In the Supreme Court of New Zealand

SC 40/2008

between: **New Zealand Big Game Fishing Council Inc**
Second Appellant

and: **The New Zealand Recreational Fishing Council Inc**
First Appellant

and: **Sanford Limited, Sealord Group Limited, and Pelagic & Tuna New Zealand Limited**
First Respondents

and: **Minister of Fisheries**
Second Respondent

and: **The Chief Executive of the Ministry of Fisheries**
Third Respondent

Submissions for first respondents (Commercial Fishers)

Dated: 23 December 2008

Chapman Tripp *Barristers & Solicitors*

10 Customhouse Quay
PO Box 993
Wellington 6140 NZ

Tel +64 4 499 5999
Fax +64 4 472 7111
DX SP20204

Reference: B A Scott/G T Carter

TABLE OF CONTENTS

(A) REFINEMENT OF ISSUES

1 Leave has been granted to determine the following question:

> Did the Minister of Fisheries, when setting the total allowable commercial catch for kahawai under section 21 of the Fisheries Act 1996 in 2004 and 2005, act in accordance with statutory requirements?

2 The appellants' (the **recreational fishers**) submissions do not identify the particular issues that they contend arise within this general question. The first respondents (the **commercial fishers**) consider that there are four issues. The first three are essentially of a legal nature, involving an inquiry into the interpretation and function of ss.21, 13 and 8 of the Fisheries Act 1996 (the **Act**). Having established the statutory requirements, the fourth issue is a factual enquiry into whether the Minister complied with those requirements when making his 2004 and 2005 kahawai allocation decisions under s.21.

3 The commercial fishers see the issues as follows:

3.1 What does s.21 require when the Minister allows for recreational interests in the course of setting a total allowable commercial catch (**TACC**)? (the *s.21 issue*);

3.2 Are those requirements materially added to or altered by the definition and objective of "utilisation" in s.8(2) of the Act? (the *s.8 issue*);

3.3 Is the recreational fishers' reliance on s.8(2) assisted by the distinction they seek to draw between utilisation and sustainability decisions - namely the contention that s.13 total allowable catch (**TAC**) decisions are primarily sustainability decisions, whereas s.21 TACC decisions are utilisation decisions? (the *s.13 issue*); and

3.4 Did the Minister in fact have regard to all matters necessary to comply with the statutory requirements when making his 2004 and 2005 kahawai allocation decisions under s.21? (the *factual issue*).

(B) SUMMARY OF COMMERCIAL FISHERS' ARGUMENT

Requirements of s.21

4 The correct starting point in this inquiry is to analyse the requirements of s.21, not s.8. While the ultimate purpose of s.21 is to allow the Minister to set a TACC, in so doing the requirement for the Minister to "*allow for*" non-commercial interests (including recreational interests) effectively requires the Minister to apportion the TAC between the sectors.

5 In apportioning the TAC the Minister must weigh the competing demands of all sectors. This requires the Minister to be adequately informed and to utilise the best available information concerning the interests that each sector has in the fishery. There has never been any disagreement that the Minister should consider the qualitative aspirations of recreational fishers (such as enhancing the recreational fishing experience by a larger biomass), as well as quantitative matters such as maximising yield or current levels of utilisation by each sector. All interests must be put in the mix and considered [see *paras 28-42*].

6 However, it is wrong to view recreational interests as only arising, and as only being able to be "allowed for", in the s.21 TACC setting process. Many important recreational interests arise in the context of the *prior* TAC decision. While TAC and TACC decisions are in practice made in a parallel process, it is the initial TAC decision that determines the biomass size that the fishery will be managed at. In shared fisheries such as kahawai, this is a key issue. Such TAC decisions often require the Minister to consider trade-offs between maximising yield (achieved by targeting B_{MSY} as favoured by commercial fishers) and managing a stock at larger biomass sizes in order to produce faster catch rates, and on average larger fish (above B_{MSY}, generally favoured by recreational fishers) [*see paras 23-27 and 35*].

7 More generally, it is fundamental to the commercial fishers' position, that neither s.21 nor any other provisions of the Act gives either the commercial or recreational sector any priority or preference in the allocative process required under s.21. The apportionment of the TAC is inherently a discretionary decision for the Minister to make balancing all factors relevant to each particular fishery.

Recreational fishers' interpretive arguments seek priority, preference or advantage

8 Each of the interpretive issues raised by the recreational fishers in their submissions ultimately seek (sometimes obliquely) to obtain some priority, preference or advantage for recreational fishers in the allocative process under s.21. Four such arguments can be distilled from the recreational fishers' submissions. None have any merit:

8.1 *Ordinary meaning of "allow for" does not require benefit or advantage:* The ordinary meaning of "*allow for*" in the context of s.21 is to require the Minister to make an allowance for, or take into consideration, recreational interests. It does not, as the recreational fishers contend, require some benefit or advantage to be given to the recreational sector. The commercial fishers' interpretation is consistent with dictionary definitions, previous authorities and the legislative history of the provision [*see paras 43-46*].

8.2 *Requirement to set allowances before setting TACCs does not give any priority:* The requirement in s.21 to determine the allowances before setting the TACC, does not confer any priority on recreational fishers. The authorities recognise that recreational interests may be allowed for in whole or part and does not confer any priority. This interpretation is also consistent with the legislative history [*see para 47*];

8.3 *Common law rights do not confer any priority:* The common law right of the public to fish from the sea is irrelevant to the exercise of the Minister's discretion under s.21. First, the common law right did not differentiate between the purposes for which fish was taken (ie. for sale or personal consumption). But in any event, common law rights (including those of the recreational fisher) have now been abrogated or regulated, albeit with different legislative mechanisms and controls applying to the respective sectors [*see paras 48-50*];

8.4 *Section 8 does not assist recreational fishers:* Reliance on s.8(2) does not assist the recreational fishers because:

(a) to the extent the provision has application, it applies equally to both commercial and non commercial fishers (ie. the "*people*" whose well-being is being "*enabled*" is not limited to recreational fishers [*see paras 53-55]*);

(b) the recreational fishers' submissions attempt to elevate the status of s.8(2) (a definition within a general purpose provision) beyond that provided for, or contemplated by, the Act. It adds nothing to that which is already required to be considered under s.21 itself [*see paras 56-58*].

(c) the recreational fishers' reliance on s.8(2) is premised on an erroneous distinction between "*sustainability*" and "*utilisation*" decisions. In most situations there is no bright line between sustainability and utilisation decisions, with most decisions requiring a balance to be struck between both considerations (as reflected in s.8(1)) [*see paras 60-68*].

Did the Minister properly consider recreational interests?

9 The factual question of whether the Minister did in fact give proper consideration to the recreational interests when setting allowances for kahawai under s.21 can be answered in two ways – first by looking at what the recreational fishers ask for and the outcomes they achieved, and second by an analysis of material provided to the Minister and his decision letters. Each analysis demonstrates that the Minister did consider all relevant aspects of the recreational interests in this fishery.

10 As to what they asked for and the outcomes achieved:

10.1 The interests of the recreational fishers primarily arose in relation to the TAC decision. They asked for the TACs to be reduced so as to enable the stock to rebuild, (thereby providing faster catch rates and larger fish). In response the Minister reduced the TAC by 15% in 2004 and a further 10% in 2005. This was broadly in line with the submissions made by the recreational fishers (within 10%) and the recreational fishers have not appealed the High Court determination that the TAC decisions took into account their interests [*see paras 72-74*];

10.2 In terms of the TACC decisions, the recreational fishers asked for and received allowances (a) based on the *methodology* they asked for, namely the use of their own most recent catch history, being a 2000 survey of recreational catch and (b) which resulted in a *tonnage* allowance within 8% of what they asked for (and a 23% increase on what was initially proposed) [*paras 75-78*];

10.3 In addition, the wider management outcomes concerning the fishery also heavily favoured recreational fishers and are only explicable on the basis that the Minister was well aware of and took into account their interests [*paras 79-80*];

11 As to the detailed analysis of the advice papers and decision letters, this confirms that the Minister did take into account the qualitative interests of recreational fishers and was not misdirected or blinded by the Ministry's preference for allocations based on catch history [*paras 81-97*].

(C) BACKGROUND

(C1) Kahawai fishery

(i) Recreational and commercial fisheries

12 Kahawai is a frequently caught and popular recreational species. Estimates of recreational and customary catch of kahawai are uncertain but, based on the most recent recreational catch estimates in 2000/2001, the non-commercial sector has been allocated approximately 60% of the combined TACs across quota management areas (**QMA**).

13 As to the commercial kahawai fishery:

13.1 Most kahawai is caught commercially as part of the mixed species purse seine fishery, now based solely in the Bay of Plenty. The vessels operate out of the Port of Tauranga, where the fish is also processed. Sanford's purse seine operation generates sales of approximately $18 to $25 million per annum, 10%-15% of which is

from kahawai. Approximately 100 full time equivalent staff are employed as part of the purse seine fleet's operations;[1]

13.2 The availability of kahawai quota impacts on the viability of the overall operation and profitability of the purse seine fleet. As the purse seine fleet operates in a mixed species fishery, reduced kahawai quota constrains Sanford's ability to catch its quota for the other species in the mixed fishery. This has been compounded in recent years by the increasing abundance of kahawai. As a consequence, kahawai can generally no longer be targeted by the purse seine fleet, and has primarily become a by-catch species of the other species in the mixed fishery.[2]

13.3 A much smaller amount of kahawai is taken by trawlers, mostly as by-catch;

13.4 A small amount of kahawai is also taken by set-netters, which is sold fresh into local fish shops and fish markets.

14 The 80% of the New Zealand population that are not recreational fishers rely on the commercial sector for the supply of fish. Kahawai in particular is a species that is readily available in fish shops and supermarkets at an affordable price.

(ii) Pre-QMS management of kahawai

15 Despite kahawai being important to both the commercial and non-commercial sectors, it did not enter the quota management system (**QMS**) until 2004. This was initially due to the impact of the Maori Fisheries litigation, with interim orders in late 1987 preventing the introduction of any further species to the QMS. While that litigation was settled with the landmark Deed of Settlement in 1992, the new legislative mechanisms and consequential administrative systems that were needed to enable most of the remaining species to enter the QMS did not come into effect until the early 2000s. Absent those difficulties, it is likely that kahawai would have entered the QMS in the late 1980s or early 1990s.[3]

16 With the inability to bring kahawai into the QMS, kahawai commercial catch limits (**CCL**) to constrain commercial utilisation were introduced in

---

[1] The total New Zealand kahawai commercial catch (all companies and methods) is estimated to be worth approximately $3.2 million. Sanford's Purse Seine fleet operates year round, fishing a multi species catch plan comprising skip jack tuna, jack mackerel, blue mackerel and kahawai. Sanford's kahawai catch generates approximately $2.5 million per annum of sales income, of which approximately 80% is export earnings.

[2] As to the position at the time of the entry of kahawai into the QMS, see Sanford's submission dated April 2004 [**Vol 5**, p1054]. As to the subsequent impact of the reduced TACC on the purse seine fishery, coupled with the increased kahawai abundance, see Wilkinson paras 243-252 [**Vol 3**, p387] and affidavits of two skippers within the fleet, Kevin Murray and Peter Reid [**Vol 2**, p282 and p288].

[3] See Wilkinson paras 123-125 [**Vol 3**, p353].

the early 1990's by regulation, both on an overall basis and with sub-limits set for purse seining. As a consequence of lobbying from the recreational sector, the CCLs for kahawai were reduced further in 1993 and again in 1995, as set out in the following table (in tonnes):

QMA	1990/01	1993/94	1995/96
QMA 1 & 9	1,666	1,200	1,200
QMA 2	851	851	851
QMA 3	2,339	2,339	1,500
Total	4,856	4,390	3,551

17 In addition, in order to reduce conflict and provide spatial separation between commercial fishers and recreational fishers, commercial fishers agreed to voluntarily close large inshore areas in QMA 1, QMA 2 and QMA 3 to purse seine vessels throughout the 1990s.[4]

18 In summary, the introduction of kahawai to the QMS in 2004 had been preceded by a long period of active fisheries management of the commercial fishery outside the QMS. Those management actions progressively reduced the share of the kahawai resource available to the commercial sector and materially reduced the areas where commercial fishers could operate. In contrast, the recreational sector was (and is still today) limited only by a general mixed species bag limit of 20 fish per day per person.[5]

(iii) TACs, allowances and TACCs

19 The Ministry commenced consultation on TACs, allowances and TACCs for kahawai stocks in early 2004, with decisions to take effect from the introduction of kahawai into the QMS from 1 October 2004.

20 The Minister set TACs, allowances and TACCs based on a "nominal" 15% reduction to the Ministry's estimates of current recreational and commercial utilisation, although no measures were put in place to reduce the recreational catch to their allowances. The Minister's 2004 decisions are set out in the following table:[6]

FMA	TAC	Rec	Cust	Other	TACC
KAH 1	3,685	1,865	550	75	1,195

[4] For a detailed description of the development of the purse seine fishery and the management of the kahawai fishery through the 1990s, including the imposition of purse seine catch limits, the emerging conflict between commercial and recreational fishers, and the introduction of voluntary area closures, see Wilkinson p7-30 [**Vol 3**, p331] and the summary set out at [12] of High Court judgment [**Vol 1**, tab 2, p38].

[5] In the South East fishery management area (East Coast of the South Island) there is a limit of 15 kahawai as part of a mixed species bag limit of 30.

[6] A diagram showing the location of each of these quota management areas is at **Vol 4**, p 527.

KAH 2	1,705	680	205	35	785
KAH 3	1,035	435	125	20	455
KAH 4	16	5	1	0	10
KAH 8	1,155	425	125	25	580
KAH 10	16	5	1	0	10
Total	7,612	3,415	1,007	155	3,035

21 In 2005, at the Minister's direction, the Ministry again consulted on TACs, allowances and TACCs for kahawai stocks. The Minister arbitrarily reduced these by a further 10% with effect from 1 October 2005 (and once again, no change was made to the management controls of recreational fishers to give effect to their reduced allowances):

FMA	TAC	Rec	Cust	Other	TACC
KAH 1	3,315	1,680	495	65	1,075
KAH 2	1,530	610	185	30	705
KAH 3	935	390	115	20	410
KAH 4	14	4	1	0	9
KAH 8	1,040	385	115	25	520
KAH 10	14	4	1	0	9
Total	6,848	3,073	912	140	2,728

22 When the first kahawai commercial catch limits were introduced in 1990, commercial utilisation was reduced to a total limit of 6,500t (with a sub-limit of 4,856t for purse seining). After the 2005 decisions, the total TACC is now 2,728t, a reduction of nearly 60% from the 1990 position. In contrast, there has been no change to the single management control for most of the recreational kahawai fishery (the mixed bag limit of 20 fish per day per person), despite recreational fishers now having 45% of the TAC allocated to them.[7]

(C2) Concepts of MSY and B_{MSY}

23 An understanding of the concepts of maximum sustainable yield (**MSY**) and the biomass that produces MSY ($\mathbf{B_{MSY}}$) is important in the context of the issues that arise in these proceedings. The affidavit of Paul Starr (a stock assessment scientist), at paras 12-16 explains these concepts with the use of a yield curve diagram [**Vol 2**, p302].

24 Section 13 requires a TAC to be set so as to ensure that the fish stock (the biomass size) is maintained "*at or above a level that can produce the*

[7] The Minister's decision not to consider advice on the bag limit reductions necessary to give effect to the 15% then further 10% reductions in the recreational allowance resulted in the High Court's finding that the Minister's decision on this was unlawful (irrational and predetermined), and that it should be set aside and reconsidered. [**Vol 1**, Tab 2 paras 108-126]

maximum sustainable yield". The phrase MSY is defined in s.2 as being "*the greatest yield that can be achieved over time while maintaining the stocks' productive capacity…*".

25 With reference to that diagram, it is important to appreciate that:

25.1 The amount of yield[8] produced from a fishery in any given year is a function of the size of the current biomass relative to the biomass before any fishing occurred. As the biomass is reduced through fishing (known as the 'fishing down' phase) the yield produced by the fishery increases to a point where it is maximised (i.e. the biomass that produces the maximum sustainable yield or B_{MSY});

25.2 In most fisheries, yield is maximised when the biomass is reduced to approximately 25% of its unfished (virgin) biomass. In the case of kahawai, B_{MSY} has been estimated to be at about 16% to 20% of the unfished biomass.[9] In 1997, the kahawai was assessed to be at about 50% of its unfished biomass, i.e. nearly 3 times B_{MSY}[10]. The most recent (2007) stock assessment found that KAH 1 is likely to be above B_{MSY}, although it is uncertain how far above.[11]

25.3 A fish stock can potentially be managed sustainably (held at) at a broad range of biomass sizes, both above and below B_{MSY}. Section 13, however, only allows stocks to be managed to achieve stock sizes that are at or above B_{MSY};

25.4 Commercial fishers generally (but not always) favour managing fisheries at or about B_{MSY}, as this strategy maximises the long term yield that can be obtained from the fisheries on a sustainable basis;[12]

25.5 Recreational fishers, however, generally prefer to have fisheries managed at larger biomass sizes (above B_{MSY}), as a larger biomass means that:

(a) there are more fish in the water and therefore catch rates are improved; and

---

[8] Yield in this context equals the annual growth occurring in the fishery as a result of new fish being born and increasing weight of the existing population, less natural mortality.

[9] See Starr paras 40-41 [**Vol 2**, p312].

[10] Ibid.

[11] See the updated (2007) stock assessment [**Vol 7**, p1396]

[12] Managing at MSY is also consistent with Article 61(3) of the United Nations Convention on the Law of the Sea; see **Vol 2** of appellants' authorities, Tab 13.

(b) fish are on average older and therefore larger.[13]

26 These concepts are important in the context of this case because they show that:

26.1 the key *qualitative* interests or aspirations that recreational fishers have in fish stocks (the desire for larger biomasses, giving faster catch rates and bigger fish) are a function of the TAC set under s.13, **not** the TACC set under s.21;

26.2 sustainability is not achieved at only one stock size; and

26.3 a decision to reduce a TAC under s.13 in order to rebuild a fishery so as to improve the quality of the fishery from a recreational perspective is as much a utilisation decision as a sustainability one.

27 Given the importance of the TAC in this context, it is significant that the recreational fishers did not appeal the High Court's finding that the Minister properly took into account social, cultural and economic factors relating to recreational fishers when setting the TACs under s.13 in 2004 and 2005.

(D) SECTION 21 – STATUTORY REQUIREMENTS

(D1) Inquiry should start with s.21

28 Section 21 (not s.8(2)) is the starting point in any inquiry as to whether the Minister set the kahawai allowances and TACCs in accordance with the statutory requirements.

29 The High Court's judgment concentrated on the application of s.8(2) and neither focussed on s.21, nor referred to the analysis of this section by the full bench of the Court of Appeal in *Fishing Industry Association Inc & Ors* v *Minister of Fisheries* (CA 82/97) (the ***Snapper case***) or the earlier High Court judgment in those proceedings.[14]

30 In contrast, the Court of Appeal considered that s.21 was the starting point (as did the Crown and the recreational fishers), acknowledged the broad nature of the inquiry under s.21, and rejected the High Court finding that s.8(2) narrowed the scope of the Minister's discretion under s.21.[15]

---

[13] See evidence of Dr Holdsworth for recreational fishers on this issue, where he describes the catch rate and the size of fish as the primary factors that influence the quality of fishing for recreational fishers, and the consequential need to increase the biomass size for kahawai [**Vol 2**, p 247]

[14] For Court of Appeal judgment see appellants' authorities: **Vol 1**, Tab 3 and for High Court judgment see Tab 2.

[15] Court of Appeal judgment [50]-[69] **Vol 1**, Tab 5.

(D2) Section 21 provides a broad discretion to weigh all elements of competing demands

31 Section 21 requires the Minister, when setting a TACC, to consider and then balance the interests of all sectors (commercial, customary and recreational) in order to determine the allocation or apportionment of the TAC (including making any allowance necessary for other sources of mortality such as catch by poachers or unlawfully discarded fish).

(i) Commercial interest

32 When setting or adjusting a TACC, the Minister is required to carefully assess the effect on the commercial interests potentially affected by that decision. In the *Snapper Case* the Court of Appeal stated:

> Of course, if the Minister is considering any reduction in the TACC with a consequential reduction in quota, he must carefully weigh the economic impact of what he proposes to do both on individual quota holders and on the QMS generally. That is a given…[pg 16]
>
> …
>
> All we wish to say for the future is that the Minister would be wise to undertake a careful cost/benefit analysis of a reasonable range of options available to him in moving the fishery towards MSY. If the Minister ultimately thinks that a solution having major economic impact is immediately necessary, those affected should be able to see, first, that all other reasonable possibilities have been carefully analysed, and, second, why the solution adopted was considered to be the preferable one. [pg 23]

33 The High Court's view in these proceedings that the Minister was not entitled to consider the "*potential effect of catch reductions on commercial operators*", and in particular the purse seine commercial fishery,[16] appears to be accepted by all parties (and the Court of Appeal) as incorrect. The Minister's allocation decisions under s.21 require full consideration of all interests, including commercial interests.[17]

(ii) Recreational interest

34 As to what is encompassed by "*recreational interests*" in the context of s.21, as for commercial fishers, the Minister is required to consider the full range of interests that recreational fishers may have in the particular fishery. These include both quantitative and qualitative interests.

35 As discussed earlier, issues affecting the qualitative nature of recreational interests are also relevant to s.13 TAC decisions. In practice TAC decisions are made in a process parallel with the subsequent TACC decisions. It is therefore wrong to proceed on an assumption that "recreational interests" can only be "allowed for" at the TACC setting stage, as many of those interests will in fact be relevant to, and taken into account in the context of, the prior TAC setting stage (as occurred in the case of the Minister's kahawai decisions).

---

[16] See High Court judgment [69]-[71] **Vol 1**, Tab 2.

[17] See [59] of Court of Appeal judgment and para 71 of recreational fishers' submissions

36 Obviously, quantitative information relating to levels of current and historical recreational utilisation (ie. catch history) is highly relevant to the Minister's decision in allowing for recreational interests under s.21, along with a consideration of qualitative factors.[18]

37 It is neither necessary nor desirable to attempt to exhaustively define "recreational interests" in the abstract. The nature and extent of recreational interests will differ on a case by case basis depending on the circumstances and location of each particular fishery and the aspirations of recreational fishers in respect of each such fishery.

38 When considering recreational interests, the Minister must base his or her decision on the best available information, exercising caution when information is uncertain (s.10 – information principles).[19] In part, that information will be provided by recreational fishers themselves through consultation (ss.12(1) and 21(2)), although ultimately it is the Minister's obligation to obtain that information.[20]

39 Having identified the relevant information concerning commercial and non-commercial interests that need to be considered, the Minister then has a broad discretion to weigh the competing demands of the various sectors when making what is essentially an allocative decision. The Court of Appeal in the *Snapper Case* described the nature of this task as follows (emphasis added):[21]

> 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 can 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. [pg 17]
>
> …
>
> If over time a greater recreational demand arises it would be strange if the Minister was precluded by some proportional rule from giving some extra allowance to cover, subject always to his obligation to **carefully weigh all the**

---

[18] The role played by catch history in the particular decisions under review is dealt with in Section (F) of these submissions. It is significant that the recreational fishers submissions (para 89) accept in principal that allocations could be made based on catch history in appropriate circumstances. Clearly therefore they do not argue that it is an impermissible consideration under s.21. It is simply a question of how, on the facts, catch history was used.

[19] In this context the recreational fishers' submission at para 78a that the Minister or Ministry discounted perception surveys and other anecdotal information is wrong. The advice papers advised the Minister of this information, reflected in the Minister's decision letters, which refers to such information as "important" [**Vol 4**, p638, para 17].

[20] See *Northern Inshore Fisheries Management Co Ltd* v *Minister of Fisheries* (Ronald Young J, 4 March 2003 CP 235/01) para [75]: 1st Respondents' authorities **Tab 1**.

[21] Appellants' authorities, **Vol 1**, Tab 3. As can be seen in this judgment the decisions under review were made under the provisions of the 1983 Act, but the Court was conscious of the fact that the 1996 legislation had been enacted and made these statements in the context of both Acts.

> **competing demands** on the TAC before deciding how much should be allocated to each interest group… What the proportion should be, if that is the way the Minister looks at it from time to time, is a matter for the Minister's assessment **bearing in mind all relevant considerations**. [pp 18-19]

40 The Court of Appeal in this case agreed with that approach. In doing so it rejected the submission from recreational fishers that such an approach had the effect of reducing the recreational allowance to a purely mathematical exercise.[22]

41 It is fundamental to the commercial fishers' position that neither s.21 nor any other provision of the Act gives either the commercial or recreational sector any priority or preference in the allocative process required under s.21. The apportionment of the TAC is inherently a discretionary decision for the Minister to make balancing all factors relevant to each particular fishery.

42 Finally in this context, the High Court's finding that s.21 did not leave the Minister with a broad discretion, and the recreational fishers' repetition of that proposition in their submissions to this Court,[23] is not based on anything contained in s.21. Rather it is based on an erroneous interpretation of s.8(2) (discussed later).

(D3) Ordinary meaning of "allow for" - does not require decision to benefit or advantage recreational fishers

43 While the precise form of legislative wording relating to the allocation of the TAC has changed over time, the requirement to "*allow for*" recreational interests, along with other non-commercial interests, has existed in the fisheries legislation since the QMS was enacted in 1986. *Schedule 1* to these submissions sets out the four different versions that have existed in the legislation over that time.

44 The recreational fishers submit that in the context of s.21 the words "*allow for*" in the context of a specified interest require a decision which is to the benefit or advantage of the specified group (ie. recreational fishers).[24] However, on the ordinary meaning of the words "*allow for*" (grammatically an intransitive verb), the definition is "*make due allowance for, take into consideration*".[25]

45 An interpretation of "*allow for*" as equating to the need to make "*an allowance*" is also consistent with:

---

[22] See [67] **Vol 1**, Tab 5.

[23] See [67] of the judgment **Vol 1**, Tab 2 and para 76 of recreational fishers' submissions.

[24] See para 64(g) of recreational fishers' submissions.

[25] See Shorter Oxford English Dictionary, 1st respondents' authorities, Tab 2. See definitions 7 and 15. Other dictionary definitions are to similar effect.

45.1 the legislative history of s.21 where the Select Committee, when in reporting back on the Bill, said (emphasis added):[26]

> A quantitative **allowance** can be made for non-commercial fishing interests in the TACC setting process….
>
> 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.

45.2 the Court of Appeal's approach in the *Snapper Case* (refer passages quoted in paragraph 39 above), accepted by the Court of Appeal in this case.

46 The recreational fishers' proposition that, after allowing for all non-commercial interests, there is "*no obligation to allocate the TAC fully*" (para 36) is illogical. Having decided on a "*total **allowable** catch*", the Minister cannot (at least in the absence of some compelling reason) then decide that part of that total cannot be caught by any of the sectors. This would be contrary to the purpose of a "*total allowable catch*".

(D4) No priority conferred due to need to "allow for" recreational interests before setting TACC

47 The recreational fishers' proposition (albeit made tentatively, see para 88 of their submissions) that the words "allow for" in s.21 confer a priority on recreational interests because sequentially their allowance must be set before the TACC, is not supported by the authorities or the legislative history of this provision. In particular the claim to some priority is inconsistent with:

47.1 the Court of Appeal's decision in this case at [57]:

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

47.2 the Court of Appeal's decision in the *Snapper Case* (in the passages quoted in paragraph 39 above);

47.3 the more explicit finding of the High Court in the *Snapper Case* that "*allow for*" means "*allow for in part or whole*", and that this did not confer any priority:[27]

[26] See passages set out in full at paragraphs 48 and 49 of the recreational fishers' submissions.

> I do not think Parliament intended to bind the Minister to "allow for" the *whole* non commercial (mainly recreational) interest as a first priority, regardless of impacts on commercials. Parliament in 1986 was not operating with a clean slate. There was an established industry, and reduction in catches could have severe economic effects (this proceeding exemplifies). A recreational policy was being worked up. It postulated priorities in some popular spots, but no general priority direction. Nor was there a clean slate in 1990 or 1992. It is likely Parliament intended to leave a discretion to the Minister to adjust any resource shortage as between the competing interests as the Minister saw fit at the time; and "allow for" is to be construed as meaning "allow for in whole or part".

47.4 the Select Committee's report on the Bill in 1996, where the Committee said that, by adopting the words "*allow for*", "*the Minister would then be able to give consideration to these interests to the extent to which he or she considers appropriate on a case by case basis*";[28]

47.5 uses of "*allow for*" in earlier allocation provisions. For example, from 1990, the equivalent wording in the 1983 Act also required the Minister to "*allow for*" any allowable catch for foreign fishing craft, determined under s.12 of the Territorial Sea and Exclusive Economic Zone Act 1997.[29] This provision gave effect to New Zealand's obligations under Article 62 of the United Nations Convention on the Law of the sea to make any surplus capacity in the EEZ available to foreign States. In no sense could this provision be seen as creating a priority for foreign fishing craft in the allocation process.

(D5) Common law right to fish not relevant – does not confer any preference

48 The recreational fishers' submissions purport to describe the nature of the common law right to fish (paras 55-57), and make the submission that while the common law right to fish for commercial purposes has been abrogated, nothing in the fisheries legislation or regulations abrogates the public right to fishing (paras 58-62). The recreational fishers then submit that the Minister, when allowing for recreational interests, should "*recognise public rights of fishing, as a pre-existing legal right requiring protection, albeit now limited by regulation*" (para 78(b)).

49 In effect, this is another means by which the recreational fishers seek to obtain priority over commercial fishers in the allocation process, and is without any logical or legal foundation:

49.1 The Court of Appeal in this case correctly accepted at [68] that the common law right of the *public* to fish in the sea was never limited to the right to take fish for personal use. There are examples in the

---

[27] See appellants' authorities **Vol 1**, Tab 2, pg150.

[28] See passage quoted at paragraph 49 of recreational fishers submissions.

[29] See wording of former section 28D set out in *Schedule 1*.

early judgments that discuss the common law right in a context where it is plain that a commercial fishing activity was at issue.[30] Any pre-existing common law rights did not distinguish between commercial and non-commercial fishing activity;

49.2 The common law right was based on an unscientific (and now outdated) view that uncontrolled catch of fish in the sea cannot damage the stock: *Commonwealth* v *Yarmirr* (2001) 208 CLR 1, [282].[31] The regulatory closure earlier this year of the recreational blue cod fishery in the Marlborough Sounds demonstrates that recreational fishing alone can deplete a stock to the point where a complete closure was necessary to allow it to rebuild;[32]

49.3 As a public not proprietary right, the common law right to fish is freely amenable to abrogation or regulation by a competent legislature: *Harper* v *Minister of Sea Fisheries* (1989) 168 CLR 314, 330;[33]

49.4 In relation to commercial fishers, the common law right has been replaced with a statutory right (through fishing permits and quota). That statutory right is greater than the common law right to fish: *Yarmirr*, [283];

49.5 While Parliament has used a different legislative framework to regulate non-commercial fishing (both recreational and customary), s.89(2)(a) of the Act only exempts natural persons from the requirement to have a fishing permit if they take fish otherwise than for the purpose of sale "*and in accordance with the amateur fishing regulations made under, and any other requirements imposed by, this Act*". Plainly the common law right to fish without constraint has been abrogated by this provision, as well as by the regulations themselves. There is no longer an unqualified common law right of fishing - it is a regulated right;

49.6 The amateur fishing regulations (general and area specific) contain over 300 hundred individual regulations prohibiting or regulating the activities of recreational fishers in relation to every species of any significance;[34]

---

[30] See for example *Richardson* v *Mayor of Oxford* (1743) 126 ER 496: 1st Respondents' authorities, Tab 3. In that case the defendant was accused of trespass by taking 10,000 bushells of oysters from Oxford Haven. The defendants contend the haven was an arm of the sea and that they accordingly had the liberty and privilege of free fishing.

[31] See appellants' authorities, **Vol 1**, Tab 9.

[32] See Reg 4F Fisheries (Challenger Area Amateur Fishing) Regulation 1986

[33] See appellants' authorities, **Vol 1**, Tab 8.

[34] See regulations listed in footnote 17 of recreational fishers' submissions.

49.7 The legislative mandate for the regulations, (ss.297 and 298 of the Act), provides a broad suite of regulatory powers enabling regulations that have the effect of "*regulating, authorising or prohibiting"* the taking or possession of any fish, aquatic life or seaweed. That suite includes significant powers that have not yet been given effect to by regulation, for example, the power to require recreational fishers to report their catch;[35]

49.8 Finally, when reporting back on the 1996 Bill, the Select Committee expressly contemplated that the allowance made for recreational fishers by the Minister when setting a TACC would be *enforced* through regulatory controls on recreational fishers.[36]

50 In summary, the attempt by recreational fishers to obtain a preference in the s.21 allocative process by reference to the common law right to fish, is erroneous. The common law right of the public to take fish from the sea did not differentiate based on the purpose for which the fish was being taken. In any event, common law rights have been regulated, albeit with different legislative mechanisms and controls applying to the respective sectors. Any pre-existing rights therefore have no relevance to the Minister's statutory obligations under s. 21.

(E) RELEVANCE AND ROLE OF SECTION 8

(E1) Section 8 does not advance recreational fishers' position

51 The recreational fishers' reliance on s.8(2) amounts to a further attempt to elevate the interests of recreational fishers in the s.21 allocative process above those of commercial fishers. They assert that s.8(2) requires the Minister, when determining the recreational fishers' allowance, to "*allow access to a sufficient level and quality of any particular fish stock which will enable people to provide for their well-being from the fishery"* (see para 82 of submissions).

52 The argument is flawed for two interrelated reasons.

(i) Section 8 applies equally to commercial and non-commercial fishers

53 First, the argument could only advance the recreational fishers' case if the "*people"* whose well-being is being "*enabled*" excludes commercial fishers. If the need to "*enable*" people to provide for their social, economic and cultural well-being applies to both the commercial and recreational sectors, then the provision adds nothing to (and does not narrow) the

[35] See s.189(h) of the Act. While not used yet in relation to recreational fishers, the Fisheries (Kaimoana Customary Fishing) Regulations 1998 and Fisheries (South Island Customary Fishing) Regulations establish a regime for the authorisation of customary take and the formal reporting of the catch.

[36] See last para of the passage quoted from the Select Committee's report at para 49 of recreational fishers submissions.

obligation that already exists within s.21 - to weigh all elements of the competing demands between sectors when allocating the TAC.

54 Both sectors are seeking access to the stock to enable them to provide for their respective well-being. Section 8(2) neither provides any priority to one sector over the other, nor provides any guidance as to how those competing demands should be weighed. As stated by the Court of Appeal in these proceedings (para [61]):

> Rather than dwelling on what the Judge did or did not mean, we simply confirm our view that the reference to enabling people to provide for their social, economic and cultural wellbeing in the definition of "utilisation" in s 8(2) does not exclude any sector of society, does not favour any particular interest (for example recreational over commercial), does not limit the relative weight which the Minister may give to the interests of competing sectors and does not indicate any priority of one interest over the other… As with most aspects of the decision- making role played by the Minister, the consideration of the wellbeing factor requires a balance of competing interests, especially in the case of a shared fishery such as kahawai.

55 The recreational fishers' submissions, in the Court of Appeal and in this Court, accept that s.8(2) applies equally to commercial fishers. They also accept that s.8(2) should apply to "*any sufficiently identifiable sector*"[37]. However, despite these acknowledgments, the recreational fishers then appear to imply that in the context of s.21, social, economic and cultural well-being only requires an "*applied consideration of interests*" for the customary and recreational sectors (see last sentence of para 71). Plainly, on their own analysis, such an implication is incorrect.

(ii) Misuse of general purpose provision in the Act

56 Second, the recreational fishers' argument seeks to elevate the status of s.8(2) beyond that provided for, or contemplated by, the Act:

56.1 Section 8(2) does not confer any separate discretion or decision making power on the Minister. As the Court of Appeal in these proceedings emphasised, s.8(2) is not the purpose provision itself, but rather is a definition provision within that purpose section: see para [59];

56.2 The Court of Appeal adopted a correct and orthodox approach to s.8 (reflecting previous Court of Appeal decisions):

(a) section 8 was intended as a statement of policy to guide decision makers and assist the Court's interpretation: see [54];

(b) section 8 sets out a "*broad purpose"* which the Fisheries Act, and the mechanisms within it is designed to achieve (relying

[37] See [66] of Court of Appeal judgment, **Vol 1**, Tab 5 and para 71 of recreational fisheries submission.

on Keith J in *Kellian v Minister of Fisheries* (CA 150/02)[38]: see [53].

57 As a consequence, the Court of Appeal considered (para [58]) that the decision the Minister makes must "*bear in mind and conform with*" the purpose of the Act (quoting from Keith J in *Westhaven Shellfish Ltd* v *Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at [45]).[39]

58 The recreational fishers' submissions criticise the use of the *Westhaven* approach on the basis that it is "*too broad and generalised*" (para 75) and "*does not provide a meaningful standard that is capable of effective review*" (para 72). There is no proper basis for that criticism. The allocation or apportionment of a fisheries resource between competing sectors inherently involves policy (and in some respects political) considerations. It is hardly surprising that s.21 is not drafted in a manner attempted to narrow the Minister's discretion or direct the Minister in any particular direction, let alone leave the Minister's decisions readily susceptible to judicial review.

59 The Court of Appeal's interpretation of s.8 is also supported by the wider scheme of the Act:

59.1 If it had been intended that the same or similar wording to that found in s.8(2) should be incorporated in s.21, then Parliament could have provided for this expressly, as it did in s.13(3). It did not do so: see Court of Appeal's analysis of the history of these provisions at para [59];

59.2 Equally, other sections of the Act specifically refer back to the s.8 purpose provision and require it to be taken into account (see for example ss.10(d), 17B(2), 97(3), 254 and 256(7)(a)). Again, s.21 does not refer back to section 8, let alone refer only to subsection (2).

(E2) Section 8 argument premised on erroneous assumption

60 The recreational fishers' attempt to elevate the definition of "utilisation" in s.8(2) to a specific mandatory relevant consideration under s.21 is expressly premised on the proposition that the Act draws a clear dividing line between "sustainability" and "utilisation" decisions. This distinction is said to be "central" to their s.8 argument (see para 4) of submissions. The primary function of the TAC is said to be a sustainability measure, while the function of a TACC decision is said to be a utilisation measure, dividing the resource between sectors. According to the recreational

[38] See appellants authorities, **Vol 1,** Tab 24.

[39] See appellants' authorities, **Vol 1**, Tab 18.

fishers, because s.21 is a utilisation decision, s.8(2) requires the Minister to enable recreational fishers to provide for their well-being.

61 This fundamentally misunderstands the nature and purpose of most decision-making under the Act, including the factors that influence TAC and TACC decisions. It was also rejected by the Court of Appeal: see para [48].

62 While it is undoubtedly true that a TAC performs an important sustainability role (in that it is required to limit the total level of annual harvest to that which is sustainable), a TAC is also a key utilisation decision:

62.1 One of the primary functions of a TAC is to *allocate* to all users of the resource (commercial and non-commercial) that portion of the total biomass (or yield) that can be collectively utilised (harvested). Put simply, the "total allowable catch" is the total allowable level of *utilisation* allowed each year;

62.2 Adjustments to TACs are made from time to time for both sustainability reasons and to achieve certain utilisation objectives. For example:

(a) TAC *increases* are always made for utilisation reasons. If the TAC is being increased then, by definition, that existing TAC must be sustainable. The opportunity for a greater level of utilisation (a higher TAC) may result in a lower biomass, but as long as the TAC is set to maintain the stock at or above B_{MSY}, s.13 authorises that decision;

(b) Similarly, a TAC may be sustainable at its current level, but the Minister may nevertheless decide to *reduce* the total level of harvest (the TAC) for a range of utilisation reasons. For example:

(i) the Minister may want to increase the size of the biomass over time in order to provide a larger stock size for future generations;

(ii) relevantly in the present context, a TAC might be reduced to increase the size of the biomass over time in order to improve the catch rates of recreational fishers and the average size of the fish that are in the water.

63 It is wrong for the recreational fishers to contend (para 47 of their submissions) that a TAC decision is intended to be driven by a

sustainability analysis "*rather than being driven by sector demands and economic, social and cultural factors*". While a TAC must be set to maintain the stock at or above B_{MSY}:

63.1 section 13(3) expressly requires economic, social and cultural factors to be taken into account when considering the way and rate a stock is moved towards or above B_{MSY};

63.2 in a shared fishery, whenever there is a contest between sectors as to whether a fishery should be managed at B_{MSY}, or at a higher biomass size (ie. above B_{MSY}), that is a TAC debate driven by social, cultural and economic factors.

64 In shared fisheries such as kahawai, the Minister will be presented (as occurred in this case) with a number of potential TAC options. In most situations these options will factor in both sustainability and utilisation considerations. The Minister must balance those competing considerations and interests when making a decision to select one option over another.

65 The need to balance sustainability and utilisation considerations is by no means unique to the TAC and TACC setting process. For example, s.15 allows the Minister to prohibit fishing for the purpose of ensuring that a limit on fishing-related mortalities for marine mammals is not exceeded. Like a TAC decision made under s.13, s.15 decisions are in Part 3 of the Act. In the context of a decision under s.15(2), the Court of Appeal considered that "*(t)he Minister, as is often the case under the Fisheries Act, was required to balance utilisation objectives and conservation values*". [40]

66 Similarly, TACC decisions (and the related decisions as to what allowance will be made for recreational interests), commonly require sustainability issues to be balanced alongside demands for greater or lesser levels of utilisation. A TACC is both a limit on the level of commercial harvest that can be taken sustainably and an allocation of part of the resource to the commercial sector. In practice, TACC decisions are not made in isolation from the related TAC decisions.

67 Many provisions throughout the Act have important sustainability drivers even though they are not part of the "sustainability measures" in Part 3. For example the deemed value regime (ss.75 to 76 of the Act) and the ability to set overfishing thresholds (ss.77 to 78 of the Act) are important measures with the wider QMS that help to ensure sustainability in conjunction with the TAC and TACC.

---

[40] See *Squid Fishery Management Company Ltd* v *Minister of Fisheries* (13 July 2004, CA 39/04) at para [75]. See also the discussion of the broad continuum of options available to the Minister in that case at paras [85] – [102], 1st Respondents' authorities, Tab 4.

68 The error in the recreational fishers' distinction between sustainability and utilisation decisions can be seen simply by looking at the purpose of the Act itself, with its direction to "*provide for utilisation while ensuring sustainability*". Sustainably and utilisation issues are ever present in fisheries decision-making and can only rarely be viewed in isolation from each other. As such, the Court of Appeal correctly held that "*s 8(1) describes the purpose as involving an inherent balancing exercise between sustainability and utilisation, and we do not see that as being subdivisable*": see para [47].

(F) FACTUAL ISSUE - DID THE MINISTER CONSIDER THE RELAVANT QUALITATIVE FACTORS?

69 The essence of the recreational fishers' complaint at a factual level is that the Minister took into account *quantitative* factors (essentially the parties' respective current utilisation or catch histories) and failed to have regard to the wider *qualitative* interests that recreational fishers had in kahawai stocks. This contention is focused on the Ministry's policy preference for allocations between sectors that reflected each sectors' catch history or current level of utilisation.

70 The commercial fishers submit that the factual question can be answered in two ways – both of which demonstrate that there is no substance to the recreational fishers' criticism:

70.1 First, by looking at what the recreational fishers asked for and the outcomes they achieved;

70.2 Second, by a detailed analysis of the material provided to the Minister (the submissions, advice papers associated with the 2004 and 2005 decision) together with his decision letters (and affidavit).

(F1) Outcome not blind chance – it reflected what recreational fishers had asked for

(i) Introduction

71 At para 87(e) of the recreational fishers it is submitted that it would be "*blind chance*" if catch history was to be a reasonable proxy for the wider interests recreational fishers contend they wished the Minister to consider. However, there was a very close correlation between what the Minister decided in relation to kahawai TACs and allowances and what the recreational fishers asked for - this was anything but blind chance. Essentially this is because they got what they asked for, including asking for their own allowance based on their own recent catch history.

(ii) TAC decisions

72 In the context of setting the TACs, recreational fishers wanted the fishery to rebuild and therefore wanted the TACs to be reduced. Lower TACs

would provide better catch rates (and they were complaining about low catch rates, particularly in the Hauraki Gulf), and on average larger fish (and again they were concerned about the number of juvenile or smaller fish, particularly in the Hauraki Gulf).[41]

73 The recreational fishers' desire for lower TACs was met by the Minister making substantial TAC reductions (15% in 2004 and 10% in 2005). The recreational fishers' submissions had sought combined TACs within **10%** of the TACs ultimately set by the Minister in 2004 (TAC of 7,612 t, as against 6,900t sought), and in the important KAH 1 fishery, within 7%. In 2005, the recreational fishers sought combined TACs within **3%** of those set (6,848t TAC set compared to 6,628t sought).[42]

74 This led the Court of Appeal to (correctly) conclude: see para [81]

> 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.

(iii) TACC decisions

75 In terms of the allocative decisions then made under s.21, the recreational fishers' primary interest lay with their own allowances. If the Minister made the allowance that they requested then they could have little grounds for complaint.

76 In fact the recreational allowances ultimately determined by the Minister were essentially what the recreational fishers had asked for, both in terms of the *methodology* used to determine it and in terms of the actual *tonnage* allowance that they sought:

76.1 *Methodology:* Despite recreational fishers criticising the use of catch history as a basis for allocation, they expressly asked the Minister to use their current utilisation (catch history) as the basis for determining their allowance. The joint submission made on behalf of the recreational fisher organisations in 2004 submitted:[43]

> MFish do not have good estimates of non-commercial catch. We do know that the Minister is required to use the best available information. Therefore the Minister should use the 2000 National Recreational Harvest Survey results except for QMA 2, which should be based on the 2001 survey.

---

[41] See analysis of recreational fishers' submission in Appendix 1 to 2004 FAP: **Vol 4**, p609-617]

[42] 2004 FAP Table 5 [**Vol 4**, p576]; 2005 FAP para 141 [**Vol 4**, p787].

[43] See boxed text at the end of section 5.5 of recreational fishers' 2004 submission: **Vol 5**, p1040. The same figures are also used in recommendation (g) at the end of the paper, p1052.

76.2 *Tonnage:* Seeking an allowance for recreational interests based on their most recent catch history (the 2000 National Recreational Harvest Survey results) significantly increased their allowance from those proposed by MFish in the 2004 IPP consultation round. The IPP had proposed using a much lower figure based on an average of the 1996 and 2000 survey results.[44] The Minister's decision to use the 2000 survey results as requested by recreational fishers increased the recreational catch estimates by **23%** in the combined allowances (and **18%** in KAH 1). This can be seen from the following table;

Rec Allowances 2004	**KAH 1**	**All QMAs**
IPP recommendation	1,580	2,780
Rec Fishers' submissions	2,000	3,707
Minister's decision	1,865	3,415

76.3 In terms of the tonnages, as can be seen from this table, the recreational fishers asked for a total recreational allowance of 3,707 tonnes in 2004. They ultimately received an allowance of 3,415 tonnes (within 8% of the amount asked for): [45]

77 The recreational fishers therefore achieved:

77.1 the TAC reductions they asked for (25% reduction over 2 years);

77.2 their own allowances calculated using (a) the methodology they asked for (their catch history based on the 2000 survey results alone), (b) a tonnage allowance within 8% of the amount they asked for, and 23% more than had been initially proposed.

78 In these circumstances alone, it is simply not possible to say the Minister failed to "*allow for*" recreational interests under s.21.

(iv) Wider outcomes also favoured recreational fishers

79 In addition to recreational fishers getting essentially the TACs and allowances they sought, when one stands back and looks at the effect of the wider management decisions that have been made over time, it is not open to the recreational fishers to claim that the Minister did not take into account their interests. The overall outcomes achieved by the recreational fishers through the 2004 and 2005 decisions, together with earlier management decisions, are so heavily weighed in their favour that they are only explicable on the basis the Minister was well aware and took into account their interests. In particular:

[44] See Table 7 of 2004 FAP: **Vol 4,** p589.

[45] See data in 2004 FAP, Table 7: **Vol 4**, p589.

79.1 ***Non-commercial fishers have 60% of the TACs:*** The overall non-commercial share of the combined TACs is approximately 60%. In the important KAH 1 fishery, the non-commercial share of the TAC is about 66%. The Minister's press release for his 2004 decisions described this as allocating the "*lion's-share*" of the catch to recreational fishers: *Press release 10 Aug 2004* [**Vol 6**, p1141];

79.2 ***TACs include 900 t of phantom allocation:*** Over 900t of the combined TACs has been allocated for customary take, based on an arbitrary 25% of estimated recreational utilisation. However, all the evidence suggests that Maori take kahawai within the recreational allowance, rather than as separately authorised customary take. The customary allocation is therefore highly unlikely ever to be fished - the yield has effectively been 'shelved' by the decisions and will serve to increase the stock size further: *Wilkinson paras 163-173* [**Vol 3**, p367]; *Wilkinson (R), paras 28-30* [**Vol 3**, p484]; *Tau para 27-29* [**Vol 2**, p127].

79.3 ***Kahawai stocks likely to be above B_{MSY}***: As to the recreational fishers' desire to have the fishery managed above B_{MSY}, while the best available information was (and remains) uncertain, kahawai stocks are likely to be above B_{MSY}. In 1996 the stock was conservatively estimated to be *three times* B_{MSY} (50% of the virgin biomass (B_0), with B_{MSY} being 16% of B_0): *2004 IPP, Table 9* [**Vol 4**, p548]). Commercial catches had been restricted by purse seine catch limits since the early 1990s, and even the recreational fishers' expert acknowledges that as a consequence it is likely that kahawai biomass has increased: *Boyd (R) para 25,* see also *Starr paras 40-43*: [**Vol 2**, p312]. The 2007 estimates have now confirmed that the fishery is still well above B_{MSY} [**Vol 7**, p1396].

79.4 ***No target purse seine fishery left:*** Another of the objectives of the recreational fishers in their submissions to the Minister has been to bring an end to the target purse seine fishery for kahawai.[46] The effect of the Minister's 2004 and 2005 decisions, and those of earlier Ministers through purse seine catch limits, has been to largely achieve that outcome:

(a) The KAH 3 fishery was shut down in 1997 after a major purse seine catch limit reduction on top of voluntary closures: *Wilkinson para 115* [**Vol 3**, p352];

(b) The purse seine fishery in KAH 1 is in the Bay of Plenty, with the fleet based in Tauranga. As a direct consequence of the

[46] See for example paragraph 6.3 of recreational fishers' 2004 submissions, together with recommendation 9(g), **Vol 5**, p1052.

Minister's decisions, the purse seine fishery no longer has sufficient quota to target kahawai: *Wilkinson paras 245-249* [**Vol 3**, p387];

(c) This has occurred notwithstanding the perception by purse seine Skippers that they are now encountering high levels of abundance: *Murray para 12* [**Vol 2**, p284]; *Reid para 16* [**Vol 2**, p291].

79.5 ***They have the Hauraki Gulf to themselves:*** As a result of the voluntary agreements negotiated in 1991, there has been no purse seining at all in the Hauraki Gulf for over 15 years, and most trawling and other commercial fishing has been banned through regulation. A number of closures were also negotiated in other areas in KAH 1 (and KAH 2 and KAH 3) to create spatial separation between commercial and recreational sectors: *Wilkinson paras 81-83, 112* [**Vol 3**, p344]; *6 July 2005 Advice paper* (including closure maps) [**Vol 6**, p1210].

The recreational fishers' submission that recreational catch rates in the Hauraki Gulf (based on boat ramp surveys) are low also ignores the fact that (a) very little kahawai is caught by commercial fishers in the Gulf and (b) most recreational fishers fishing from boats in the Gulf are targeting snapper and use gear not designed to catch kahawai;[47]

79.6 ***No bag limit reductions:*** Contrary to that suggested by the recreational fishers (para 87(3)) and their submissions, the Minister's theoretical 25% reduction to recreational allowances as a consequence of the 2004 and 2005 decisions has been of no practical consequence to the recreational fishers - the Minister decided not to reduce recreational bag limits. Contrast the position of commercial fishers, who have suffered a real 25% reduction through reduced TACCs.

80 Given the circumstances set out above, it is a mystery to commercial fishers why the recreational fishers ever brought the proceedings. The 2004 and 2005 decisions have served only to further enhance recreational interests and continue the graduated exclusion of the commercial sector from the kahawai fishery, both in KAH 1 and in other QMAs. Viewed in the round, it is not credible to see the decisions as doing anything other

[47] See Bradford: Comparison of Marine Recreational fishing harvest rates and fish size distributions: NIWA 1999 **Vol 5**, p845. The study shows that 90% of the kahawai in these boat ramp surveys was taken as a by-catch while people are targeting snapper. It notes that estimates of catch rates in the much smaller target kahawai fishery are much higher. See "Discussion" at page 16 of Report. In addition, the Hauraki Gulf is likely to be a nursery area, with the result that there are a lot more smaller juvenile fish in the Gulf: See Harthill pg 13, **Vol 5**, p953.

than giving significant preference to the qualitative and quantitative values that recreational fishers wanted the Minister to take into account when making the decisions.

(F2) Detailed analysis of advice papers and decision letters confirms Minister had regard to qualitative factors

(i) Use of "catch history" and relevance of "uncertain" information

81 The recreational fishers continue the High Court's criticism of the use of each sector's "catch history" as the basis for allocating the TAC. The criticism turns on the High Court's view that (*paras [67-69]*):

81.1 catch history did not capture the qualitative interests of recreational fishers;

81.2 the Ministry wrongly advised the Minister to discount qualitative considerations on the basis that they were uncertain.

82 First, it is not open to the recreational fishers to dispute the use of catch history as a basis for allocation when they sought recreational allowances based on their most recent catch history data (discussed at para [69] above).

83 Next, given that the Minister's task is to "*carefully weigh all the competing demands on the TACC before deciding how much should be allocated to each interest group*" (see *Snapper Case* appellants' authorities, Tab 3 pg 18), it was logical and necessary to consider how much each sector is in fact catching (their current level of utilisation). Catch history is commonly used by fisheries managers around the world as a basis for allocating rights in a fishery: *Wilkinson para 141* [**Vol 3**, p360].

84 Moreover, commercial catch history relating to kahawai inherently reflected the restrictions from purse seine catch limits and voluntary restrictions which had been in place for nearly 15 years, primarily as a consequence of recreational lobbying: *Wilkinson para 142* [**Vol 3**, p361]; *2004 FAP para 241* [**Vol 4**, p592].

85 The Ministry also recognised that looking only at catch history (described as "*claims based*" allocation) was only one way of assessing competing demands for the kahawai resource, and therefore proposed an alternative method, based on the "utility value" of the fishery to the different sectors ("*utility-based*" allocation). This attempted to ascertain each sector's "*quantum of well-being*" in relation to of the fishery for comparative purposes: see 2004 FAP para 181 [**Vol 4**, p583]; generic description in 2005 FAP paras 87-98 [**Vol 4**, p662].

86 Given the Minister's task is to weigh competing demands, it must be permissible (although not essential) to try and use a common currency

(money) to assess the relative value of the resource to different sectors. This was expressly the purpose of providing what the Ministry called a "comparative measure" – in economic terms, recreational fishers' marginal willingness to pay: 2004 IPP para 128 [**Vol 4**, p550].

87 The Ministry's view was that there was considerable "*uncertainty*" related to the "*quantitative assessment of value*": *2004 FAP paras 199 and 323* [**Vol 4**, p586 and 604]. Decision makers are required by the Act to consider any uncertainty in information, and must be cautious when information is uncertain (s.10(b) and (c)). The High Court was therefore wrong to criticise the Ministry for expressing concern about uncertainty in the available quantitative (and qualitative) information relating to utility value.

88 Significantly, the Ministry did not ignore the *qualitative* assessment of *value* put forward by the recreational fishers. To the contrary, the advice expressly recognised that the recreational fishers did not like the Ministry's attempt to quantitatively assess value and stated (emphasis added) (*2004 FAP para 198* [**Vol 4**, p586]):

> Most recreational submissions strongly favour preferential access for the recreational sector on the basis that kahawai is more highly valued by them. Much is made in submission of the fact that kahawai caught commercially has a low value. Recreational groups favour a **qualitative** assessment of **utility** based on giving a preference to recreational fishers in a fishery that is **obviously "more valuable"** to them.

89 In the absence of any means of assessing relative values based on subjective considerations, the Ministry could do no more than ensure the Minister was aware of recreational views and the evidence submitted in support. The advice papers are replete with references to qualitative recreational concerns and aspirations, and the Ministry's views on the evidence.

90 The Ministry explained to the Minister its reason for having a "policy preference" for allocation based on catch history in relation to kahawai (it was more certain and reflected associations with the resource, including previous management decisions): *2004 FAP paras 183, 200* [**Vol 4**, p584]. The Ministry was entitled to have such a policy preference: *Kellian* v *Minister of Fisheries* (CA150/02).[48]

91 The Ministry also made it clear to the Minister that the use of catch history and utility value approaches was not intended to fetter the Minister's discretion (*2004 FAP para 321* [**Vol 4**, p604]):[49]

[48] Appellants' authorities **Vol 1**, Tab 24.

[49] Refer also 2005 FAP para 261 [**Vol 4**, p804].

> The policy discussion on utility and claims based approaches is not intended to fetter your discretion, but rather provides policy guidance in order to provide a more robust framework when considering allowances.

(ii) Recreational fishers' views on qualitative interests made clear

92 The Ministry's advice and recreational fishers' submissions made the qualitative aspirations of those catching kahawai for recreational purposes clear to the Minister. In particular, the advice papers:

92.1 identified the importance of kahawai to recreational fishers: *2004 IPP paras 2(e), 8, 20-22, 97-102, 126-130*; *2004 FAP paras 221 and 306*;

92.2 discussed and responded to recreational fishers' perceptions that there had been a decline in the fishery: 2004 IPP paras 2(f), 20, 65(c) and (e) and 102; 2004 FAP paras 11(h) and (j), 65-71, 138, 142 and 306, 330-358; 2005 FAP paras 271-322;

92.3 identified and discussed the intangible benefits to recreational fishers of managing the fishery at a higher biomass, giving bigger fish with higher catch rates: 2004 IPP para 21, 2004 FAP para 36, 220; 2005 FAP para 96-97;

92.4 in 2005 discussed a Government proposal (announced just prior to the release of the 2005 IPP) for a formal policy of managing shared fisheries such as kahawai at levels above B_{MSY}, in order to enhance the quality of recreational fishing:

- See Minister's speech announcing the proposal at the New Zealand Recreational Fishing Council Conference on 8 July 2005: [**Vol 6**, p1257];
- 2005 Generic Paper, paras 97-126 [**Vol 4**, p687];
- 2005 FAP, paras 7-36 [**Vol 4**, p768];
- Minister's 2005 Decision Letter [**Vol 4**, p828].

92.5 analysed at length other information which the recreational fishers said supported their view that the quality of their fishing experience was not as good as they wanted it to be: *2004 IPP, para 102* [**Vol 4**, p546]; *2005 FAP, 65-70 and Appendix 1* [**Vol 4**, p776 and 808-19];

92.6 identified the recreational fishers' desire to have the target commercial purse seine fishery shut down: *2004 FAP, para 222* [**Vol 4**, p589]; *2005 FAP, para 211* [**Vol 4**, p796].

93 Given the length of the advice papers, extracts of the key paragraphs relied on by the commercial fishers are set out in *Schedule 2* to these submissions.

(iii) Minister's decision

94 It is apparent from the written reasons given by the Minister following each of the decisions that he:

94.1 knew of the importance of the kahawai fishery to recreational fishers: *2004 Decision Letter paras 10, 17, 25, 27* [**Vol 4**, p637]; *2005 Decision Letter* [**Vol 4**, p828];

94.2 expressly took into account the perceptions of recreational fishers as to the state of the fishery: *2004 Decision Letter para 17* [**Vol 4**, p638]; *2005 Decision Letter* [**Vol 4**, p828];

94.3 reduced the TAC, TACC and allowances in both years in order to maintain or increase the biomass: *2004 Decision Letter paras 19-25* [**Vol 4**, p638]; *2005 Decision Letter* p5-6 [**Vol 4**, p828];

94.4 sought separate advice on further constraining commercial catch in the Hauraki Gulf after concerns raised by recreational fishers (before determining such were unnecessary due to commercial fishing already being excluded): Minister's affidavit paras 58-61.

(F3) Relevance of Crown's concession in Court of Appeal

95 In the High Court the Crown argued that the Minister had been well informed by officials' advice and stakeholder submissions, and had taken into account all relevant matters, including qualitative matters affecting recreational interests in the fishery. In the Court of Appeal the Crown again argued that the Minister was well informed of the relevant qualitative factors, but based on the findings in the High Court judgment, now "*accepted that the Minister had been led to believe that he could, and therefore did, exclude qualitative factors and rely only on catch history*".[50]

96 Counsel for the Crown has confirmed that this concession was not made as a consequence of any subsequent discussion with the Minister. The Minister had not been asked following the High Court judgment whether he accepted that, despite being well informed about the qualitative factors going to the interests of recreational fishers, he was nevertheless led to believe he could not, and therefore did not, take them into account.

97 There is nothing in the Minister's affidavit filed in the proceedings or the Minister's decision letters that would support such a conclusion.[51] On a factual matter such as this, it is the Minister's view that matters, not that of Counsel or these instructing Counsel. The Crown's concession was therefore irrelevant and the Court of Appeal, having analysed the advice

[50] See Court of Appeal judgment, para [72]

[51] See **Vol 3**, pages 636 and 828.

papers, did not accept that it reflected what had in fact occurred (see paras [79] and [81]).

(G) RESULT

98 For the reasons set out above, the appeal should be dismissed and the Court of Appeal's decision affirmed.

Dated 23 December 2008

_____

BA Scott / GT Carter
Counsel for the respondent