

**KAHAWAI LEGAL CHALLENGE - MEDIA RELEASE,  
AND FOR FISHING CLUBS AND SUPPORTERS**

**22 March 2007**

**JUDGE FINDS "WELLBEING OF THE PEOPLE" THE PRIORITY IN LANDMARK  
KAHAWAI LEGAL CHALLENGE**

1. Recreational and amateur fishers have secured a win in the Auckland High Court from the Kahawai Legal Challenge case. Yesterday Justice Rhys Harrison made declarations that the Minister of Fisheries decisions on entry of the kahawai species to the quota management system in 2004 and 2005 were unlawful as the Minister of Fisheries had:
  - a. Set total allowable commercial catch for kahawai without having proper regard to the social, economic and cultural wellbeing of the people – a mandatory consideration in the Fisheries Act 1996; and
  - b. Failed to take into account the special considerations applying to the Hauraki Gulf, due to the Hauraki Gulf Marine Park Act 2000, when fixing the total allowable catch within area 1 (covering North Cape to East Cape, and including the Hauraki Gulf).
  
2. The judicial review case was brought by the New Zealand Recreational Fishing Council Inc and the New Zealand Big Game Fishing Council. Both recreational fishing councils lodged the proceedings as a test case. The case is the first legal proceedings by amateur and recreational fishing interests since the introduction of the quota management scheme.

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3. The High Court has directed the Minister to reconsider or review his 2005 decisions to take account of the Court's decision. This will require fresh decision-making before the start of the new fishing year in October 2007.

**Non-commercial interests "the starting point" before any allowance for commercial fishing interests.**

4. Setting a TACC (total allowable commercial catch) is a mechanism in the Fisheries Act for allocating the use of the total allowable catch between commercial and non-commercial interests after sustainable levels have been set. Setting the TACC "divides the pie" between commercial and non-commercial interests.
5. In finding that the Minister did not correctly set the TACC, the Court has found that the Minister did not properly apply the criterion in the fisheries legislation of enabling people "to provide for their social, economic and cultural wellbeing". The Court described this as a "mandatory consideration" when allowing for recreational interests in the fish stocks. The Court said [para 55] that:

"The allowance for recreational interests reflected in the level of a TACC should appropriately recognise the extent to which kahawai provides for their [peoples'] wellbeing. In this context 'wellbeing' must mean the state of people's health or physical welfare. People provide for their wellbeing either by catching kahawai or by purchasing it from retail outlets".

6. In assessing the people's "wellbeing" objective, the Court said [para 59] that a number of factors apply to kahawai, including:
  - Recreational fishers progressive loss of access to other, more highly prized inshore species, principally snapper;

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- Kahawai's minimal value to people other than recreational fishers, as reflected in its small retail market;
- The recreational fishers well settled common law right to fish and provide for his or her needs.
- Patterns and levels of recreational catch history.

7. The Court found that there was no evidence that either the Ministry of Fisheries (MFish) or the Minister followed the necessary process of evaluating or taking into account both quantitative and qualitative aspects of peoples' wellbeing when setting the TACCs and the recreational and customary Maori allowances. [see para 62]

8. The Court found that the Minister of Fisheries gave almost complete reliance to MFish advice [para 25]. The error by the Minister resulted from incorrect advice from MFish which placed an over-reliance on allocating fish stocks based on catch history, rather than making a wider assessment of whether the allocation addresses the statutory criteria of weighing up the social, economic and cultural wellbeing of people [para's 67-74].

### **Special considerations in the Hauraki Gulf**

9. The Court has held that "the Hauraki Gulf requires special consideration whenever a sustainability measure is proposed or implemented.... " [para 82]. The Court found the Minister's failure to carry this out constituted a material error of law. The Minister had an obligation to pay particular regard to the social, economic, recreational and cultural wellbeing of the people of the Hauraki Gulf and in particular to maintain and enhance its physical resources in the form of kahawai stock [para 81]. The Court found that the Ministry's advice to the Minister made some reference to the special

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provisions of the Hauraki Gulf Marine Park Act 2000, but the Court found these fell short of satisfying the Minister's statutory obligations [para 81].

### **Commercials fisher's counterclaim**

10. The commercial fishers represented by Sanford Limited, Sealord Group Limited and Pelagic & Tuna New Zealand Limited mounted a robust counterclaim against the Minister's kahawai decisions in 2004 and 2005. The High Court for the most part rejected the counterclaim but upheld the commercials claim that the Minister of Fisheries failed to properly consider advice from MFish to review recreational bag catch limits for kahawai in late 2004.
11. The Court declined to make any declarations requiring the Minister of Fisheries to put in place regulatory measures to control or licence recreational fisheries (as the commercial's argued) saying that the Court had no jurisdiction to make such orders [para 140].

### **Result**

12. The Court had made declarations that the Ministers decisions in 2004 and 2005 were unlawful to the extent that the Minister:
  - a. Fixed the TACCs for kahawai for all areas without having proper regard to the social, economic and cultural wellbeing of the people;
  - b. Failed to take any or proper account of the Hauraki Gulf Marine Park 2000 when fixing the TAC for kahawai for area 1;
  - c. The Court also upheld part of the commercial fishers counterclaim that the Minister failed, without giving any or proper reasons, to consider advice from MFish to review bag catch limits for recreational fishers.

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13. The Court has reserved leave to the parties for further apply to the Court for further relief if necessary. Justice Harrison also ruled that the current kahawai management regime should remain in place until the Minister makes a fresh and legally effective decision for the new fisheries year commencing on 1 October 2007.
14. The Court has (provisionally) indicated that recreational fishers are entitled to costs against the Minister of Fisheries and reasonable disbursements, and that costs should lie where they fall on the commercial fishers counterclaim, which was largely dismissed.

#### **Will the High Court decision affect other fish stocks?**

15. The Court's decision will be a helpful precedent which will apply to other fish species. However the Court has said that individual assessment of each fish stock is required. The Judge said that the availability and value of a particular species will be a material factor in each case, and that the approach to setting TACCs and allowances will differ amongst species with the results dependant upon the Ministers evaluation of all relevant factors [para 73]. In saying this the Judgment reinforces that the MFish default approach of allocation simply based on existing catch history is not an adequate approach to allowing for recreational fishing interests under the fisheries legislation. The Court has confirmed that the Hauraki Gulf requires special consideration by virtue of the Hauraki Gulf Marine Park Act 2000. This finding will apply to all fish stock species within the waters of the Hauraki Gulf.

#### **Initial response from recreational fishers representatives**

16. The Court proceedings were brought by two fishing councils, New Zealand Recreational Fishing Council Inc and New Zealand Big Game Fishing Council Inc

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and supported by option4, a non-commercial fishers lobby group whose support for the proceedings included fund raising from the public.

17. Paul Barnes, option4 spokesperson has expressed delight with the decision. Paul Barnes said that he was especially pleased to see that the Court has recognised that recreational fishing rights stem from ancient common law rights, and that these rights have particular value in New Zealand given the popularity of fishing. He was also pleased that the Court had recognised providing for peoples' wellbeing takes priority over the Ministry's policies of proportionality and catch history. Mr Barnes noted that the Minister has been told that allocating fisheries should allow for all values, not just monetary ones.
18. Keith Ingram the President of New Zealand Fishing Council said that in the past the recreational fishing community has been fitted into the left-overs of a commercially managed fishery. This fundamentally flawed situation has led to this test case which has confirmed that making proper provision for non-commercial fishing interests is the "starting point" before there is any allowance for commercial fishers. Mr Ingram said that after 20 years of the quota management scheme there was a real need for case law which acknowledged the right of the public of New Zealand to fish for food or fun.
19. Richard Baker, vice-president of the New Zealand Big Game Fishing Council said that the Court proceedings have been a huge commitment by a group of amateur fishers who have been trying to get better definition of the public's right to fish, and to get a re-build in many fish stocks. Mr Baker said that he was especially appreciative of the fishing clubs and the option4 group who had committed financial resources to the cause, to the Ngapuhi iwi who supported the proceedings, and to the many

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individuals who have contributed substantial time and effort in preparing the case and by fund raising behind-the-scenes.

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