In the Supreme Court of New Zealand

SC 40/2008

between

New Zealand Big Game Fishing Council Inc

First Appellant

and

New Zealand Recreational 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

Legal Submissions of Appellants

Dated: 1 December 2008

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May it Please the Court:

Issue

1. The question for which leave has been allowed is did the Minister of Fisheries, when setting the total allowable commercial catch for Kahawai under s.21 of the Fisheries Act 1996 in 2004 and 2005, act in accordance with statutory requirements.

A: INTRODUCTION

2. These proceedings were first initiated by the appellants as a test case seeking directions as to the nature and extent of the public's recreational fishing rights when setting the total allowable catch (TAC's) and the total allowable commercial catch (TACC's) under the quota management system (QMS) for the kahawai fish species.

The Key Question

3. In the appellants' submission the key question in the Appeal is how the objective of utilisation in Section 8 of the Fisheries Act 1996 (the Act), namely *"by conserving, using, enhancing and developing fisheries resources"* to *"enable people to provide for their social, economic, and cultural well-being",* is to apply to the exercise of the Minister's powers and duties under Section 21 where the Minister has a duty*" to allow for*" "*recreational interests*" when setting the TACC for fisheries in the quota management system (QMS).

4. Central to the appellants' argument is the distinction in the scheme of the Act, between TAC decisions on the one hand which are for the primary function and purpose of ensuring sustainability of fish stocks, and on the other hand setting or varying the TACC (and non-commercial 'allowances') which determines the utilisation by and between the respective fishing sectors. This distinction was accepted by Harrison J see [43], [44], [54] (HC) [Vol 1, Tab 2]. It was this distinction between the different purposes or functions inherent in the two decisions (TAC and allowances/TACC) which led Harrison J to his finding that the Minister of Fisheries fixed the TACCs in 2004 and 2005 for all kahawai stocks without having proper regard to the social, economic and cultural well-being of the people (paragraphs [54]-[83], (HC)) [Vol. 1, Tab 2].

The Court of Appeal rejected Harrison J's analysis; see paras [49] – [69] (CA) [Vol 1, Tab 5].

5. The Fisheries Act 1996 provides no specific direction as to how the Minister is to 'allow for' non-commercial fishing interests in making his or her TACC decision under s.21 (i.e. as to what quantum or quality of the fisheries resource should be provided to recreational fishers) - other than the directive to the Minister that he or she "shall allow for" those interests.[1]

6. Section 21(1) requires the Minister to exercise a mandatory function to allow for the recreational (and non-commercial) interests in the context of setting or varying the TACC. Previous decisions have noted the potential ambiguity and openness in the statutory language. In the "Snapper 1" proceedings, a case in which the recreational fishers took little part (granted leave to withdraw from the Court of Appeal) the Court of Appeal and High Court accepted that the non-commercial interests are to be allowed for first, before setting or varying the TACC.[2]

7. Section 8 of the Fisheries Act 1996 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 well-being.

[1] The fishing sector interests (see definition in s.6(3)are commercial fishers (as defined in s.2, by reference to fishing where a permit is required by s.89), and non-commercial fishing interests comprising recreational fishers (a term not defined), and Maori non-commercial customary fishers.

[2] *New Zealand Federation of Commercial Fisherman Inc. & ors v Minister of Fisheries & ors* (Wellington, HC, CP237/95, McGechan J) [Authorities: I, Tab 2], and *New Zealand Fishing Industry Association & ors v Minister of Fisheries* (Court of Appeal, CA 82/97, 22 July 1997) [Authorities: I, Tab 3] (together the "Snapper 1 case"). *And see Roach v Kidd* (High Court, Wellington, CP715/91, McGechan J, 2 October 1992) [Authorities: I , Tab 4].

8. The appellants' submission is that when allowing for recreational fishing interests, construed in the light of the statutory purpose, the legislation imposes a standard on the Minister to provide a level and quality of access to the fisheries resource which will actually enable people to provide for their social, economic and cultural well-being from the activities of conserving, using, enhancing and developing the particular fisheries resource. Section 8 requires that decisions under the Act should *enable* people to provide for their *own* well-being. A decision should create opportunities.

9. Because of the passage of time the quantum of kahawai 'allowed for' in 2004 and 2005 is less important to the appellants than clarification of the legal principles to be applied by the Minister in respect of fish stocks where there is a significant recreational interest.

10. The Minister has indicated that new TAC, allowance and TAAC decisions will be made after the outcome of the present proceedings to take effect in October 2009.

B: CONTEXT

QMS fisheries

11. The majority of species of importance to commercial fishers are now managed under the quota management system (QMS). The QMS was introduced in 1986, and created a system of statutory rights for commercial fishers.[3]

12. To date there are 97 species groupings in the QMS, which are divided into 629 individual management units. The available commercial take (TACC) across all quota management systems stocks was 573,000 tonnes, with an actual catch of 441,000 tonnes for the latest complete fishing years. Customary fishers provided for within the QMS have an allowance of 4,802 tonnes. While estimating recreational catch is not accurate (there are no reporting requirements for recreational fishers, no permit is required, and participation is open to all natural persons fishing non-commercially) the national estimated recreational catch

[3] Transferable rights for deepwater species was introduced in 1982.

across all species is 25,000 tonnes[4]. As at November 2007, 31% of the total New Zealand population are estimated to participate in recreational fishing.[5]

Non-commercial fishing

13. At common law the public has a right (a common property right) to fish in the sea, except where a property right is acquired exclusive of the public right, or where Parliament has restricted or modified the public right by act of the legislature (see below).

14. The large majority of near shore fish stocks with a recreational component have already entered the QMS.

15. Rather than measuring success in gross weight, i.e. tonnes (as with commercial fishers), common measures of success of recreational fishers are the numbers and size of individual fish relative to time. This coincides with the predominant regulation in the form of daily bag limits. These indicators of the quality of the fishery will be affected by the abundance of the fish stocks in locations where the recreational fishers fish. There are relatively few near shore fisheries in which recreational participation is substantial - snapper, blue cod, kahawai, rock lobster, paua and scallops.[6]

16. The best estimate of the dollar value of the industry kahawai catch in the papers before the Court is approximately $3.2 million of which $2.5 million represents the take by the Sanford purse seine fleet operating out of Tauranga. A large percentage of the purse seine catch is exported. [7]

17. Kahawai has a special value for recreational fishers. The Minister's 2004 decision describes kahawai as the "people's fish". An economic

[4] Approximately 5.6% percent of current commercial catch

[5] Source: New Zealand Fisheries at a Glance' from MFish website: http//www.fish.govt.nz/Fisheries+at+a+glance/default.htm, citing Andrew Fletcher Consulting Survey, November 2007, for the Ministry of Fisheries.

[6] See Briefing for the Minister of Fisheries, 2004 [Vol 5, p 982,1002], and see Briefing for the Minister 2005: [Vol 7, p 1291,1292].

[7] Mace & Company Ltd submission for Sanford Ltd re introduction of kahawai into the Quota management System [Vol V, page 1484, pages 14870-1488]

analysis by the South Australian Centre for Economic Studies (SACES) concluded that the recreational fishers valued kahawai between 11 and 16 times higher than the commercial sector: see Affidavit of K Ingram paras 29-30 [Vol 2, p 131, 136], and IPP2004, p48, para 129 [Vol 4, p 550-551, para 126-129].

18. For the majority of fish stocks fished commercially, there is little or no actual or perceived conflict with recreational fishers, because the large majority of the commercial take is of deep water species well beyond the range of conventional fishing methods available to recreational fishers (principally the hand held line).

19. Where there is a conflict between the fishing sectors it is necessary to identify an appropriate basis for a resolution. As Professor Robert Kearney in an article titled "*Fisheries property rights and recreational/commercial conflict: Implications of policy developments in Australia and New Zealand*" [Authorities: I, Tab 1, pp 54-55] has identified, at the heart of resource allocation decisions for fisheries resources is a dispute over the *values* or *principles* which underpin decisions on resource allocation: [Authorities: I, Tab 1]:

> The dilemma now facing managers is that the resource will need to be allocated to competing users **but no principles have been established for allocation**
>
> [emphasis supplied]

20. It is the primary contention for the appellants that, as accepted in the High Court, Section 8 of the Act expresses the standards and values which must underpin decisions on fisheries allocation.

C: THE SCHEME OF THE FISHERIES ACT

TAC And TACC – Decisions For Different Functions

Internal Context of the Fisheries Act 1996

21. It is submitted that contrary to the Court of Appeal decision, the internal context and scheme of the Act makes a distinction between TAC decisions which are a "sustainability measure" and which have the primary function and purpose of "ensuring sustainability"; and 'allowances'/TACC decisions that primarily concern the "utilisation" of fisheries resources.

Part 2 - Purpose And Principles

22. Part 2 of the Act contains the *Purpose and principles* namely ss. 8 (purpose), 9 (environmental principles) and 10 (information principles). Other sections in the Act should, it is submitted, be interpreted in the context of these purpose and principles.

23. Section 8(1) expresses two statutory objectives, which could be in conflict, but which, read as complementary, express the overall purpose of the statutory regime. Grammatically the *while* which separates the two – "utilisation" and "ensuring sustainability" – expresses a requirement for complementarity in the implementation of the two objectives. Both "utilisation" and "ensuring sustainability" are separately defined in s.8(2).

24. Within Part 2 of the Act, both s.9 and s.10 commence with: "*All persons exercising or performing functions, duties or powers under this Act, in relation to the utilisation of fisheries resources* ***or*** *ensuring sustainability shall take into account the following … principles.*" The disjunctive "or" recognises the different inherent character of "utilisation" and "sustainability".

Part 3 – Sustainability Measures

25. Part 3 of the Act is headed "Sustainability Measures". Under section 11 the Minister may set a *sustainability measure.* The setting or varying of a TAC under section 13 is a "*sustainability measure".* As defined in s.2: *"Sustainability measure means any measure set or varied under Part 3 of this Act* ***for the purpose of ensuring sustainability***" (emphasis supplied).

26. Section 13(2) requires a TAC to be set "at *or above* a level that can produce the maximum sustainable yield …". Maximum sustainable yield (MSY) is defined in s.2 as "*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*" (emphasis supplied). Maintaining the stock's productive capacity is the object of the MSY definition. The Act intends that maintaining the stock's productive capacity is the 'bottom line' for ensuring sustainability. Any stock *below* that which can produce MSY is to be altered in a way and at a rate that

will result in the stock being restored to or above a level that can produce the MSY. Any stock *above* that which can produce MSY is to be altered in a way and at a rate that will result in the stock being restored to or above a level that can produce the MSY, having regard to the interdependence of stocks: see s.13(2)(a)-(c).[8]

27. Section 13(3) requires the Minster to have regard to such social, cultural, and economic factors as he or she considers relevant, in 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. These factors or 'qualifiers' are relevant to *the way* in which, and *the rate* the stock is moved to produce MSY, rather than the MSY target itself.

28. Section 13(5) provides that the TAC may be set or varied at, or to, zero.

Consultation First

29. Before doing anything under any of the provisions listed in s.12(1) (all *sustainability measures*, as defined) the Minister must consult with the classes of persons in sub-paragraph (a), and in sub-paragraph (b) provide for the input and participation of tangata whenua, and have particular regard to kaitiakitanga (as defined in s.2, by reference to the exercise of guardianship, and the ethic of stewardship). (By contrast, a separate consultation regime is stipulated in s.21 - which is not located in Part 3 of the Act.)

30. For consultation under s.12 the persons or organisations to be consulted are those classes of persons "*having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned…*". The function of consultation and class of persons to be consulted correlates closely with the focus of second limb to the definition of "ensuring sustainability" in s.8(2), i.e. the effects of fishing on the aquatic environment.

31. It follows that a TAC set under Part 3 of the Act must be set by the Minister for the purpose of ensuring sustainability. That is the primary function of the TAC.

[8] Note that new Section 13(2A) was inserted, as from 28 September 2008, by s.4(1) Fisheries Act 1996 Amendment 2008 (2008 No. 96).

Part 4 – Quota Management System

32. Setting or varying the TACC by the Minister under s.21 is within Part 4 of the Act headed "Quota Management System".

Determination on entry to QMS

33. Prior to any decisions under s.13 or s.21 there has to have been a determination by the Minister to make the stock or species subject to the quota management system (ss 17B, 17, 18). Section 17B(1) requires the Minister to make that determination if satisfied that current management is not ensuring sustainability or providing for utilisation – again a disjunctive reference to the two functions of section 8. Before determining the disjunctive criteria in s.17B(1), the Minister must consult: s.17B(3).

TACC

34. Sections 20 and 21 require that a decision to set "*the TAC*" (a sustainability measure) must be made prior to the decision to set or vary the TACC. This necessarily follows from s.21(1) which states that in setting or varying the TACC the Minister "*shall have regard to **the** total allowable catch for that stock*", and from s.20(5)(a) which provides that a TACC for any quota management stock shall not "*be set unless **the** total allowable catch for that stock **has been set** under section 13…"* [or be greater than the total allowable catch set for that stock – s.20(5)(b).]. [emphasis supplied]

Consultation first

35. Consultation under s.21(2) is distinct from the consultation duty in s.12(1) in respect of the sustainability measures. Under s.21(2) consultation is required with the specified classes of persons *"having an interest in this section".*

36. It is submitted that the Minister's exercise of powers under s.21(1) is a decision for the utilisation of the resource, made after the sustainability decision in setting the TAC. The TACC is only set or varied after the mandatory obligation to "*allow for*" non-commercial fishing interests in each stock, being Maori non-commercial customary fishers, and recreational fishers; and allowing for all other fishing caused mortality. The recreational and Maori customary non-commercial interests must be

allowed for, whereas a TACC may be set or varied at or to zero: s.20(3), i.e. there is no express statutory obligation to "allow for" or set a TACC above zero. Allowing for non-commercial interests and setting the TACC involves a resource allocation decision between the respective fishing sectors. However, there is no obligation to 'allocate' the TAC fully.[9]

37. Once the TACC is set, quota is then "allocated" to commercial fishers in terms of Part 4 of the Act. There is no Ministerial discretion exercised after the TACC is set, i.e. quota shares are allocated without the exercise of Ministerial discretion and based on eligibility criteria established by provisional catch history.

38. Accordingly the Act stipulates a process for the "utilisation" of a sustainable fisheries resource under the QMS which involves distinct sequential steps:

    a. A determination that a stock or species is subject to the QMS for either of the reasons in s.17B(1).

    b. The setting or varying of a TAC in s.13 or s.14 for the purpose of ensuring sustainability (unless the Minister decides that the purpose of the Act is better met by one of the alternative sustainability measures in s.11).

    c. Utilisation of the fisheries resource by the customary and recreational and commercial fishing sectors by:

        i. Allowing for the specified customary and recreational interests in that stock;

        ii. Allowing for all other mortality to that stock caused by fishing; and

    d. The setting or varying of the TACC, if any, for commercial fishing interests.

[9] Strictly, the Act reserves the word "allocate" for quota. "Utilisation" expressly envisages the activities of conserving, and enhancing, and developing as well as using fisheries resources. "Conservation" is defined in s.2 of the Act to mean *the maintenance or restoration of fisheries resources for their future use; and 'conserving' has a corresponding meaning*

Interpretation Consistent With International Treaties

39. Section 5 of the Act requires the Act to be interpreted in a manner consistent with New Zealand's international obligations relating to fishing (inter alia).[10] The United Nation's Convention on the Law of the Sea 1982 (UNCLOS) which is ratified by New Zealand and came into effect in New Zealand on 18 August 1996 [Authorities: II, Tab 13]. Articles 61 and 62 distinguish:

    a. "Conservation"(by producing maximum sustainable yield) in article 61, as qualified by the relevant environmental and economic factors in clause 3; and

    b. the "optimum utilization" of living resources in article 62. In clause 1 of article 62, optimum utilization is to be promoted but "*without prejudice to*" [the conservation/ maximum sustainable yield purpose] in article 61.

40. As McGechan J earlier recognised in *Snapper 1*, section 13 of the Act clearly enshrines the key concepts of clause 3 of article 61: [Authorities: I, Tab 2, pp 82-85]. Article 61 broadly correlates to s.13, as article 62 compares to ss.20 and 21.

41. Although not expressly related to fishing, legal recognition of social, cultural and economic rights finds expression in general international treaties that New Zealand is a signatory to, such as the International Covenant on Economic, Social and Cultural Rights, which includes recognition in article 11 of fundamental rights of people to adequate food: [Authorities: II, Tab 14].

Legislative History – Fisheries Bill and Select Committee Report

42. The legislative history of the enactment of the purpose in s.8 of the Fisheries Act 1996 affirms the dual purpose of utilisation while ensuring sustainability. At the time of the Act's passing in 1996, sustainability had already been enshrined into law as the major principle on which to manage the use and allocation of New Zealand's natural and physical

[10] See long title to Fisheries Act 1996 being to "recognise New Zealand's international obligations relating to fishing" (inter alia).

resources (the RMA), and was an established international principle.[11] In addition the allocation of fisheries resources based on ensuring sustainability and utilisation was consistent with the international treaty obligations relating to fishing, as applied to New Zealand circumstances.

43. In 1996 the then Minister of Fisheries (Hon. Doug Kidd) when introducing the Fisheries Bill, on the Report of the Primary Production Committee noted the principal changes [Authorities: II, Tab 4(h), page 34, *Hansard,* vol 557, p 14022, 31 July 1996]

> There were a number of important advances that I would like to draw to the attention of the House. First is what I know the committee has come to call the religious bits. They set out the principles and purposes to enable people to provide for their social, economic, and cultural well-being through fishing, while ensuring the sustainability of fisheries resources, and making it clear that management action should be taken to avoid, remedy, or mitigate any adverse effects of fishing on the aquatic environment. The purposes and principles are augmented by the information principles that require decision makers to be cautious in the face of uncertainty.

44. The Select Committee's report preceding the 1996 Act needs to be read in full. The themes in it are clear. The insertion by Parliament of an express statement of purpose and principles in the Act was intended to provide a statutory direction to decision makers on which to base future fisheries decision making. [Authorities: II, Tab 5, p ii].

45. In its original form the purpose clause to the Fisheries Bill No 63-1 stated at clause 6(1): "*The purpose of this Act is to provide for the sustainable utilisation of fisheries resources*." "Sustainable utilisation" was defined in clause 6(2) of the Bill: [Authorities: II, Tab 7]. The Select Committee recommended amendments to define "utilisation" separately from the "sustainability" part of the purpose clause, resulting in its current form in section 8. The Committee said: "*this reflects the fact that the Bill aims to facilitate the activity of fishing, and that all fishing should ensure sustainability of the resource*" (Fisheries Bill, as reported from the Primary Production Committee, [Authorities: II, Tab 5, pp vii – viii]).

46. On entry to the QMS, all fishing sectors are brought within the purpose of ensuring sustainability. The Committee said (page ii):

[11] See the *Report of the World Commission on Environment and Development*, 1987 (the Bruntland Report).

> The Bill retains the Total Allowable Catch (**TAC) as the main environmental standard** for most wild fisheries and the Quota Management System (QMS) as the principal fisheries management mechanism. A **TAC is the maximum catch** from all sources combined, including commercial, recreational and customary Maori fishing…. The **requirement to allow for the level of non-commercial** take within the TAC for any fishery **when setting a TACC** is also retained by the Bill …
>
> [emphasis supplied]

47. Setting a TAC is the key management tool for ensuring sustainability, encompassing all removals from the sea. Setting a TAC is intended to be driven by a sustainability analysis which has a scientific basis to ensure the productive capacity of the fish stocks, rather being driven by sector demands and the economic, social and cultural factors. This is confirmed by the Committee's recommendations to reject the proposal in clause 11 of the Bill which was to enable the TAC to be set below MSY where in the national interests to do so. This led the Committee to recommend amendments to adopt the so-called "*qualifiers"* as derived from Article 61 of UNCLOS (and now contained in s.13(3) of the Act) whereby social, cultural and economic factors are relevant to considering *the way*, and *the rate* at which a stock is moved towards its sustainable level (MSY) but not the TAC itself. The Committee said [Authorities: II, Tab 5, p xi]:

> We accept that the Bill needs to be consistent with New Zealand's international obligations. However, we are convinced that "net national benefit" is a vague term which would be difficult to measure and recommend that it be deleted. **We strongly believe that sustainability concerns should be the key factor used to determine a TAC.** We recommend subclause 18(8) which requires the Minister to have regard to such social, cultural and economic factors as are considered relevant when considering the way in, and rate at which, a stock is moved towards its sustainable level. This is consistent with UNCLOS, does not detract from the philosophy that **setting a TAC should be primarily based on sustainability concerns**, and recognises recent management practice.
>
> (emphasis supplied)

48. The Committee emphasised that entry to the QMS did not conflict with continued recognition of non-commercial fishing interests, saying [Authorities: II, Tab 5, p xiii]:

> A quantitative allowance can be made for non-commercial fishing interests in the TACC setting process. The decision to manage a stock as a non-commercial fishery is not pre-empted by bringing a stock within the QMS, as commercial harvest can be set at zero.

49. The 1996 Act therefore left unaffected from the 1986 Amendment that the "cascading" scheme from the 1986 Amendment that required non-

commercial interests to be allowed before any provision for the commercial fishing sector.[12] [Authorities: II, Tab 3]. In recognising the recreational and Maori non-commercial interests, the Committee rejected the Bill's proposal to only "*have regard to*" the interests of non-commercial fishers. The Committee recommended an amendment that the Minister "***allow for*** *these interests as provided for in the existing [1983] legislation"*. The Committee said [Authorities: II, Tab 5, p xiv]:

> Various submissioners felt that a clear priority should be given to Maori customary fishing, recreational fishing or both. They considered the requirement for the Minister to "have regard to" the interests of non-commercial fishers is nebulous, and should be replaced with a requirement that the Minister "allow for" these interests, as provided for in the existing legislation. The Minister would then be able to give consideration to these interests to the extent to which he or she considered appropriate on a case by case basis.
>
> 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.

Sustainability And Utilisation

50. It is accepted that while TAC decisions must be set for the purpose of ensuring sustainability, the TAC is not exclusively concerned with this purpose in the sense that the TAC contemplates utilisation of the fisheries resources. This was recognised by both the High Court (see [Vol 1, Tab 2] para [17] HC), and the Court of Appeal [Vol 1, Tab 5] ([148] CA).

51. The Act provides a framework for the utilisation of fisheries resources. The definition of utilisation is broadly defined in the Fisheries Act and the activities of conserving, using, enhancing and developing fisheries resources. The word "conservation" is defined exclusively in s.2 by reference to the future use of fisheries resources. Conservation as

[12] In its original form the 1983 Fishing Act provided (as amended by the 1986 amendment) in s.[28C.Declaration of total allowable catch —(1) ***The Minister may, after allowing for the Maori, traditional, recreational, and other non-commercial interests in the fishery, by notice in the Gazette, specify the total allowable catch to be available for commercial fishing*** *for each quota management area in respect of each species or class offish subject to the quota management system.* [Authorities: II , Tab 3]

defined "*means the maintenance or restoration of fisheries resources for their future use". "*Conserving" has a corresponding meaning.

52. Setting a TAC at MSY is the *greatest yield* achieved over time while maintaining the stock's productive capacity. Expressed as a yield, MSY contemplates utilisation of the fisheries resource to a level with the object of ensuring the productive (and therefore biological) sustainability of the fisheries resource.

53. Also, ensuring sustainability is defined by reference to the objective of meeting the foreseeable needs of future generations - an anthropocentric (people centred) objective; in addition to the eco-centric objective of avoiding (etc) effects on the aquatic environment.

54. However, this "overlap" in functions does not detract from the submission that the primary function and the purpose of setting the TAC under s.13(2) is ensuring sustainability, and the purpose of allowing for the interests recognised in section 21 and setting the TACC is utilisation of the identified available resource by and between the relevant fishing sectors. This is because the TACC can only be set or varied once a decision ensuring sustainability (the TAC) has been made.

The Nature Of The Rights And Interests To Be Taken Into Account In Section 21

55. At common law there are recognised public rights of navigation and fisheries. In *Malcolmson v O'Dea* [1863] 11 All ER 1155 the House of Lords held that since the Magna Carta the Crown could not establish exclusive fishing rights by grant, and that public rights of fishery could not be overturned except by statute.[13] The same approach has been applied in Canada, see *Attorney-General (British Columbia) v Attorney-General (Canada)* [1914] AC 153, 169, (PC) [Authorities: I, Tab 7]; and more recently by the High Court of Australia.[14] [Authorities: I, Tab 8 and 9]. These public rights are rights in common.

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[13] And see *Waipapakura v Hempton* (1914) Vol 33 NZLR 1065, 1071, per Stout C J. For consideration of the relationship of the common law public right of fishing with the modern resurrection of aboriginal title; see *Foreshore and Seabed*, Lexis Nexis, (2005), Richard Boast, [Authorities: I, Tab 5, p 42] . And see generally *Halsbury's Laws of England* (4th Edition), Volume 18: Fisheries, [Authorities: I, Tab 6, p 258, para 609] .

[14] *Harper v Minister for Sea* Fisheries: (1989) 168 CLR 314; and *Commonwealth v Yarmirr* [2001] 208 CLR 1, 129 [Authorities: I, Tab 9]

56. Prior to 1983 few controls existed in relation to recreational catch.[15] Section 89(1) of the 1996 Act contains a prohibition on any person taking any fish without a current fishing permit.[16] However natural persons are exempt (s.89(1) "*does not apply*") where taking fish otherwise than for the purpose of sale, in accordance with any amateur fishing regulations, and any other requirements imposed by the 1996 Act: s.89(2)(a).

57. Recreational fishing is regulated primarily by the Amateur Fishing Regulations, promulgated under the 1983 Act, which impose daily bag limit restrictions per fisher. Within the Amateur Fishing Regulations recreational fishers take is regulated by techniques such as closed areas, closed seasons, daily limits, method restrictions, size restrictions and combinations of these restrictions.[17] The regulations differ by area, which coincide with the quota management areas. [Authorities: II Tab 10 and 11] .[18]

58. It is submitted that there is nothing in the Fisheries Act 1983, the Fisheries Act 1996, nor Regulations which abrogates the public rights of fishing as it relates to recreational fishing. Common law rights, albeit modified by regulation, live or co-exist together with the statutory regime.[19] In contrast there is no continuing commercial fishing of kahawai as of right. Commercial fishing rights for kahawai are wholly

[15] The Fisheries (Amateur Fishing) notice 1993/297, enacted under the Fisheries Act 1983 did not include any specific bag limit but contained a minimum mesh size (100mm) and minimum species length (25cm). These regulations were subject to various amendment: Fisheries (Amateur Fishing) Regulations 1983, Amendment No. 1, 1984/138; Fisheries (Amateur Fishing) Regulations 1983 Amendment No. 2, 1984/342, and subsequently, were replaced by the 1986 Amateur Fishing Regulations

[16] s.89(1) states: No person shall take any fish, aquatic life, or seaweed by any method unless the person does so under the authority of and in accordance with a current fishing permit.

[17] Fisheries (Amateur Fishing) Regulations 1986 (SR 1986/221). See also Fisheries (Auckland and Kermadec Areas Amateur Fishing) Regulations 1986 (SR 1986/222); Fisheries (Auckland and Kermadec Areas Amateur Fishing) Amendment Regulations 2004 (SR 2004/282), Fisheries (Central Area Amateur Fishing) Regulations 1986 (SR 1986/223); Fisheries (Central Area Amateur Fishing) Amendment Regulations 2004 (SR 2004/283), Fisheries (Challenger Area Amateur Fishing) Regulations 1986 (SR 1986/224), Fisheries (South-East Area Amateur Fishing) Regulations 1986 SR 1986/225, and Fisheries (Southland and Sub-Antarctic Areas Amateur Fishing) Regulations 1991 (SR 1991/57). (Collectively the Amateur Fishing Regulations).

[18] For example, within the Auckland and Kermadec area the daily bag limits provide a bag of no more than 20 fish (in total) of the following species, blue cod, blue moki, bluenose, butterfish, elephant fish, flatfish, john dory, kahawai, red cod, red gurnard, red moki, red snapper, rig, school shark, tarakihi and trevally; 30 grey mullet; 15 snapper (limited to 9 snapper within the Auckland fishery management area (east)).; A bag of 5 hapuku/ bass and kingfish.; 3 kingfish.

[19] *Burrows, Statute Law in New Zealand*, Third Edition (2003) [Authorities: I, Tab 11, pp380-384], and in the fisheries context see *Cooper v Attorney General* [1996] 3 NZLR 480, 483 citing Ch 29, Magna Carta, per Barragwanth J [Authorities: I, Tab 12]

statutory rights. Within the QMS both "commercial fishing" and "commercial fisher" are defined in s.2 of the Act by reference to fishing by permit.

59. The Fisheries Act and regulations describe the well defined rights and interests of commercial fishers. To qualify for quota for kahawai, a commercial fisher must have held a fishing permit by reference to s.93 (Qualifications for holding fishing permits and moratorium). See repealed provisions: [Authorities: Vol II, Tab 9].. A fishing permit for the qualifying years, and provisional catch history is the mechanism for allocation of quota of the kahawai species once in the QMS.

60. For fish stocks in the QMS, the TACC is comprised of individual transferable quota (ITQ) which are expressed as shares ("quota shares").[20] Quota shares are a proportion of the TACC as set or varied.[21] 100,000,000 quota shares make up each stock. The value of 1 share is equal to one hundred-millionth of the total allowable commercial catch for the stock (s.42). These shares are "allocated" amongst eligible persons on the basis of provisional catch history.[22] Quota owners apply for annual catch entitlement (ACE) which provides an annual right to take a quantity of fish.[23]

61. Quota has the attributes of property.[24] Some aspects of the "bundle of rights" remain with the state, namely the rights of protection and of

[20] Fisheries Act 1996; s.42 Quota to be expressed in shares, s.43 Rounding of amounts or shares, s.44 Te Ohu Kai Moana Trustee Limited entitled to 20 percent of total new quota, s.45 Criteria of eligibility to receive quota, s.47 Allocation of quota on basis of provisional catch history, s.49 Unallocated total allowable commercial catch to be held by the Crown.

[21] Fisheries Act 1996; s. 42 and see s.47(1)(b) "The number of shares that bears the same proportion to the 80,000,000 shares of quota available for allocation for the stock as the person's provisional catch history bears to the total provisional catch history held by persons who are eligible to receive quota for the stock."

[22] Fisheries Act 1996; s.45 Criteria of eligibility to receive quota.

[23] Fisheries Act 1996; s.66 Generation of annual catch entitlement at beginning of new fishing year, s.67 Allocation of annual catch entitlement, s.67A Allocation of additional annual catch entitlement in case of underfishing, s.68 Minister to create additional annual catch entitlement if total allowable catch increased during fishing year.

[24] ITQ are the transferable (i.e., sellable) right held to catch a proportion of the volume of fish permitted for commercial purposes in a broadly defined geographic area. The Act provides security to holders of ITQ's through the Quota Register: The Quota Register under the 1996 Act operates similarly to a land title register, and a registration document relating to ownership, mortgagee or caveator rights of ITQ is conclusive proof, subject to provisos regarding registration through fraud. The interests of registered bona fide purchasers or mortgagees for value are protected, even where their interests are registered through fraud, error or void or voidable instruments. The Fisheries Act 1996 is silent as to the duration of ITQ's, and quota shares. Quota shares do not expire, nor do they lapse if they are not used. ACE rights are calculated every 12 months (see Fisheries Act 1996 s.65 and s.66)

management. The rights granted to quota owners are in the fishing, not in the fish themselves.[25]

62. Variation of the TACC is specifically provided for in the Act.[26] The variable nature of the TACC means that the quota owners do not hold rights in TACC, rather rights are in the quota shares [compare to the Court of Appeal in *Kahawai* at [16] [Vol 1, Tab 5]. A reduction of the TACC would cause a reduction in the ACE and the total number of fish able to be taken by individual commercial fishers (subject to s.22).[27] However, quota shares (and property rights therein) remain intact.[28]

D: IMPLICATIONS ARISING FROM THE DISTINCTION IN THE STATUTORY SCHEME

63. It is submitted that the requirement in section 21 to allow for recreational interests requires a quantitative and qualitative assessment in terms of the section 8 directive "*to enable people to provide for their social, economic, and cultural well-being*."

64. The text of s.21 indicates that :

a. Section 21 is to be read in conjunction with the preceding section, s.20.

b. The Minister "shall have regard to the total allowable catch" for any stock, i.e. the TAC must have previously been set.

c. There is a mandatory requirement ("shall") for the Minister "*to allow for the following non-commercial interests in that stock*".

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[25] Christine Stewart, Food and Agricultural Organisation of the United Nations. 2004. *Legislating For Property Rights In Fisheries*

[26] Fisheries Act 1996, s.22 Effect of reduction of Total Allowable Catch

[27] Fisheries Act 1996; s.66 Generation of annual catch entitlement at beginning of new fishing year. s.22 Effect of reduction of total allowable commercial catch – allows for the redistribution of crown unencumbered shares to commercial interests should there be a reduction of TACC.

[28] As correctly recognised by the Court of Appeal in *Snapper 1* [Authorities: I, Tab 3, p 16]:

> "…**While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced**. If such reduction is otherwise lawfully made, **the fact that quota are a "property right" cannot save them from reduction**. That would be to deny an incident integral to the property concerned. There is no doctrine of which we are aware which says you can have the benefit of the advantages inherent in a species of property but do not have to accept the disadvantages similarly inherent…"
>
> [emphasis supplied]

By comparison, the Minister has a discretion (i.e. *may)* set or vary the TACC at, or to, zero: s.20(5). As Harrison J recognised [Vol 1, Tab 2] non-commercial interests must be allowed for where they exist in that stock (and the TAC is set above zero).

d. "Stock" is defined in s.2 principally in relation to the quota management area. It is submitted that this requires a spatial assessment of the interests. The *interests* to be allowed for is *in that stock.* Recognition should be made for any known regional differences in the structure and characteristics of the stocks and allow for variance in population demographics and geography.

e. The Minister (and Ministry) are informed by the consultation under s.21(2).

f. The recreational interests to be allowed are a "fishing" interest (see s.2 definition of "fishing") and a non-commercial interest (implies distinct from the "commercial" interests, as defined in s.2).

g. There is no qualification of the Minister's obligation to "allow for" recreational "interests", i.e. there is no restriction to "catch" or "take" as in s.81(5)(b). It is submitted that to allow for a specified interest generally requires making a decision which is to the benefit or advantage of the specified group.[29]

65. Sections 20 and 21 provide no specific guidance on how the Minister is to 'allow for' non-commercial fishing interests when making his or her TACC decision.[30]

66. In determining how the Minister is to allow for non-commercial interests a court must:

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[29] "Interests" has the following dictionary definitions: *A thing which is to the advantage of someone; (a) benefit, (an) advantage* (Shorter Oxford English Dictionary, Fifth Edition); A legal concern, title or right in property; *A group or organisation having a specified common concern In the interests (or interest) of something: for the benefit of* (The New Oxford Dictionary of English, Clarendon Press, Oxford, 1998, First Edition)

[30] The fishing sector interests (see definition in s.6(3)are commercial fishers (as defined in s.2, by reference to fishing where a permit is required by s.89), and non-commercial fishing interests comprising recreational fishers (a term not defined), and Maori non-commercial customary fishers.

a. In determining purpose have regard to both the immediate and general legislative context – *Commerce Commission v Fonterra* [2007] 3 NZLR 767, 776

b. Ensure that the Minister's powers are used to promote the policy and objectives of the Act: see *Padfield v Minister of Agriculture* [1968] 1 All ER 694, 699; and *Unison Networks v Commerce Commission* [2008] 1 NZLR 42, 58.

67. To allow for "interests", as s.21 requires, necessarily requires the Minister to properly identify and understand the nature of those interests and the potential implication of his decisions.

68. It is submitted that the legislative history, the specific recognition of s.8 as a statement of purpose and principles and the absence of any specific direction in s.21 is a strong legislative indication that s.8, and in respect to utilisation the objective "*to enable people to provide for their social, economic, and cultural well-being*", is a directive to the characterisation of the interests to be considered.

69. In the context of the Minister's s.21 decision Harrison J characterised the allowance/TAAC decision as a utilisation decision requiring consideration of the s.8(2) utilisation principles.

70. In contrast the Court of Appeal rejected that analysis and abstracted the s.8 purpose and principles as a "global approach" to purpose, saying [Vol 1, Tab 5]:

> [57] **In our view the Judge overstated the significance of s 8(2) in the context of a TACC decision**…
>
> [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** …
>
> [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 utilization 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.

71. The appellants do not suggest that the Minister is to exclude consideration of the social, economic and cultural well-being of any other sector of society, particularly commercial fishers, who have an interest in the fish stock. However, it is submitted that there has to be specific consideration of those section 8 matters in relation to any sufficiently identifiable sector. In the section 21 context that undoubtedly requires an applied consideration of the interests of both customary and recreational fishers.

72. It is submitted that Harrison J was correct. The effect of the Court of Appeal approach was to denote s.21 of any meaningful standard capable of effective review. Indeed it led the Court of Appeal to reject the Crown's acceptance that there had been an error in the Ministry's advice to the Minister that he could prefer catch history over utility considerations relevant to social, economic and cultural well-being.

73. In so doing the Court of Appeal in effect treated s.21 as creating a "conceptual abyss", an interpretative outcome which Hon. Justice Fogarty has recently argued creates "an inherently poor quality of law.[31]

74. Associate Professor Geddes echoes this approach to the selection of policy choices, and cites the Supreme Court of the United States in *Rodriguez v United States* 480 US 522(1987) as saying:[32]

> "No legislation pursues its purposes at all costs. Deciding what competing values will or will not be scarified to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplicity to assume that *whatever* furthers the statute's primary objective must be the law".

[31] John Fogarty, "Giving Effect to Values Used in Statutes" in *Law, Liberty, Legislation: Essays in honour of John Burrows QC*, Wellington, LexisNexis NZ Limited, 2008. [Authorities: I, Tab 22]

[32] As cited in R.S. Geddes "*Purpose and Context in Statutory Interpretation" (*2005) 2 UNELJ 5, 44; [Authorities: I, Tab 23] and for a comparison of the purposive approach to statutory interpretation in Australian and US law in environmental decision-making see: Charmain Barton: "*Aiming At The Target: Achieving The Objectives Of Sustainable Development In Agency Decision-Making*" Georgetown International Law Review (2001) Vol 13:837

75. It is submitted that the Court of Appeal's adoption of the approach of Keith J in *Westhaven Shellfish* that the correct approach to purpose clauses is to "*bear in mind and conform with the purposes of the legislation*" is too broad and generalised to the specific duty/power being exercised in s.21. A test of "conform with" is not helpful in identifying in the selection of appropriate considerations and outcomes open to the decision-maker. It risks reading away Parliament's intention that utilisation of a particular fishery to enable people's 'social, cultural and economic well-being' was to be a positive standard achieved when making utilisation decisions for the fisheries resource.

76. It is submitted that the High Court's findings that "*the Minister did not have a wide discretion on what factors he took into account when determining allocations; he was bound to consider social, economic and cultural well-being when allowing for recreational interests in the stock*" [Vol 1, Tab 2, para 67] is a correct application of the principle that the Minister's discretion had to be exercised within the policy and purpose of the Act, including that particularly expressed in section 8.

77. Allowing for recreational interests necessarily involves:

    a. Making a qualitative and quantitative evaluation of the nature and extent of those interests within the section 8 context.

    b. Assessing recreational interests in that stock, i.e. a spatial assessment of the interests, and assessing the implications of decisions.

    c. Making a decision that promotes those interests, i.e. "enables".

78. In addition the Minister should:

    a. Use the "best available" information s.11. It is submitted that information can only be "best" if it will further the statutory purpose (see opening words to s.10). Information that measures recreational wellbeing in any meaningful way will be different from information measuring commercial wellbeing (e.g. tonnages). The best available information in a recreational context may be anecdotal information. The Ministry's discounting of survey and anecdotal information in effect denied recreational interests in consideration of the best available information.

b. Recognise public rights of fishing, as a pre-existing legal right requiring protection, albeit now limited by regulation.

79. Evaluating the nature and extent of recreational interests raises the questions: Who are the interested parties? What is their diversity? What is their interest in the fishery? How much of the resource do they want, or need? What are their motivations? What are the social, economic and cultural implications for decision-making affecting the diverse elements which make up the interests?

80. To allow for an interest necessarily implies that the Minister is properly informed of the potential implications of his decisions.[33] In allowing for recreational interests it is necessary that the Minister should understand the implications of an allowance, including any restrictions on bag numbers because, applying the purpose, any decision involving "utilisation" is to enable people to provide for their social, economic and cultural well-being.

81. Since *Roach v Kidd* (High Court, McGechan J, CP715/91 [Authorities: I, Tab 4]) the Court's below have construed the words "allow for" to mean allow for in whole or part. In *Snapper 1* [Authorities: ,I Tab 2, pp150-151]. McGechan J said that to "allow for" is to be construed as meaning "allow for in whole or part". The Court of Appeal in *Snapper 1* found that the Minister must make allowance for non-commercial interests before setting the TACC [Authorities: I, Tab 3, p 17). Non-commercial fishing interests are therefore entitled to a priority in the sense that their interests have to be allowed for with the balance forming the TACC.[34]

82. Accordingly it is submitted that the High Court decision was correct in determining that s.21 decisions should be measured against the s.8(2) utilisation criteria. The purpose in s.8 is an accessible public policy goal which can be assessed subjectively and objectively. Section 21 decisions should allow access to a sufficient level and quality of the

[33] See *Auckland Harbour Board v Auckland City* (Court of Appeal 28 April, 1989, CA248/88, Cooke P, Richardson, McMullan, Somers and Bisson JJ, 27-28). [Authorities: I, Tab 13]

[34] The Court of Appeal in *Snapper 1* did not appear to consider the purpose of the Act in relation to decisions under s.21 , and strictly the Snapper 1 proceedings related to the 1983 Act, which had no express purpose clause, however the 1996 Act was enacted by the time of the Court of Appeal's decision.

particular fish stock which will enable people to provide for their well-being from fishing.

The 2004/2005 Decisions – Validity

83. The High Court Judge determined that the 2004/2005 decisions were invalid because of the Minister's failure to consider and apply the s.8(2) utilisation principles and instead to adopt the Ministry's preference for its catch history model.

84. The Court of Appeal reversed that determination, concluding at [81] Vol 1, Tab 5] that:

> "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."

85. That conclusion was inconsistent with the Minister's acceptance, through counsel [see at [81]], that the Ministry had erred in advising the Minister that he could adopt the Ministry's policy preference for catch history and that in doing so the Minister had excluded from his decision making an allowance/TACC that qualitative information relevant to social, economic and cultural well-being.

86. It is submitted that the Court of Appeal was not in an informed position to reject that proper concession.

87. Even if the Court of Appeal was entitled to second guess the Minister's concession it was wrong to do so on the evidence:

a. The 2004 and 2005 IPP's and FAP's identified qualitative considerations and catch history as <u>alternatives</u>: see 2004 FAP, para. 73 [2004 FAP, Vol 4, p 532-533]

> "there is information available for both catch history (current utilisation) and for utility value. In shared fisheries Ministry of Fisheries has a policy preference in favour of the catch history model in the absence of clear information to the contrary. While the utility based model is not discounted altogether its application to kahawai is problematic as the information is uncertain."

b. While it is accepted that the Ministry's policy preference did not expressly "fetter" the Minister's discretion, the only options presented to the Minister were based on this policy preference.[35]

c. That policy preference was materially influenced by the Ministry's expressed concern that a decision on a qualitative basis and hence non-proportion might result in a claim for financial compensation from commercial interests.[36]

d. Despite the variety of circumstances in different fisheries of significance to recreational interests, the Ministry's policy preference has invariably been applied.[37]

e. In the IPP's, FAP's and Court of Appeal decision there was no recognition of or attempt to grapple with the fact that it would be blind chance if catch history was to be a reasonable proxy for the required considerations of social, economic and cultural well-being in a situation of fish stock scarcity and reductions in entitlements. For example, the different interests involved – commercial interests, largely recognised by gross tonnage and economic return from exporting as pet food and bait *versus* recreational, largely the New Zealand way of life, valuing kahawai on a contingent valuation study 11 to 16 times more

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[35] See Final Recommendations for FAP 2004 [Vol 4, p 0623]. The Ministry advised the Minister of its policy preference to allow for both sectors utilisation by allocating the TAC based on catch history of both sectors, and then to "allocate" the TAC proportionally between the fishing sectors.

- 2004 FAP, [Vol 4, p 606, para 328(c), and 623-624, para 3(c)] – "MFish has a preference for the allowances and TACCs within the lower of the TACs proposed to be determined in proportion to the current use of recreational and commercial sectors…"
- 2004 FAP, para 129(d) [Vol 4, p 575].
- 2004 FAP, table 12 – final proposal to set TACs, allowances and TACCs for kahawai [Vol 4, p 605].
- 2005 FAP, para 149, p 433 [Vol 4, p 788].
- 2005 FAP, para 66, p 68 [Vol 4, p 712] – "MFish favours the adoption of a proportional policy as a default approach when adjusting the TAC".
- 2005 FAP, para 27, p 407 [Vol 4, p 762].

[36] Numerous references were made in the Ministry advice to the Minister that the risks of varying the TACC on a non-proportional basis may be subject to compensation claims by commercial fishers against the Crown, but that s.308 of the Act expressly protects the Crown from compensation claims if the decision is a sustainability measure: FAP 2004, [Vol 4, p 521, para 66]; FAP 2005, [Vol 4, p 659, para 68]; FAP 2005, see submissions by commercial fishers, [Vol 4, p 713-714], and see MFish response to submissions, [Vol 4, p 714-716 and para 162 – 164, [Vol 4, p 790]. Preceding Ministers have been advised by the Ministry in similar terms see [Vol 5, p 898, para 16 and 17]

[37] See Affidavit of Ingram [Vol 2, p 137, para 35 and 36] (uncontested), and see Barnes [Vol 3, p 454-454, para 6-9] (uncontested).

highly including consuming as food[38] – and the different resources – commercial with aerial spotters, seine nets, and a trawler fleet *versus* tinnies, fishing rods and limited time in the weekends – make it an unequal contest if catch history is the touchstone.

f. The failure to identify the consequences in reduced bag limits until after the decisions were made in 2004 (on the evidence down to 4-6 fish[39], or in KAH1 on the evidence of Holdsworth potentially 3 fish[40]) confirms a failure to consider the implications in well-being terms, particularly given the evidence of Mr Tau of the importance of kahawai as a food source to Ngapuhi.[41]

g. Similarly the failure to distinguish between regions, treating KAH1 (and the Hauraki Gulf) the same as KAH8 despite sufficient stock in KAH8, and the evidence of scarcity in KAH1. In respect to the Hauraki Gulf there was information that catch rates of kahawai were extraordinarily low. Mr Holdsworth deposes that the NIWA boat ramp surveys indicated the lowest catch rates of kahawai in the Hauraki Gulf since 1991 (1 in 8 boat trips, 1 in 100 hours, juvenile fish): see affidavit of Holdsworth, para 23.12 – 23.29 [Vol 2, p 261 – 265, and 313 – 318]. All areas were treated on the same basis, i.e. 15% and 10% cuts.

h. A fair reading of the IPP's and FAP's confirms the Minister's concession that the consequence of the manner in which the

[38] In the FAP 2004, MFish note the considerable disparity between estimates of commercial and non-commercial value contained in the contingent valuation study (the SACES survey): [see FAP 2004 para 192, 199, 200, pages 4, 503, 585-586].

[39] The Minister was not given advice by the MFish on the magnitude of effects of likely recreational bag limit reductions until after his 2004 decision. The Minister signalled he was considering the introduction of a reduced recreational catch limit (2004 decision letter [Vol 4, p 636, 639, para 22]). The NIWA advice to the Minister (as contracted by MFish) suggested possible bag limit reductions down to between four-six fish per fisher. The NIWA analysis was a "nationalised" figure, which does not appear to take into account any regional variations in stocks i.e. per QMA nor, other spatial considerations e.g. Hauraki Gulf Marine Park. The lower of the estimates was based on boat ramp surveys (4) the higher figure (6) based on the telephone-diary surveys [Vol 6, p 1168, 1160, para 7, 9].

[40] Mr Holdsworth, a deponent for the Appellants, suggests implementation of the Minister's decisions in KAH1 could result in potential bag limits of 3 fish per amateur fisher in KAH 1 in order to achieve the reduction in the actual number of kahawai taken by recreational fishers. Affidavit of Holdsworth, para 19.13. [Vol 2, p 199, 245]

[41] Northland Maori leader, Mr Tau deposes that Ngapuhi, the most populous iwi, predominantly fish as recreational fishers, and that for Ngapuhi, kahawai provide important food for sustenance and the recognition of manaakitanga [Vol 2, p 123, 127, para 25, 31, 39, 42]

Ministry's policy preference was presented to relegate consideration of people's "social, economic and cultural well-being" as incidental matters to the Ministry's policy preferences towards catch history and proportionality.

88. The effect of the Ministry's preferred catch history policy was to deny the potential for a fish stock to become a wholly or substantially "recreational" fish stock or a commercial by-catch only fish stock, reflecting s.8(2) principles.

89. While the Court of Appeal was correct to say that the Minister might set a TACC reflecting catch history if that provides a reasonable basis for assessing competing interests [80], that can only be done if catch adequately reflects the s.8(2) factors, such a conclusion would require analysis and specific conclusion, it is an unlikely outcome in a situation of scarcity, and it certainly was not the product of such an analysis and conclusion in the present case.

90. Accordingly it is submitted that the High Court Judge's conclusions at [67] to [74] were appropriate and the declarations that the 2004 and 2005 allowance/TACC decisions were invalid should be reinstated.

Dated at Auckland this 1st day of December 2008.

……

A R Galbraith QC/ S J Ryan

Counsel/ Solicitor for the Appellant