IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2008
[2009] NZSC 54

BETWEEN	NEW ZEALAND RECREATIONAL FISHING COUNCIL INC First Appellant
AND	NEW ZEALAND BIG GAME FISHING COUNCIL INC Second Appellant
AND	SANFORD LIMITED, SEALORD GROUP LIMITED AND PELEGIC & TUNA NEW ZEALAND LIMITED First Respondents
AND	MINISTER OF FISHERIES Second Respondent
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES Third Respondent

Hearing: 12 February 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: A R Galbraith QC, S J Ryan and B A Galloway for Appellants
B A Scott and G T Carter for First Respondents
D B Collins QC Solicitor-General, A E L Ivory and P A McCarthy for Second and Third Respondents

Judgment: 28 May 2009

JUDGMENT OF THE COURT

The appeal is dismissed. There is no award of costs.

REASONS

ELIAS CJ

[1] The parties to the appeal are the Minister of Fisheries, the Chief Executive of the Ministry of Fisheries and commercial and recreational fishers of kahawai, a species of fish subject to quota management under the Fisheries Act 1996 in respect of commercial fishing. It is also a species valued by recreational fishers. The litigation which gave rise to the appeal concerns the setting of the total allowable commercial catch for kahawai in the 2004 and 2005 fishing seasons. The Minister's determinations of the total allowable commercial catch in these years under s 20 of the Act have been overtaken by the passage of time. Relief in respect of the particular decisions is no longer sought. The underlying issue of interpretation of the Act, which was the basis of the proceedings for judicial review brought by the commercial and recreational fishers, remains however a live issue. It was claimed that in setting the total allowable commercial catch the Minister had failed to act in accordance with the statutory requirements. Since the Minister is generally required to set a total allowable commercial catch in each fishing year and for each species subject to quota, what the Act requires is a question of continuing public importance. That is the basis upon which leave to appeal was granted by this Court.

[2] The proceedings instituted by the New Zealand Recreational Fishing Council Inc and the New Zealand Big Game Fishing Council Inc, representing recreational fishers of kahawai, originally sought review not only of the total allowable commercial catch set under s 20 of the Act, but also the total allowable catch set under s 13 of the Act. Section 13 is a principal sustainability mechanism under the Act and an essential step which must be taken before the Minister can proceed to set the total allowable commercial catch which underlies the quota management system contained in Part 4 of the Act. Recreational fishers have an interest in a total allowable catch that is set below the level that can produce the maximum sustainable yield of a fish stock, because such management is likely to produce larger and more accessible fish. Commercial fishers have an interest in the total allowable catch being set at the maximum sustainable yield because that will generally ensure their access to the greater volume of stock. These competing aspirations are the background to the present litigation. There is no appeal against the High Court decision declining judicial review in respect of the setting of the total allowable

catch. Instead, on appeal, the different ends sought by the recreational and commercial fishers have been played out in challenges to the Minister's decision under s 20 setting the total allowable commercial catch by which the catch available to commercial fishers holding quota for kahawai is limited.

[3] While disagreeing about whether the balance struck by the Minister properly applied the principles and policies of the Act, the parties have proceeded on the basis that the s 20 determination confers upon the Minister a power to determine which part of the total allowable catch will be available to recreational fishers and which to commercial fishers. The recreational fishers argue that, had the Minister properly applied the principles and policies of the Act, he would have set the total allowable commercial catch under s 20 below what was available within the total allowable catch, to the benefit of recreational and other non-commercial interests. They maintain that there is a priority of concern for recreational interests in the scheme of the Act. The commercial fishers argue that the policies relied upon by the recreational interests (principally those derived from s 8 of the Act[1]) have little application to s 20 determinations of total allowable commercial catch because they apply equally to commercial and recreational fishers. They say there is no priority for recreational use over commercial use. That position is supported by counsel for the Minister.

[4] McGrath J, writing for the majority in this Court, agrees with the contentions put forward on behalf of the commercial fishers and the Minister and would affirm the decision of the Court of Appeal to the same effect. On this approach, s 20 and the procedure required by s 21 is a mechanism for allocating the fish stock within the total allowable catch between commercial and non-commercial interests. On this view, the Minister quantifies "an allowance" for recreational fishing interests under s 21 in arriving at a total allowable catch for the commercial fishers under s 20. I do not agree that ss 20 and 21 set up a mechanism for deciding what stock should be made available to recreational fishers. I write to indicate the reasons why I think this interpretation is misconceived and does not fit within the structure of the legislation.

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[1] Especially in maintaining the potential of the resource to "meet the reasonably foreseeable needs of future generations" and in pursing the purpose of "conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being".

The Minister has powers available to him under the Act to control and manage recreational take. Sections 20 and 21 in my view are not a source of such powers. Section 21(1) simply requires the Minister to deduct the fish stock lost through mortality. It includes Mäori customary non-commercial take, recreational take, and "all other mortality to that stock caused by fishing". The deduction is necessary to ensure compliance with the statutory requirement under s 20(5) that, when setting the total allowable commercial catch, the total allowable catch is not exceeded. Ensuring that the total allowable catch is not exceeded is important to other users and to those interested in conservation more generally. For that reason, s 21(2) requires the Minister to consult with Mäori, environmental, commercial, and recreational interests in setting or varying a total allowable commercial catch.

[5] I reach this view as to the correct interpretation of ss 20 and 21 on the text of those provisions, and in the context of the scheme of the Act as a whole. The legislative history of the language of s 21, although perhaps insufficiently clear on its own, is I think consistent with the interpretation I prefer. I expand on these reasons in what follows.

The Scheme of the Fisheries Act 1996

[6] The determination of the appeal turns on the meaning of s 21(1) of the Act. Before considering its text, it is necessary to place it in the context of the Act as a whole. It is necessary to touch only on the provisions of relevance to the present appeal.

[7] Parts 2 and 3 of the Fisheries Act 1996 (dealing with the purpose and principles of the Act and sustainability measures, respectively) apply to all fisheries resources in New Zealand, whether managed as property interests under the quota management system or under other regulatory regimes provided for by the Act. The Act aims "to provide for the utilisation of fisheries resources while ensuring sustainability".[2]

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[2] Section 8(1).

[8] Part 2 of the Act sets out its purpose and principles. "Ensuring sustainability" is defined in s 8 to mean:

> (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" is defined in s 8 to mean "conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing".

[9] Part 2 also sets out in s 9 the environmental principles to be taken into account by all exercising functions under the Act. They include taking into account the interdependence of species, the desirability of biological diversity and the preservation of habitats. Section 10 sets out "information principles" for those exercising functions under the Act. It recognises that decisions will have to be made on imperfect information, while requiring those performing functions under the Act to base their decisions on "the best available information". So, decision-makers are required to consider any uncertainty in the available information, and to "be cautious" in its use. Imperfect information is not, however, a reason for postponing or failing to take measures to achieve the purpose of the Act.

[10] Sustainability is a principal purpose of the Act. The measures contained in Part 3 of the Act are designed to achieve the sustainability of all species. Importantly, sustainability measures include catch limits as s 11(3) makes clear. Catch limits of non-quota species (including commercial catch limits) can be set by the Minister by notice in the *Gazette* under s 11(4)(a). In setting catch limits for non-quota species, the Minister must have regard to the matters referred to in the provisions dealing with total allowable catches and total allowable commercial catches for quota species under ss 13(2) and 21(1).[3] Catch limits for quota management stock are set by the Minister through a total allowable catch set under s 13 or s 14 of Part 3, as notified in the *Gazette*. Commercial catch limits for quota management stock are set through a total allowable commercial catch set under s 20,

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[3] Section 11(5).

contained in Part 4 of the Act, after taking into account the matters referred to in s 21. This cross-referencing between s 11, and ss 13 and 21 provides equivalence in setting catch limits, including commercial catch limits, for quota and non-quota stock.

[11] In setting catch limits, including commercial catch limits, for non-quota species under s 11(5), the Minister must have regard to the matters referred to in s 13(2) and s 21(1) in setting, respectively the total allowable catch and the total allowable commercial catch for quota species. So, in terms of s 13(2), in setting the catch limit for a stock, the Minister must have regard to "setting 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.

[12] In setting a commercial catch limit for any species either under s 11 or (in the case of quota management) under s 20, the Minister must have regard to the matters identified in s 21(1) and "must allow for ... non-commercial fishing interests in that stock", including "recreational interests" and "all other mortality to that stock caused by fishing". The full text of s 21(1) is set out at para [20] below.

[13] Apart from catch limits, sustainability measures under Part 3 (which apply to both quota and non-quota species) may include the adoption of fisheries plans for

stocks, years or areas,[4] restrictions based on size, sex or biological state of the stock, designation of the areas from which stock may be taken, specification of fishing methods, and the setting of fishing seasons.[5] These measures may be adopted by the Minister either directly by notice in the *Gazette* or by recommending regulations under s 298 of the Act.[6]

[14] In setting sustainability measures under Part 3 (including catch limits for all species and commercial catch limits for non-quota species), the Minister is obliged by s 12(1)(a) to consult with:

> such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Maori, environmental, commercial, and recreational interests.

[15] Part 4 of the Act is concerned with quota management and applies to "every stock made subject to the quota management system".[7] Such species will already have been made the subject of sustainability measures under Part 3 of the Act, including by the setting of a total allowable catch for quota species in any quota management area. The total allowable catch is the primary sustainability measure upon which the Part 4 quota management of the commercial catch is based. Part 4 sets out the method by which the total allowable commercial catch is set and provides for its division into quota shares, a form of property, and the allocation of the quota shares to commercial fishers. Unallocated quota are held by the Crown.[8] Section 20(1) of the Act provides for setting and s 20(2) for variation of the total allowable commercial catch in respect of any quota management area, by notice by the Minister in the *Gazette*. Section 20(3) permits the Minister to set or vary a total allowable commercial catch "at, or to, zero". By s 20(5)(a), a total allowable commercial catch for any quota management stock cannot be set until a total allowable catch for the stock has already been set under either s 13 or s 14 of Part 3 of the Act. Under s 20(5)(b), a total allowable commercial catch must "not … be

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4 Section 11A.
5 Section 11(3).
6 Section 11(4)(b).
7 Section 17(1).
8 Section 49.

greater than the total allowable catch set for that stock". The full text of s 20 is set out below at para [19].

[16] Access to fisheries is dealt with by Part 6 of the Act. In brief and as relevant to the appeal, fishing permits are required to take fish unless the person taking is a natural person, who takes in accordance with any amateur fishing regulations or Mäori customary non-commercial fishing regulations or other requirements imposed by the Act, and not for the purposes of sale.

[17] General regulations to regulate the taking of fish and methods of fishing can be made under s 297 of the Act, contained in Part 16 (Miscellaneous provisions). Section 298 permits the making of regulations relating to sustainability measures. These provisions may be used to set bag limits and catch sizes for fishers, including recreational fishers. Under s 311 the Minister is given a power to recommend the making of regulations closing areas to commercial fishing for a stock to protect access for recreational fishers. Any area so closed is one of the matters that must be taken into account under s 21(5) when "allowing for recreational interests" under s 21(1) in setting the total allowable commercial catch. Section 311 provides:

> **311 Areas closed to commercial fishing methods**
>
> (1) The Minister may, where—
>
> (a) Catch rates by recreational fishers for a stock are low; and
>
> (b) Such low catch rates have a significant adverse effect on the ability of recreational fishers to take their allowance for that stock; and
>
> (c) The low catch rates are due to the effect of commercial fishing for the stock in the area or areas where recreational fishing for the stock commonly occurs; and
>
> (d) A dispute regarding the matter has been considered under Part 7 of this Act and the Minister is satisfied that all parties to the dispute have used their best endeavours in good faith to settle the dispute but have failed to do so,—
>
> after consulting with such persons or organisations as the Minister considers are representative of those classes of persons who have an interest in the matter, recommend the making of regulations under section 297 of this Act that close an area or areas to commercial fishing for that stock, or prohibit a method or methods of commercial fishing in an area or areas for that stock for the purpose

> of better providing for recreational fishing for that stock, provided that such regulations are not inconsistent with the Maori Fisheries Act 1989, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, or Part 9 of this Act.
>
> (2) After determining to recommend the making of regulations under subsection (1) of this section, the Minister shall, as soon as practicable, give to the parties consulted in accordance with that subsection reasons in writing for his or her decision.

[18] In summary, the total allowable commercial catch follows on from the setting of a total allowable catch. The total allowable catch can be set to maintain a stock at or above the level which can produce the maximum sustainable yield or (in the case of a stock which is currently below that level) at a level which enables the stock to be moved towards restoration to or above maximum sustainable yield. Where the current level of a stock is above or below that which can produce the maximum sustainable yield,[9] in setting the total allowable catch the Minister must have regard to "such social, cultural, and economic factors as he or she considers relevant".[10] To the extent that non-commercial fishers are interested in more plentiful fish and larger specimens, their interest is served by the total allowable catch being set to maintain a stock above a level that can produce the maximum sustainable yield and by the total allowable commercial catch being set at a level that does not exhaust the total allowable catch. They will also benefit from any specific restrictions on commercial fishing set for the benefit of recreational fishers under s 311 and may be affected (adversely or beneficially) by sustainability measures imposed by regulation or by notice. Such measures include any bag limits and size limits by which the catch allowed to individual fishers is restricted. And in respect of such sustainability measures recreational fishers (together with others interested in the stock or the effects of fishing) must be consulted. This is the background against which s 21(1) of the Act is to be interpreted.

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9 Or where the current level of a stock or the level of that stock that can produce the maximum sustainable yield cannot be estimated reliably on the best available information (s 13(2A)).

10 Section 13(3).

The meaning of s 21(1)

[19] Section 21(1) is the key provision in issue on the appeal. It provides for matters to be taken into account by the Minister in setting the total allowable commercial catch for quota species under s 20. As already indicated, s 21(1) must also be taken into account in setting the commercial catch limits for non-quota species. Since s 21 sets out the methodology for reaching the total allowable catch under s 20, the terms of s 20 are important:

> **20 Setting and variation of total allowable commercial 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 commercial catch for that stock, and that total allowable commercial 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 may from time to time, by notice in the *Gazette*, vary any total allowable commercial catch set for any quota management stock by increasing or reducing that total allowable commercial catch.
>
> (3) Without limiting the generality of subsections (1) and (2) of this section, the Minister may set or vary a total allowable commercial catch at, or to, zero.
>
> (4) Every total allowable commercial catch set or varied under this section shall have effect on and from the first day of the next fishing year for the quota management stock concerned.
>
> (5) A total allowable commercial catch for any quota management stock shall not—
>
> (a) Be set unless the total allowable catch for that stock has been set under section 13 or section 14 of this Act; or
>
> (b) Be greater than the total allowable catch set for that stock.

In applying s 20 to set the total allowable commercial catch for quota species, the Minister is obliged by the terms of s 21(2) to consult with the same interested groups which must be consulted before he makes decisions under ss 11 or 13. They include environmental interests. Section 21(2) is a parallel provision to s 12, which applies to the limits set under ss 11 and 13.

[20] Section 21 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—
>
> (i) Maori customary non-commercial fishing interests; and
>
> (ii) Recreational interests; and
>
> (b) All other mortality to that stock caused by fishing.
>
> (2) Before setting or varying a total allowable commercial catch for any quota management stock, the Minister shall consult such persons and organisations as the Minister considers are representative of those classes of persons having an interest in this section, including Mäori, environmental, commercial, and recreational interests.
>
> (3) After setting or varying any total allowable commercial catch under section 20 of this Act, the Minister shall, as soon as practicable, give to the parties consulted under subsection (2) of this section reasons in writing for his or her decision.
>
> (4) When allowing for Maori customary non-commercial interests under subsection (1), the Minister must take into account—
>
> (a) Any mataitai reserve in the relevant quota management area that is declared by the Minister by notice in the *Gazette* under regulations made for the purpose under section 186:
>
> (b) Any area closure or any fishing method restriction or prohibition in the relevant quota management area that is imposed by the Minister by notice in the *Gazette* made under section 186A.
>
> (5) When allowing for recreational interests under subsection (1) of this section, the Minister shall take into account any regulations that prohibit or restrict fishing in any area for which regulations have been made following a recommendation made by the Minister under section 311 of this Act.

[21] As already indicated, I am of the view that the direction to the Minister in s 21(1) to "allow for" non-commercial interests before fixing the total allowable catch does not confer a discretion upon him to allocate the proportion of the total allowable catch he thinks appropriate for non-commercial interests. Rather, it is a

direction to him to deduct from the stock available the loss attributable to non-commercial take. That is an exercise it is necessary for the Minister to undertake if he is to ensure that the total allowable catch is not exceeded, as s 20(5)(b) requires. The s 21(1) exercise is concerned with ascertaining what stock is available to the Minister in setting the total allowable commercial catch, without compromising the total allowable catch. At the time the Minister sets the total allowable commercial catch, the total allowable catch will already have been set under s 13 or s 14 after consultation with the different interest groups, as directed by s 12. Section 21(2) is equivalent to s 12 and ensures that those interested in the fisheries are consulted in the setting of the total allowable commercial catch. This is a stand alone provision which is not derived from s 21(1) and serves a different purpose. It is concerned not with compliance with the total allowable catch (and the need to deduct non-commercial take before considering what is available for the total allowable commercial catch), but with the substantive assessment of what the total allowable commercial catch should be, applying the policies of the legislation. The total allowable catch is the principal sustainability measure to maintain the fish stock at maximum sustainable yield or above it. But such maintenance does not exhaust sustainability or utilisation ends, which are concerned also with social, economic, and cultural well-being and the reasonably foreseeable needs of future generations, as the definitions of "sustainability" and "utilisation" make clear. Specific sustainability measures may be taken under s 11 directed at ends other than the maintenance of the stock at or above maximum sustainable yield. They include measures relating to the size of fish that may be taken and fishing methods. But, as s 11(3) makes clear in relation to non-quota stock, the setting of a commercial catch limit is itself a sustainability measure. And the interests which must be consulted in setting the total allowable commercial catch under s 20 suggest that it too is concerned with sustainability ends which are not fully addressed by a total allowable catch which maintains the stock at or above maximum sustainable yield.

[22] Under s 20, the Minister is not obliged to make the full amount of the stock not otherwise accounted for through non-commercial mortality available as total allowable commercial catch. Neither s 20 nor s 21 makes the total allowable commercial catch simply a calculation after deduction from the total allowable catch of other mortality to the stock. As s 20(3) makes clear, the total allowable

commercial catch can set be set at zero. Since the total allowable commercial catch cannot be set to exceed the total allowable catch, the explicit recognition that the total allowable commercial catch can be set at zero cannot be explained as necessary to protect the total allowable catch. Section 20 confers upon the Minister a discretion to set the total allowable commercial catch in respect of a quota species between zero and an amount which does not cause the total allowable catch to be exceeded. Within that range, his decision is a matter for the Minister as long as he acts within the purpose and principles of the Act. Sustainability considerations and utilisation considerations, as identified by s 8, may be important in a particular decision. In considering the use of s 20 a range of interested groups are to be consulted. The considerations that may bear on the setting of the total allowable commercial catch, in application of the principles of the Act, will vary. Since, for example, a total allowable catch may have been set above the level at which stocks are sustainable under s 13(2), limiting the commercial catch may be a principal tool in moving the stock towards sustainability. Conceivably, where a species is of particular importance to one interest group (perhaps Mäori or recreational) or where interdependence of stock prompts environmental concern, limitation of the commercial catch may be a necessary tool for sustainability reasons which are independent of the maintenance of the stock at or above maximum sustainable yield. So, too, the Minister may take the view that a recreational interest in larger fish should be taken into account consistently with the provisions of the Act. If so, he can achieve that end in a number of ways: by adopting specific sustainability measures under s 11; by setting a total allowable catch that maintains the stock at a level above that which can produce the maximum sustainable yield; or by setting a total allowable commercial catch at a level that does not exhaust the available total allowable catch. I mention these examples for illustrative purposes only. The Minister may also take the view that a conservative approach in setting the total allowable commercial catch is required because of imperfection in information as to take and the state of the stock: a cautious approach suggested by s 10.

[23] Do such sustainability and utilisation considerations mean that in "allowing for" non-commercial fishing interests under s 21, the Minister is allocating the total allowable catch between commercial and non-commercial fishers and other identified interests, balancing the claims of each to arrive at an effective notional

quota for non-commercial interests? I do not consider that is the effect of ss 20 and 21 for a number of reasons.

[24] In the first place, there is no explicit power under s 20 to set "an allowance" for recreational fishers amounting to a "total allowable recreational catch", such as would be equivalent to the power under s 20(1) to limit the catch available to commercial fishers. Section 21 would be an odd place to find such an important substantive power since s 21 is ancillary to the power to set the total allowable commercial catch in s 20. The absence of such a power does not support the view that the s 20 exercise requires a balancing of equivalent interests.

[25] Secondly, there is no power equivalent to s 20(3) to set the recreational "allowance" "at, or to, zero". If s 21(1) entailed the setting of an effective "total allowable recreational catch", it might have been expected that the ability to deny recreational access too would have been included here. The absence of such a power when setting the total allowable commercial catch is consistent with the requirement "to allow for" recreational interests under s 21(1) being a requirement to deduct the take properly attributable to recreational fishers from the total allowable catch, which sets the outer limit of the discretion for the purposes of the total allowable commercial catch. Usually that deduction will be based on what is in fact taken (or an estimate of actual take on the basis of the best available information). In circumstances where regulations have been made under s 311 (following a process of dispute resolution), it may however be necessary to take into account those regulations (and their premise that the recreational fishing take allowed under the Act is being depleted by commercial fishing) and adjust the estimated recreational fishing take.

[26] Thirdly, "recreational interests" under s 21(1) are put on the same basis (requiring that they be "allowed for") as "Maori customary non-commercial fishing interests" and "all other mortality to that stock caused by fishing". It seems highly unlikely that Mäori customary non-commercial fishing interests (which are the subject of detailed provisions under Part 9 of the Act) are to be treated as subject to limitation under s 21 to achieve some "balance" with commercial interests or that the Minister in "allowing for" them, is required to keep commercial interests in mind.

The better view seems to me to be that recreational take, like Mäori customary take, is limited by other provisions of the Act. Section 21(1) requires such take to be factored in to what must be allowed for mortality of the stock from fishing before the Minister can set the total allowable commercial catch. We were advised by counsel that "other mortality to that stock caused by fishing" refers in particular to poaching. It is clear that such other mortality can only be an estimate of actual loss, rather than what *should* be lost. In the same way, what is allowed for recreational interests under s 21(1) is not in my view an assessment by the Minister of what he thinks *should* be allowed for, but a calculation of what is taken, with some adjustment for restrictions on commercial fishing through regulations made under s 311 (just as adjustment is made in respect of mataitai reserves or closure of fishing areas under s 186 when allowing for Mäori customary non-commercial interests). The language of s 21(1) is only consistent with the requirement "to allow for" being a requirement of deduction of take. The Minister is required to allow for non-commercial fishing interests (Maori customary non-commercial and recreational) "and …*all other mortality to that stock caused by fishing*". The ordinary sense of the subsection read as a whole is that it is mortality to the fish stock caused by non-commercial fishing interests which must be "allowed for" under para (a).

[27] Fourthly, additional support for the interpretation is provided by s 21(2). It requires the Minister to consult with a number of interests about the setting or varying of the total allowable commercial catch. This, as I have already suggested, is a stand-alone requirement, not derived from s 21(1), as its equivalence with s 12 emphasises. In addition to those interests identified in s 21(1)(a), s 21(2) includes "environmental" interests, as well as "commercial" interests. If the aspirations of non-commercial interests are required by s 21(1) to be balanced in setting "an allowance" for recreational fishers (and Mäori interests), it is not clear why an "allowance" for conservation should not also have been provided. Nor is it clear why environmental interests should be consulted on the total allowable commercial catch, but not the "allowances" permitted to the non-commercial fishers. The sequence of s 21 is that deductions for mortality of stock must be made (to avoid the total allowable catch being exceeded) and then that all those interested (as users or as environmentalists) are to be consulted before the total allowable commercial catch is set. This consultation permits wider aspirations relevant to the statutory aims of

sustainability and utilisation to be considered, after existing take (managed as to limits by separate mechanisms under the Act which themselves permit public consultation) is subtracted. This is the outcome contended for by the recreational fisher appellants. It follows that I disagree with the view taken by McGrath J at para [52] that the Minister is required, except in exceptional circumstances, to allocate the whole of the total allowable catch among the different interests referred to in s 21. In my view he must deduct the stock lost to non-commercial fishing, but then has a discretion to be exercised in conformity with the policies of the Act to set the total allowable commercial catch between zero and the stock remaining within the total allowable catch.

[28] Fifthly, I think it is a long step in the particular statutory context to turn a requirement "to allow for" recreational interests into a requirement to grant "an allowance" which limits the access of recreational fishers. Part 4 is not concerned with regulating recreational use. It contains no machinery to permit such "allowance" to be enforced. The recreational take is not controlled by s 20 or s 21. The access of amateur fishers is controlled by provisions under different Parts of the Act, principally by regulation under Part 16. In respect of kahawai such access is controlled by individual bag limits. When in s 311 a precondition of regulations is the fact that low catch rates are having "a significant adverse effect on the ability of recreational fishers to take their allowance for that stock", what is being referred to is not a global "allowance" for recreational fishers, but the ability of individuals to obtain the bag limits which are their allowance under the regulations.

[29] To the extent that there are statements in the decision of the Court of Appeal in *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries*[11] that suggest that ss 20 and 21 confer upon the Minister a significant allocative decision among competing interests, I would not follow them. I think the Court of Appeal was right in that case to say that s 21 simply requires the Minister's "best estimate of what [the non-commercial interests] will catch during the year, they being subject to the controls which the Minister decides to impose upon them e.g. bag limits and

[11] (CA 82/97, 22 July 1997), Tipping J for the Court.

minimum lawful sizes". But I do not agree that "the Minister in effect *apportions* [the total allowable catch] between the relevant interests". And I do not accept that s 20 provides a mechanism by which the Minister varies "the ratio between commercial and recreational interests".[12]

[30] Section 21(1) is concerned with ascertaining what is available for the total allowable commercial catch. Within what is available, in making his determination under s 20, the Minister must still consider the different objects of the Act and must take into account the views of those interested. There is no statutory presumption that the whole total allowable catch will be utilised. It is not entirely accurate to say that there is no substantive priority for non-commercial fishing interests over commercial ones. That is no doubt correct in overall application of the Act. But in application of s 20 in setting the total allowable commercial catch, the Minister must first allow for recreational and other non-commercial take. At that stage, it requires a deduction which is a priority. The control of the recreational take is primarily through regulations. The Act does not envisage a general balancing of competing claims to utilisation in making the s 20 determination.

[31] The legislative history of the wording of s 21(1) does not suggest a different interpretation. In the Bill as introduced, the Minister was required to "have regard" to customary Mäori and recreational interests in a stock before setting a total allowable catch.[13] That language was thought to be too weak. The Select Committee cited submissions which "felt that a clear priority should be given to Maori customary fishing, recreational fishing, or both". They recommended that the Minister be required to "allow for" these interests. The Select Committee reported:[14]

> We agree with this point and recommend that the Minister "allow for" non commercial interests. The non-commercial allowance will be quantified and enforced through bag limits and other controls or customary fishing regulations.

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12 At p 17.
13 Clause 21 of the Fisheries Bill (No 63-2).
14 Primary Production Committee, "Report on the Fisheries Bill", 1996, xv.

I do not seek to put much weight on this expression of the reasons for the wording. But it does seem to be consistent with the interpretation I prefer. "Have regard to" is too weak an expression if, as I think is the effect, the Minister must allow for the take by non-commercial interests by subtracting it from the total allowable catch. The acknowledgement that "the non-commercial allowance will be quantified and enforced through bag limits and other controls or customary fishing regulations" is also consistent with the view that it is not quantified through an "allowance" in setting the total allowable commercial catch.

Conclusion

[32] It follows that I would not reject the appellants' contentions that the Minister may set a total allowable commercial catch that is less than the difference between the total allowable catch and what is allowed for non-commercial mortality to the stock. The s 20 determination is different from the s 21(1) deduction. Nor do I agree that the deduction the Minister must make under s 21(1) for non-commercial mortality to the stock is "a policy decision".[15] The deduction he must make is a matter of assessment, which must be based on the best available information, while taking into account its imperfections. In the event of imperfect information, the Minister is entitled to be cautious. Once the deduction from the total allowable catch is made, the setting of the total allowable commercial catch within the balance of the total allowable catch entails a discretionary determination by the Minister. Again, it must be based on the best information available to the Minister, with a margin for caution where it is warranted by imperfection in the information. The s 20 determination must be in accordance with the policies and principles of the Act and taken after consultation with relevant interests. In the case of a stock under pressure or in respect of which there are social and cultural values which the Act requires to be taken into account, it would be open to the Minister to be conservative in setting the total allowable commercial catch, particularly since it is the platform for property rights. The s 20 determination is not a vehicle for adjusting access between recreational and Mäori customary interests on the one hand, and commercial fishers on the other. If the Minister wishes to control the recreational take, he must do so by

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[15] Compare McGrath J at para [65].

direct regulation, rather than through the setting of the total allowable commercial catch. I would allow the appeal. In my view the Minister misinterpreted his functions in setting the total allowable commercial catch under s 20 of the Fisheries Act.

BLANCHARD, TIPPING, McGRATH AND WILSON JJ

(Given by McGrath J)

Background

[33] This appeal concerns the regulation of fisheries under the Fisheries Act 1996 through the quota management system. The case concerns the competing interests in the kahawai fishery. Kahawai is a species of special importance to recreational fishers throughout New Zealand but it is also a species of importance to commercial fishers, forming part of the mixed purse seine catch in the Bay of Plenty. Kahawai became subject to the quota management regime on 1 October 2004. Six quota management areas were established. The present proceedings have focused on KAH1, an area which includes the Hauraki Gulf Marine Park, an area of particular interest to recreational fishers.

[34] The Minister of Fisheries must set a total allowable catch for each area brought into the quota management system, based on what the Minister decides is the maximum sustainable yield for the species in the area concerned.[16] It is common ground that the Minister must then make decisions which allocate that total allowable catch among the Maori customary, recreational and commercial fishing sectors in the area. The dispute which has given rise to this litigation reflects the different views that the appellants, who are associations representing interests of recreational fishers, and the first respondents, which are commercial fishing companies, each have about the lawfulness of decisions that were taken under the regime by the Minister of Fisheries in 2004 and 2005. Bearing in mind that what is allocated is a limited resource, it is not surprising that commercial and recreational fishers should have different perspectives on the way that regulatory system should

[16] In practice the total allowable catch is fixed by reference to fish weight.

operate. The Minister, and the Chief Executive of the Ministry of Fisheries are also respondents in the proceedings.

[35] The total allowable commercial catch is allocated among those fishers who hold individual transferable quota for the area. Quota is an entitlement to fish for a share of the species concerned and is expressed as a proportion of the total allowable commercial catch. Annual catch entitlements are allocated to quota holders each year, giving them the right to take their proportion of that year's total allowable commercial catch.

[36] Increases or reductions in the total allowable commercial catch for a species in any year accordingly alter what each quota holder becomes entitled to catch in that year. Reductions in the total allowable commercial catch in relation to species popular with recreational fishers, such as kahawai, are seen as being to the benefit of recreational fishers. Increases benefit commercial fishers. As mentioned, the quota management system does not directly restrict what may be taken by recreational fishers, although the Act does envisage that they may be subject to other controls such as size and bag limits imposed under statutory regulations.

[37] In the High Court the appellants and the first respondents each challenged the decisions of the Minister setting the total allowable catch and total allowable commercial catch for each year. On appeal the issues have narrowed and the appeal to this Court is principally concerned with obtaining clarification of the meaning of the statutory provisions for setting the total allowable catch and the total allowable commercial catch in the future and how they should be applied by the Minister, who is a respondent to the appeal. General declaratory relief rather than relief targeted at particular Ministerial decisions is accordingly sought from this Court.

Statutory provisions

[38] The provisions in the Fisheries Act which set up this regulatory framework are to be read in light of the purpose of the Act:

> **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.

[39] Section 8(1) appears in Part 2 of the Act headed "Purposes and principles". It expresses a single statutory purpose by reference to the two competing social policies reflected in the Act. Those competing policies are "utilisation of fisheries" and "ensuring sustainability". The meaning of each term in the Act is defined in s 8(2). The statutory purpose is that both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system. But recognising the inherent unlikelihood of those making key regulatory decisions under the Act being able to accommodate both policies in full, s 8(1) requires that in the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.

[40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the *conserving* of fisheries resources.[17] Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

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[17] Conserving involves the concept of "conservation" which is defined in s 2 to mean: "the maintenance or restoration of fisheries resources for their future use."

Total allowable catch

[41] The key operative provision in relation to ensuring sustainability in the administration of the quota management regime is s 13. It appears in Part 3 headed "Sustainability measures". Section 13 provides:

> **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.

[42] Section 13 provides the mechanism by which the Minister sets the total allowable catch for each species subject to quota management in a quota management area. The power is to be exercised subject to the various considerations expressed in the section.

[43] The guiding criterion in s 13 is sustainability. It is expressed in terms of attaining a maximum sustainable yield for setting a total allowable catch for that stock in the quota management area.[18] The determination of the total allowable catch is a "sustainability measure" under the Act, being a measure set or varied under Part 3 for the purpose of ensuring sustainability. The power to set or vary sustainability measures may be exercised after taking into account the effects of fishing on the stock, applicable catches and notional volatility of the stock. In broad terms the Minister is required by s 13 to set a total allowable catch at a figure which maintains the stock at or above a level which can produce the maximum sustainable yield. When the current level of the stock is below that which can produce the maximum sustainable yield, the Minister must set the total allowable catch at a level that enables the stock to move towards or above the level that can produce the maximum sustainable yield. When the current level of the stock is above that which can produce the maximum sustainable yield, the Minister has a discretion to set the total allowable catch at a level that either maintains the level of the stock above the maximum sustainable yield or otherwise enables the stock to move towards the level that can produce the maximum sustainable yield. The way the section is drafted seems to contemplate that stock may be moved towards maximum sustainable yield when it is already above the level which can produce that yield.

[44] While sustainability is the guiding criterion, the Minister has some flexibility under s 13 to consider aspirations of the fishing sectors for utilisation of the resource. In considering the way in which, and rate at which, a stock is moved towards or above a level producing a maximum sustainable yield, the Minister must have regard to "social, cultural and economic factors as he or she considers relevant".[19] This

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[18] Section 2 defines "maximum sustainable yield":

> **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.

[19] Section 13(3).

imports into the process for setting the total allowable catch a key aspect of the definition of "utilisation" in s 8(2).

Total allowable commercial catch

[45] Part 4 of the Act provides for the operation of its quota management system. The Minister must bring a species under the quota management system if satisfied that current management is not ensuring sustainability or providing for utilisation.[20] In that event the Minister is required to set a total allowable commercial catch for the species. This enables the calculation of individual transferable quota that, in sum, account for the total allowable commercial catch. Section 20 provides:

> **20 Setting and variation of total allowable commercial 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 commercial catch for that stock, and that total allowable commercial 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 may from time to time, by notice in the *Gazette*, vary any total allowable commercial catch set for any quota management stock by increasing or reducing that total allowable commercial catch.
>
> (3) Without limiting the generality of subsections (1) and (2) of this section, the Minister may set or vary a total allowable commercial catch at, or to, zero.
>
> (4) Every total allowable commercial catch set or varied under this section shall have effect on and from the first day of the next fishing year for the quota management stock concerned.
>
> (5) A total allowable commercial catch for any quota management stock shall not –
>
> (a) Be set unless the total allowable catch for that stock has been set under section 13 or section 14 of this Act; or
>
> (b) Be greater than the total allowable catch set for that stock.

[20] Section 17B.

[46] The total allowable commercial catch accordingly cannot exceed the total allowable catch for the stock which will already have been determined by the Minister. Section 21 provides for what the Minister is to take into account in determining the total allowable commercial catch of a stock in a fishing year:

> **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—
>
> (i) Maori customary non-commercial fishing interests; and
>
> (ii) Recreational interests; and
>
> (b) All other mortality to that stock caused by fishing.
>
> (2) Before setting or varying a total allowable commercial catch for any quota management stock, the Minister shall consult such persons and organisations as the Minister considers are representative of those classes of persons having an interest in this section, including Maori, environmental, commercial, and recreational interests.
>
> (3) After setting or varying any total allowable commercial catch under section 20 of this Act, the Minister shall, as soon as practicable, give to the parties consulted under subsection (2) of this section reasons in writing for his or her decision.
>
> (4) When allowing for Maori customary non-commercial interests under subsection (1), the Minister must take into account –
>
> (a) Any mataitai reserve in the relevant quota management area that is declared by the Minister by notice in the *Gazette* under regulations made for the purpose under section 186;
>
> (b) Any area closure or any fishing method restriction or prohibition in the relevant quota management area that is imposed by the Minister by notice in the *Gazette* made under s 186A.
>
> (5) When allowing for recreational interests under subsection (1) of this section, the Minister shall take into account any regulations that prohibit or restrict fishing in any area for which regulations have been made following a recommendation made by the Minister under section 311 of this Act.

[47] Section 21 prescribes the manner in which the Minister sets or varies the total allowable commercial catch for the stock, including certain matters the Minister must take into account. One requirement is that the Minister must consult with representatives of those having an interest in the operation of s 21 including Maori, environmental, commercial and recreational interests. The Minister is also subject to the general obligation on all decision-makers under the Act to take account of stipulated information principles, one of which is that they base their decisions on the best available information.[21]

[48] In setting the total allowable commercial catch the Minister is required to have regard to the total allowable catch, and to allow for mortality to the stock that is caused by both non-commercial fishing interests and "all other mortality". Non-commercial fishing interests are Maori customary fishing interests[22] and recreational interests. The "other mortality" referred to will principally, if not totally, be that caused by illegal fishing. In relation to the allowance for recreational interests, the Minister must take into account the impact of regulations that prohibit or restrict commercial fishing in any area.[23] The Minister has power under s 311 to make such regulations for the purpose of better providing for recreational fishing for a stock in situations where low catch rates for recreational fishers have had a significant adverse effect on their ability "to take their allowance for that stock". Following a process involving dispute resolution and consultation, regulations may be made under s 297 closing areas to commercial fishing or prohibiting certain methods of commercial fishing for the stock.

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21 The information principles which s 10 of the Act requires those exercising functions in relation to utilisation of fishing resources or ensuring sustainability to take into account are:

(a) Decisions should be based on the best available information;
(b) Decision makers should consider any uncertainty in the information available in any case;
(c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate;
(d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

22 It is unnecessary in this judgment to discuss the basis on which the allowance for Maori customary non-commercial fishing interests is to be determined. There is detailed provision in the Act for such interests (in Part 9) but no equivalent provision outside of s 21 for recreational interests.

23 Section 21(5).

[49] The Minister ultimately determines the total allowable commercial catch and must give reasons in writing for that decision.

The 2004 and 2005 decisions

[50] On the application of the quota management system to kahawai the Minister of Fisheries[24] consulted with representatives of commercial and recreational interests prior to setting both the total allowable catch and total allowable commercial catch. Following that consultation, the Ministry of Fisheries proposed to the Minister that the total allowable catch should be fixed by reference to what was termed current utilisation of the stock (being effectively the most recent catch history of commercial and non-commercial fishers) but subject to a reduction of 15 per cent in the interests of stock preservation and sustainability. Officials advised that such a reduction would be appropriate if the Minister considered current utilisation was at levels presenting a risk to the stock. The Minister fixed the total allowable catch on that basis for most quota management areas, including KAH1. He also expressed an intention to review daily bag limits for recreational fishers to restrain what they caught, but ultimately took no steps to do so.[25]

[51] The same approach was taken in 2005 by the Minister then holding office,[26] except that there was a further reduction of 10 per cent on the levels of total allowable catch and total allowable commercial catch. This provided a cumulative reduction of 23.5 per cent on catch history levels pertaining prior to 2004. Accordingly, the Minister's approach to determining what to allow for recreational interests and indirectly the total allowable commercial catch was one based on available information concerning the catch history of the two sectors.

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24 Hon David Benson-Pope.

25 In the High Court, Harrison J found the Minister's failure to address subsequent proposals by the Ministry of Fisheries, for regulations intended to have the effect of reducing recreational catch, was unreasonable *The New Zealand Recreational Fishing Council Inc v Minister of Fisheries* (High Court, Auckland CIV 2005-404-4495, 21 March 2007, Harrison J) at paras [125] – [126]. That finding was not challenged in the Court of Appeal and is not in issue in this Court.

26 Hon Jim Anderton.

The correct approach to applying s 21

[52] The scheme of the Act envisages that the Minister first sets the total allowable catch for the fishing year under s 13, and then sets the total allowable commercial catch under ss 20 and 21.[27] The requirement under s 21 to have regard to the total allowable catch, in setting the total allowable commercial catch, indicates that the Minister must keep in mind first that the total allowable commercial catch cannot exceed the total allowable catch. Secondly the Minister must bear in mind that the statutory policy of ensuring sustainability of the stock in the area has been met by the earlier decision fixing the total allowable catch. That element of the statutory purpose therefore does not constrain the Minister in exercising powers under ss 20 and 21 to provide for the utilisation of the fishery. These contextual matters indicate that, other than in exceptional circumstances provided for by the Act, the Minister is expected to allocate the whole of the total allowable catch in the course of making the allowances required and determining the total allowable commercial catch, under s 21. In other words, read in its context, which of course includes s 20, the Minister is required by s 21 to apportion the total allowable catch among the various interests and demands referred to.

[53] It follows that the total allowable commercial catch is ultimately determined by a calculation. Starting with the figure for the total allowable catch, the Minister must decide what allowances to make for what will be taken by the specified non-commercial fishing interests, and all other mortality caused by fishing. The Minister deducts the sum of these allowances from the total allowable catch and the difference is the total allowable commercial catch. The requirement to have regard to the total allowable catch also indicates that the Minister must at each stage keep in mind that s 21 is concerned with allocation of a limited resource and that what is allowed for non-commercial fishing interests will impact on the total allowable commercial catch.

[54] The meaning of "recreational interests" which the Minister must allow for under s 21(1)(a)(ii), is not defined in the Act. It must be ascertained from the

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[27] Section 20(5).

statutory context in light of the statutory purpose. In the context of s 21 itself, it is clear that recreational interests are non-commercial fishing interests which are not Maori customary non-commercial fishing interests. Section 8 provides some further contextual guidance in that "recreational interests" are interests in the "utilisation" of fisheries resources in terms of s 8(1). The meaning of "utilisation" includes "using … fisheries resources to enable people to provide for their social, economic and cultural wellbeing". The notion of people providing for their wellbeing, and in particular their social wellbeing, is an important element of recreational interests.

[55] The Act is also not explicit as to what is required by the direction that the Minister "shall allow for" non-commercial fishing interests, including recreational interests under s 21(1)(a). On their ordinary meaning the words "allow for" require the Minister both to take into account those interests and to make provision for them in the calculation of the total allowable commercial catch. That makes plain that there is to be an allocation for recreational interests.[28] This meaning of s 21 is supported by the legislative history of the section.[29] The allowances made under s 21(1) for non-commercial fishing interests differ in nature from the rights the Act creates in respect of entitlements to the total allowable commercial catch. As the Court of Appeal said in *Snapper 1*:[30]

> It is important to recognise that what is allowed for by the Minister in respect of the interests for which he must allow before setting the TACC, is not a quota as such. 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 interests before he fixes the TACC. That is how the legislation is structured.

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[28] It is, however, possible that in special circumstances (such as where it was impracticable for recreational fishers to catch the stock) a considered allowance would be nil.

[29] The Primary Production Committee ("Report on the Fisheries Bill", 1996 at xv) substituted the words "allow for" for "have regard to" in the provision in the Bill which became s 21(1) as it was reported back to the House of Representatives. Very significantly, the Select Committee said of the effect of this change:

> "The non-commercial allowance will be quantified and enforced through bag limits and other controls …".

[30] *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* (CA 82/97, 22 July 1997) ("*Snapper 1*") at p 17 per Tipping J for the Court.

[56] Although what the Minister allows for is an estimate of what recreational interests will catch, it is an estimate of a catch which the Minister is able to control. The Minister is, for example, able to impose bag and fish length limits. The allowance accordingly represents what the Minister considers recreational interests should be able to catch but also all that they will be able to catch. The Act envisages that the relevant powers will be exercised as necessary to achieve that goal. The allowance is an estimate and an allocation of part of the total allowable catch in that way.

[57] The decision concerning the allowance for recreational interests is important to the recreational fishing sector. The allowance will directly impact on the total allowable commercial catch, which itself impacts on the volume of the stock that will be available for non-commercial fishing interests in the area during the fishing year. Both commercial and non-commercial fishing sectors have an interest in the allowance made for recreational interests under s 21(2). The environmental sector is also interested and will be concerned that the allocations, on which the integrity of the total allowable commercial catch depends, are enforceable. Accordingly, each of these interests must be consulted and is entitled to receive reasons for the Minister's decision. When species such as kahawai, which are popular with recreational fishers, are brought under quota management, commercial interests and recreational interests rightly see themselves in competition for the limited resource and recognise that ministerial decisions for the permissible commercial catch significantly affect the share of the fish stock available to each sector.

[58] The appellants are critical of the focus of the Minister's decisions in 2004 and 2005 on catch history as the basis for setting the commercial catch under s 21. They argue that this approach is inconsistent with the policy and objects of the Act as set out in s 8. They say that the purpose guiding the Minister in applying s 21 is solely one of utilisation and that the Minister's focus should be on "enabl(ing) people to provide for their social, economic and cultural wellbeing". Basing the decision on what to allow for recreational interests on historic catches in the sectors is said to be inconsistent with the statutory purpose. The appellants say s 8 rather calls for a qualitative analysis of the degree of access to the total allowable catch which will enable people in the respective sectors to provide for their wellbeing from the

resource. The appellants say that this approach would be more favourable to recreational fishing interests than adjusted catch history. They also refer to the sequence of decision-making under s 21 and say that the determination of the allowance for recreational fishing interests before reaching the commercial catch figure indicates that the former has some priority. Reference is made to common law rights of recreational fishers and the lack of any requirement in the Act to allocate in full the total allowable catch among the nominated fishing interests.

[59] The appellants' argument would treat s 8 as a provision which controls how the Minister is to determine the total allowable commercial catch and the various allowances to be made as provided in s 21. That is not, however, the role of s 8 in the scheme of the Act. Parliament has stipulated in s 21 the legal basis on which the power to determine the total allowable commercial catch under s 20 is to be exercised. In s 8 Parliament has stipulated the overall purpose and objects of the Act. The scope of the Minister's powers under ss 20 and 21 has limits, set by that purpose, in that they must be exercised to promote the policy and objects of the Act.[31] As the Court of Appeal once expressed this rule of law in a fisheries regulation case, the Minister must "bear in mind and conform with the purposes of the legislation".[32] But, subject to this constraint, the nature and scope of the Minister's powers and the restrictions on them are as is provided for in the operating provisions of the Act.

[60] Section 8 expresses a composite policy that is concerned with providing for utilisation subject to ensuring sustainability. That purpose is not of direct relevance to decisions under ss 20 and 21 which are apportioning a total allowable catch that has been fixed under a sustainability measure. The terms of the definition of utilisation, including the wellbeing concept, are contextually relevant to what is meant by recreational interests and in that sense are relevant considerations in decisions under s 21. Section 8's purpose does not, however, extend to a requirement that the Minister proceed on the basis of a comparative analysis of wellbeing factors in relation to recreational interests and other interests affected by

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31 *Unison Networks Ltd v Commerce Commission* [2008] 1 NZLR 42 at p 58 (SC) per McGrath J for the Court.

32 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at p 173 per Keith J for the Court.

the setting of the total allowable commercial catch. The legislation explicitly requires that social, cultural and economic factors are considered in decisions made when setting the total allowable catch that are concerned with moving stock to a level that will produce the maximum sustainable yield.[33] But there is no requirement of that sort expressed in s 21.

[61] Sections 20 and 21 prescribe a framework within which the Minister must operate when setting the total allowable commercial catch. There is an emphasis on the requirement for an informed decision and consultation with interested parties. Reasons for the decision must be given. The framework, which we have described, requires apportionment of the total allowable catch by the Minister among the various interests and other mortality mentioned in the sections. The sequential nature of the method of allocation provided for in s 21 does not indicate that non-commercial fishing interests are to be given any substantive priority over commercial interests. In particular, the allowance for recreational interests is to be made keeping commercial interests in mind. Within the statutory framework this is an area in which the Act envisages that the Minister has room to make policy choices. The Minister may set or vary the total allowable commercial catch at or to zero.[34] The Act also envisages that provision will be made for non-commercial fishing interests in the stock. Implicitly that must be a reasonable provision in all the circumstances but these will include the fact that there is a limited resource in which others, including commercial fishers, have an interest. Within these limits, ss 20 and 21 leave it to the Minister to decide the basis on which he or she will decide on the appropriate allocations and what in the end the total allowable commercial catch is to be.

[62] It will be apparent also that we do not accept the appellants' suggestion that s 21 permits the Minister to set a total allowable commercial catch that is less than the difference between the total allowable catch and what the Minister allows for the non-commercial interests and other mortality. It is implicit in the scheme of the Act that the total *allowable* catch is the total that is allowed to be caught. Because the

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33 See s 13(3).
34 Section 20(3).

total allowable catch is set at a level consistent with sustainability of the stock, that catch is available in full for utilisation. Section 21 is to be applied accordingly.

[63] Nor do we accept that the question of common law rights to fish is relevant to the Minister's application of s 21. It is unnecessary to consider the existence, nature or scope of such a common law right as, in relation to the quota management system, it is clear that the Act covers the entire ground that would be occupied by such rights. In this respect the legislation accordingly governs all aspects of rights of the various fishing sector interests to the exclusion of the common law.[35]

[64] Ultimately it is for the Minister to decide the basis on which decisions to set the commercial catch are taken. We agree with the Court of Appeal that, in making decisions on allowances and the commercial catch, if the Minister, properly informed, and acting in accordance with the framework for exercising the powers, is satisfied that the catch history of the parties in previous years provides a reasonable basis for assessment of allocations, it is open to the Minister to take that approach.[36]

[65] In the end, within the limits provided for by the Act, the Minister makes a policy decision as to what allocations are appropriate for non-commercial interests and other mortality and what is to be the total allowable commercial catch. These decisions are interdependent. The Act does not confer priority for any interest over the other. It leaves that judgment to the Minister. The Act envisages that the allowance for recreational interests will be a reasonable one in all the circumstances. It also envisages that will be the case for the allowance for Maori customary fishing interests. The position is the same for the total allowable commercial catch, although the Act recognises that in some circumstances it may be reasonable to fix the commercial catch at zero.

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35 *Attorney-General v de Keyser's Royal Hotel Ltd* [1920] AC 508 at p 526 per Lord Dunedin.

36 (CA 163/07, 11 June 2008) (William Young P, O'Regan and Arnold JJ) at para [80] per O'Regan J for the Court.

[66] A formal declaration is not required. For these reasons we would dismiss the appeal, in the circumstances without awarding costs.

Solicitors:
Hesketh Henry, Auckland for Appellants
Chapman Tripp, Wellington for First Respondents
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