

## **Kahawai Challenge Team**

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### **Supreme Court ruling sets the scene for 2010 kahawai decisions**

After four years of successive court hearings the Supreme Court, in dismissing the kahawai appeal brought by the New Zealand Big Game and Recreational Fishing Councils, has delivered what maybe termed a mixed bag.

Since the Court's May 28<sup>th</sup> ruling both organisations have been working with the legal team, option4, Ngapuhi and Ngati Whatua to discuss how the judgment may affect future management decisions. In particular, how the Minister of Fisheries will 'allow for' non-commercial fishing interests when setting the total allowable commercial catch (TACC).

One certainty is the Minister's obligation to review kahawai stocks next year. Phil Heatley confirmed at the recent Hokianga Accord hui that MFish will be conducting this review during the 2010 sustainability round.

### **Ministerial policy decisions**

Given the pending review it prudent for us to consider the implications for future policy and management decisions.

Based on the Court's ruling the restraints include:

- ⇒ Ministerial decisions have to be reasonable, not irrational or arbitrary
- ⇒ The Minister has to be properly informed of any allocative implications, such as reductions in bag limits.
- ⇒ In allowing for non-commercial fishing interests the Minister makes an 'allocation' or 'allowance'
- ⇒ When making the non-commercial allowances the Minister needs to keep commercial fishers' interests in mind.

The Minister is also obliged to conform with the purpose of the Fisheries Act 1996.

On the question of proportional allocation decisions, where the non-commercial (customary and recreational) allowances and the TACC are either reduced or increased by the same percentage, the Court seemed to consider this was a reasonable approach, provided the Minister is properly informed.

### **Proportional reductions unfair**

Proportional reductions and subsequent bag limit cuts are unfair if those decreases are required because of excessive commercial fishing. They are particularly unjust if the fishery has been depleted to such an extent that people cannot catch a reasonable feed of fish for whanau and friends within an acceptable timeframe and for reasonable effort.

Proportional cuts to the kahawai allowances were one of underlying reasons for challenging the previous Minister's 2004 and 2005 management decisions.

Possible compensation claims by commercial fishers against the Crown, unless proportional reductions are made, have arguably 'screwed the scrum' when TACCs have been set. Proportional allocation is now the Ministry's "preferred policy option".

### **Compensation threats**

Compensation was due to be discussed at the earlier High Court hearing. However, a last minute agreement not to broach the issue was reached on the steps of court between the legal teams representing the Crown and commercial fishers.

During the Supreme Court hearing the Chief Justice queried whether the Ministry of Fisheries was 'in terrorem' (in fear) of the possibility of such claims. The Solicitor-General on behalf of the Crown responded, "I won't say yes and I won't say no."

Later in the hearing the Solicitor-General was asked if compensation would take the form of some sort of public law damages. He replied, "we'll have to wait and see".

These responses and the Supreme Court's subsequent ruling makes next year's kahawai review an interesting prospect.

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