the logical extension of the finding of Harrison J that the Minister had failed to have regard to ss 7 and 8 in relation to the TAC decision should extend to a finding that the Minister also failed to have particular regard to ss 7 and 8 in relation to the TACC decisions.

[101] Both the commercial fishers and the Minister/MFish submit that the advice given to the Minister by MFish was sufficient to inform the Minister of the matters required to be considered under ss 7 and 8. They argue that the Minister did give adequate consideration to those matters in relation to the TAC decision. Consistently with the Minister's stance in relation to the TAC decision however, the Minister concedes that his focus on catch history as a measure of recreational interest was flawed in that it did not take proper account of qualitative matters, which (implicitly) would include the matters set out in ss 7 and 8 of the HGMPA.

[102] There are a number of references in both the IPP and the FAP for both 2004 and 2005 to the HGMPA. The question is whether they directed the Minister adequately to the requirements of the HGMPA and whether the Minister brought them to account in making his decisions.

[103] In the "Statutory Considerations" of the 2004 FAP, MFish refers the Minister to the HGMPA and commented that:

> This Act's objectives are to protect and maintain the natural resources of the Hauraki Gulf as a matter of national importance. Kahawai are known to occur within the boundaries of the Hauraki Gulf and MFish considers that setting of sustainability measures for kahawai will better meet the purpose of the Act.

[104] This appears to be directed towards the setting of the TAC ("sustainability measures"), rather than the TACC i.e. it does not address the question of whether the allocation to recreational fishers for KAH1 needed to be greater than that for other KAH areas because of the considerations arising under the HGMPA. There is no reference to s 13 of the HGMPA.

[105] Later in the FAP, the statutory considerations (including the above reference to the HGMPA) were described as "statutory considerations that must be taken into account when setting a TAC and allowances for kahawai". This reference to "allowances" seems to deal with TACC decisions too.

[106] MFish wrote to the Minister on 10 June 2005 advising on developments since the setting of the TAC and TACC for 2004, and the threat which recreational fishing interests had made to challenge those decisions by way of judicial review. The

Minister made handwritten notations on this letter, confirming his intention to review catch limits during 2005, and specifically requesting a paper with "options for area constraints in the Hauraki Gulf".

[107] MFish provided this options paper on 6 July 2005. This paper noted that there appeared to have been some decline in the recreational catch within the Hauraki Gulf since a 2000 survey. It said the reasons for this were not clear. The paper recommended that no area constraints be implemented in the Hauraki Gulf, noting that the Minister was about to commence the process of setting the TAC and TACC for the 2005-2006 fishing year.

[108] The 2005 IPP contained a reference to the HGMPA, in similar terms to the rather anodyne reference in the 2004 FAP (see [103] above). This referred to the requirement under s 11(2)(c) of the Fisheries Act, but omitted reference to s 13 of the HGMPA.

[109] In addition the 2005 FAP referred to the lower recreational catch in the Hauraki Gulf and noted that recreational fishing organisations had submitted that there were particularly strong sustainability concerns in the Hauraki Gulf Marine Park area. It added:

> They submit a more drastic rebuild is needed in KAH1 to protect the national, social, cultural and economic importance of the area. Significant reductions in the TACC for KAH1 are needed to assist in rebuilding stocks to allow reasonable catch rates and fish size in the Hauraki Gulf Marine Park area.

[110] MFish's response to this was that the Minister was obliged under s 11(2)(c) of the Fisheries Act to consider how proposals for KAH1 met the requirements of ss 7 and 8 of the HGMPA. (Again there was no reference to s 13.) MFish said that it considered that under both of the options proposed in the FAP the management measures for KAH1 would meet the purpose of the HGMPA, but that the option involving a 10 per cent reduction in the TAC would provide a more certain position in that regard.

[111] In his affidavit, the Minister referred to the advice from MFish. He said he was advised that existing regulatory and voluntary closures appeared sufficient so

that no further regulation was required. He also noted that he had received the detailed briefing on the issue in July.

[112] The conclusion we reach from our review of this material is that the Minister was advised in both 2004 and 2005 of the obligation under s 11(2) of the Fisheries Act to have regard to ss 7 and 8 of the HGMPA in relation to the TAC decision, but was not advised in either year of the obligation under s 13 of the HGMPA to have particular regard to those provisions in relation to the TACC decision. There is overlap between the two decisions and at least some of the advice implied that the HGMPA was relevant to both the TAC and TACC decisions. But, in the absence of any specific advice to the Minister of the need to consider the HGMPA in relation to the TACC decisions, and no reference to it in any of the material recording the Minister's decision, we must assume that he did not, in fact, bring it to account in relation to the TACC decision.

[113] In relation to the TAC decision, the Minister was apprised of the need to have regard to ss 7 and 8, but the advice he was given by the Ministry was brief, and proceeded on the basis that the overall TAC decision which would be applied in other KAH areas would be sufficient to meet the requirements of ss 7 and 8 of the HGMPA.

[114] Harrison J considered that the Ministry's advice did not go far enough. He said at [82]:

> The Minister was bound to give discrete consideration to the Hauraki Gulf when setting the TAC for KAH1. A self-contained enquiry was necessary by express reference to the wellbeing factors relating to the people in the Gulf. It may have been best recognised by identifying a new KAH within the Gulf's boundaries from Bream Head to Cape Colville. …It is not enough to rely on the fact that Sandford's purse seine fleet has voluntarily refrained from fishing there for some years. The Gulf requires special consideration whenever a sustainability measure is proposed or implemented. It is for the Minister to determine its volume metric expression in accordance with the statute. His failure to carry it out constituted a material error of law.

[115] In our view this conclusion by the Judge overstates the obligation of the Minister to have regard to the HGMPA. As noted earlier, the requirement to have regard to a consideration is a requirement to take it into account, recognising that

there will be other, perhaps more significant, matters which also need to be taken into account. We agree that the Minister had to address his mind to the ss 7 and 8 matters, but they are expressed in very broad terms and to some extent are mutually inconsistent. As long as the Minister turned his mind to the position of the Hauraki Gulf and the interests referred to in ss 7 and 8, and satisfied himself that the TAC for KAH1 broadly met the objectives of the HGMPA, we consider that that was enough. There was no need to consider a separate KAH area for the Hauraki Gulf.

[116] Mr Galbraith said that the Minister did not give sufficient consideration to the anecdotal evidence about the concerns of recreational fishers at the apparent reduction in fish stocks in the Hauraki Gulf area. He said that this information was too readily dismissed by MFish in its advice papers. That is a matter of the weight given to considerations, rather than an allegation that the Minister did not, in fact, have regard to the matters which the HGMPA required him to have regard to. On balance, we conclude that the MFish advice and the Minister's evaluation of it did satisfy the HGMPA requirement, though we would have expected that the requirements would have been dealt with more specifically in the advice papers than was in fact the case.

[117] We conclude that the Minister was obliged to have regard to the HGMPA in setting the TACC for KAH and failed to do so. We make a declaration to that effect. We conclude that the Minister complied with the HGMPA in relation to the TAC decision, and quash the High Court declaration to the contrary effect. However, we recommend that, when the TAC for KAH1 is next determined, MFish's advice address the HGMPA criteria more specifically and that the Minister's decision record his consideration of them.

**Should the Court grant relief because the Minister failed to implement reasonable measures to monitor and assess the recreational catch?**

[118] In the High Court, the commercial fishers sought judicial review of the 2004 and 2005 decisions of the Minister "not to impose regulatory measures designed to ensure that the level of catch of recreational interests is monitored and assessed on an annual basis, as permitted under ss 11, 187, 297 and 298 of the [Fisheries] Act".

They alleged that these decisions were unlawful involving error of law, and that the Minister had acted inconsistently, arbitrarily and irrationally. The relief which they sought was a declaration:

> … that, when making the 2004 … and the 2005 … Decisions, the Minister and Chief Executive failed to put in place regulatory measures to ensure that the level of recreational catch of kahawai was monitored and assessed.

[119] In addition they sought declarations that the Minister and Chief Executive failed to take the appropriate steps to ensure that records in respect of customary fishing were provided to the Ministry and that the information in the records be used to set and vary sustainability measures or develop management controls. They also sought an order directing that the Minister ought to reconsider what regulatory measures are necessary to ensure that the level of recreational catch of kahawai is accurately monitored and assessed.

[120] The essential complaint of commercial fishers is that the majority share of the kahawai fishery is available to the recreational fishers, but insufficient action is being taken to gather information to obtain accurate estimates of the recreational catch and nothing has been done to limit recreational catch to ensure that the positive effects of the reductions in the TAC are not compromised. Although the need for both monitoring and limitation of the recreational catch has been acknowledged by MFish and the Minister, nothing has been done to follow through with practical steps.

[121] Harrison J rejected the prayer for relief on the basis that the declaration which was sought (that the Minister had failed to put in place regulatory measures) was barren without identification of what the measures actually should have been. Harrison J was also not satisfied that he had jurisdiction to order a Minister to reconsider what regulatory measures were necessary, where the commercial interests had not formulated them.

[122] In this Court, Mr Scott responded to the Judge's concerns by amending the form of declaration and order which he sought. After interchange with the Bench during the first day of argument, he then amended the proposed relief again, so that the declaration and order sought by the appellant was as follows:

1. A declaration that, in failing to put in place measures to monitor the recreational catch of kahawai following the decisions to reduce recreational allowances by 15 per cent in 2004 and 10 per cent in 2005, the Minister failed to ensure the sustainability of kahawai.

2. An order that the Minister ought to reconsider whether measures need to be imposed to monitor the recreational catch for kahawai.

[123] Mr Ivory addressed us extensively on the difficulties of regulating recreational catch and on the conflict of expert opinion as to whether a reporting regime could be effectively introduced. He also told us of a number of steps which had been taken to assess the level of stock, including the material referred to earlier. He strongly disputed the evidence given by an expert witness for the commercial fishers that the amount the Government spent on recreational research was grossly out of proportion to the amount spent on commercial fisheries. Overall he submitted there was no failure on the part of MFish or the Minister in seeking information from time to time on the kahawai fishery such as to support an allegation of unlawfulness.

[124] Updating evidence was provided in this Court by consent which showed that the Minister and MFish have moved further along the road to implementing an assessment of the level of stock at least in KAH1. A study undertaken in 2007 led MFish to conclude that the spawning biomass of kahawai was above $B_{MSY}$, but it was uncertain how far above. MFish also drew from the information a conclusion that assumed removals of fish are lower than almost all estimates of deterministic MSY. From this the Ministry concluded that it was unlikely that the stock would decline below $B_{MSY}$ at current assumed catch levels, given the assumptions of the model used to estimate the stock in KAH1. However nothing has been done to quantify kahawai stocks in other KAH areas.

[125] We pointed out to Mr Scott during the hearing that we saw real difficulties in making the declarations originally sought, because inevitably decisions about undertaking expensive monitoring and research and formulating appropriate regulatory controls involve broad decisions on the appropriate manner of spending public money in the light of other policy priorities.

[126] We have some sympathy with the position of the commercial fishers in that the lack of robust information about the extent of the recreational catch and the

absence of any controls over that catch mean that the allocation of a recreational allowance as part of the setting of the TACC imposes an essentially theoretical limit on the recreational catch. But even the modified relief sought by the commercial fishers is problematic.

[127] We can reach a view that monitoring the recreational catch of kahawai would enhance measures to ensure sustainability of the kahawai resource. But the Fisheries Act does not impose on the Minister a duty to ensure sustainability: as noted earlier s 8(1) provides that the purpose of the Act is utilisation of fisheries resources, while ensuring sustainability. Even if the Minister's duty was correctly described as being related to sustainability only, it would not be a duty to ensure sustainability of a species no matter what the cost. Priorities must be established, and spending decisions made. Such decisions are for the executive, not the judiciary. Money spent on monitoring the kahawai catch may mean more important work relating to other species (or other aspects of MFish's work) cannot be done. We decline to make the declaration and order now sought by the commercial fishers.

**Result**

[128] We allow the commercial fishers' appeal in part. We amend the declaration made in the High Court (see [5] above) by deleting paras (a) and (b). But we decline to make the declaration and order (see [122] above) that the commercial fishers now seek. As noted earlier, there was no challenge to para (c) of the High Court declaration. To reflect the agreement of the parties noted at [9] above, we quash the order that the Minister reconsider or review his 2005 TAC and TACC decisions to take account of the declarations and direct that the Minister take account of the declarations now made when the Minister next sets the TAC and TACC for kahawai in all KAH areas.

[129] We also allow the cross appeal in part. We find that the Minister was obliged to have particular regard to ss 7 and 8 of the HGMPA in setting the TACC for KAH1 and make a declaration that he failed to meet that obligation.

## Costs

[130] Each party has had a measure of success and in those circumstances we make no award of costs.

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