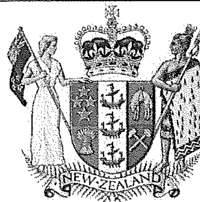
IN THE SUPREME COURT OF NEW ZEALAND SC 40/2008

BETWEEN	NEW ZEALAND BIG GAME FISHING COUNCIL INC
	FIRST APPELLANT
AND	THE 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

SUBMISSIONS ON BEHALF OF SECOND AND THIRD RESPONDENTS

14 January 2009



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Issue

1. The ground of appeal is posed in the following question:

> "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?"

2. This question gives rise to four questions of principle that will affect future decisions on allocation of shared fisheries between different fishing sectors. The Crown's analysis of the four questions of principle is summarised at paragraphs 20 to 27 below.

The Court of Appeal decision

3. It is convenient to set out first the eight findings of the Court of Appeal relating to the ground of appeal to be considered by the Supreme Court and the Crown's position on each of those findings.

Finding One

4. The Court of Appeal held s 8(1) of the Fisheries Act 1996 (the Act) describes the purpose of the Act as involving an inherent balancing exercise between sustainability and utilisation, and that this purpose is not subdivisable.[1]

5. The Crown agrees with the Court of Appeal's conclusions on this point.

Finding Two

6. The Court of Appeal determined the Total Allowable Catch (TAC) and Total Allowable Commercial Catch (TACC) decisions under ss 13 and 21 of the Act cannot be categorised as sustainability and utilisation decisions respectively.[2]

7. The Crown agrees with the Court of Appeal's conclusions on this point.

Finding Three

8. The Court of Appeal concluded s 8 is "essentially a statement of government policy to guide decision-makers and assist Courts to interpreting the detail of

[1] CA [47]; [59]

[2] CA [47]

the Act". Any decision that the Minister makes must conform with the purpose of the Act, but the primary provision governing the Minister's decision-making in relation to TACC is s 21.[3]

9. The Crown agrees with the Court of Appeal but with the following provisos:

9.1 Section 8(1) makes it clear that the purpose of the Act is "to provide for utilisation while ensuring sustainability". The purpose of the Act is not achieved by focusing only on the "social, economic and cultural well-being" of the people, referred to in the definition of "utilisation" in s 8(2);

9.2 The purpose of the Act is achieved by giving effect to the whole statutory regime, rather than by emphasising the role of each provision in the Act;

9.3 The requirement to "conform with" s 8 means decisions under s 21 may not be used to frustrate the purpose of the statutory regime.

9.4 The Crown argues the reference to "people" in the definition of "utilisation" in s 8(2)(ii) refers to commercial, recreational and customary fishers, as well as the people whom those fishers provide for.

Finding Four

10. The Court of Appeal held the "well-being" factors from s 8(2) are not mandatory considerations in relation to decisions made under s 21.

11. The Crown agrees that the "well-being" factors are not mandatory considerations by virtue of s 8(2) having any special prominence in the allocation decision under s 21. However, the Crown says that the "well-being" factors are mandatory in so far as they fall within the scope of "recreational interests" which the Minister must consider under s 21. The Court of Appeal also appears to have reached the same conclusion, having regard to its discussion at paras [70] to [81], where it refers to the Minister's obligation to consider "qualitative factors" under s 21. (Similarly "well-being" factors that

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3 CA [54]; [57]; [58]; [69]

arise as part of customary interests and commercial interests must be considered under s 21.)

Finding Five

12. The Court of Appeal held the "well-being" factors in s 8(2) do not:

 12.1 exclude any sector of society;

 12.2 favour recreational interests over commercial;

 12.3 limit the weight which the Minister may give to the interests of competing sectors; or

 12.4 indicate any priority of one interest over another.[4]

13. The Crown agrees with the Court of Appeal's conclusions on this point.

Finding Six

14. The Court of Appeal held the requirement that the Minister "allow for" recreational interests in s 21 does not mandate any particular outcome, but obliges the Minister to direct his or her mind to the extent of the allowance which should be made for the non-commercial interests before setting the TACC.[5]

15. The Crown agrees with the Court of Appeal's conclusions on this point.

Finding Seven

16. The Court of Appeal found that the Minister is entitled to have a policy preference for catch history as the basis for the TACC decision so long as this preference does not fetter his discretion, and he is satisfied that catch history

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4 CA [61]; [66]; [69]

5 CA [57]; [59]

provides a reasonable basis for the assessment of the competing interests to the TAC.[6]

17. The Crown agrees that:

    17.1 a policy for catch history must not fetter the Minister's discretion; and

    17.2 the Minister cannot base allocations on catch history if the result is unreasonable.

Finding Eight

18. The Court of Appeal held that in the present case, the Minister could adopt catch history as the basis for allocation of the TACC because the Minister was:

    18.1 fairly apprised of the qualitative factors which recreational fishers emphasised,

    18.2 informed of the Ministry's preference for a catch history approach and

    18.3 informed of the reasons for that approach.[7]

19. The Crown believes this is a factual question which can be assessed from examining the written materials submitted to the Minister, and that in the circumstances the most principled approach is for the Crown to abide by whatever conclusions are reached by this Court.

Summary of Argument

Consideration of "recreational interests" and catch-history based allocations under s 21

20. The first question of principle raised by the question to be answered by the Supreme Court asks if the Minister's consideration of "recreational interests" under s 21(1) of the Act can be reduced to an estimation of recent recreational catch levels?

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6 CA [73]; [80]; [81]; The Crown interprets "assessment" to mean the outcome of the Minister's decision under s 21, as opposed to an intermediate step in the Minister's reasoning process; that is to say (consistent with the Court's discussion at [70] – [81]), the Minister must consider all the "qualitative factors" that arise in relation to recreational and customary interests, before making a decision that an allocation based on catch history reasonably serves those interests.

7 CA [79]

21. The Crown's answer is:

    21.1 The Minister's consideration of "recreational interests" should not be reduced to a simple estimate of recent recreational catch levels.

    21.2 While the recreational allocation that results may equate to recent recreational catch levels:

        21.2.1 the assessment of "recreational interests" in a stock will include additional qualitative considerations; and

        21.2.2 the Minister must be satisfied that the allocations are reasonable in the circumstances.

    21.3 The Minister may ultimately base allocations on catch history where he is satisfied that it provides a reasonable basis for the allocations to the competing claimants to the TAC.

Does s 8 of the Act add to the scope of "recreational interests"?

22. The second question involves an analysis of parts of s 8 of the Act. Section 8(1) records the purpose of the Act by reference to "utilisation" and "sustainability". Section 8(2) defines "utilisation" by reference to management of fisheries resources in order to "enable people to provide for their social, economic, and cultural well-being". The second question asks if the reference to "social, economic and cultural well-being" adds anything to the scope of "recreational interests" that the Minister must consider under s 21(1)(a)(ii)?

23. The Crown's answer to the second question is that the reference to "social, economic, and cultural well-being" in s 8(2) is consistent with the scope of the "recreational interests" that the Minister must consider under s 21(1)(a)(ii). Those interests necessarily include social, economic and cultural elements. Section 8(2) does not extend or constrain the range of matters that must be considered under s 21(1) of the Act.

Whether a recreational interest in larger and more abundant fish ought to provided for under s 13 and/or s 21

24. The third question asks if the Minister can provide for a recreational interest in larger and more abundant fish by:

 24.1 reducing the TAC for the stock under s 13; or

 24.2 making an allocation to recreational interests under s 21(1) that is higher than recreational fishers can be expected to catch.

25. The Crown's answer to the third question is as follows:

 25.1 In order to provide for a recreational interest in larger and more abundant fish, the Minister can reduce the TAC under s 13 (and so manage above the level that can produce the Maximum Sustainable Yield (MSY)), so that the biomass of the stock increases;

 25.2 While acknowledging the possibility of other interpretations, the Crown considers that the better view is that the Minister should not make an allocation to recreational interests under s 21(1) that is higher than recreational fishers can be expected to catch if the purpose of doing so is simply to rebuild or increase the biomass of the stock. Any change in the biomass of the stock is more appropriately achieved by reducing the TAC under s 13.

 25.3 However, the Minister may make an allocation to recreational interests that is higher than recreational fishers can be expected to catch if the Minister believes that there are other qualitative and/or quantitative factors that support such a decision, for example, that the recreational fishers can be expected to, over time, catch greater numbers of fish and 'grow into' their allocation.

Scope of the Minister's discretion in making the allocation between fishing sectors

26. The fourth question asks if s 21(1) mandates any particular outcome in the allocations to each fishing sector and whether the reference to "social, economic, and cultural well-being" in the s 8(2) definition of "utilisation"

provides a goal against which the Minister's decision under s 21 is to be measured?

27. The Crown's answer to the fourth question is that s 21(1) does not mandate any particular outcome in the allocation between fishing sectors, so long as the resulting allocations are not irrational in light of the interests that s 21 requires the Minister to take into account. While the Minister may properly seek to maximise "social, economic and cultural well-being" in making the allocations and setting (or varying) the TACC, this is an inherently subjective exercise. The Act does not require the Minister's decision to be measured against that goal. Instead the Minister may make such allocation between the sectors as he or she thinks appropriate, so long as the matters required to be considered by the Act are considered and the outcome is reasonable.

Ultimate issue: lawfulness of the Minister's decisions

28. The four issues posed by the question stated in the Court's leave decision lead to an ultimate question, namely:

> "Did the Minister's decisions in 2004 and 2005 accord with the requirements of s 21 of the Act?"

A decision on this ultimate issue will have less impact than would normally be expected, as the Minister has agreed to review the TACs, TACCs and allowances for kahawai stocks in light of the Court's decision in this litigation, whatever the result. The principled guidance which the Court will provide is therefore more significant than the actual result.

29. The key issue in determining the formal result of the appeal is likely to be one of fact: namely, whether the reasoning process leading to the Minister's decisions included proper consideration of "recreational interests". In the High Court, counsel for the second and third respondents submitted that the Minister was adequately informed, and that his decisions included a correct consideration of "recreational interests".[8] The High Court rejected that submission and held that the Minister's decisions reflected consideration of

[8] Notwithstanding the contrary indication in the High Court judgment at HC [42].

[9] HC [69]-[74]

recreational "catch history" only, and placed to one side the more detailed information that was before him. [9]

30. The Minister at that time, then Minister Anderton, was content to accept that decision of the High Court and to "move on", making future decisions with the benefit of the Court's findings about the importance of qualitative factors. Accordingly there was no Crown appeal and counsel for the Minister did not challenge the relevant factual findings of the High Court in the Court of Appeal, while submitting that if the Minister had taken into account all the material in the advice papers he would have been properly informed about the relevant recreational interests.

31. The Court of Appeal examined the materials submitted to the Minister and held that the Minister's decisions did in fact reflect an adequate consideration of recreational interests. The second and third respondents are content for the formal result of this appeal to reflect this Court's assessment as to whether the factual conclusions of the High Court or those of the Court of Appeal should prevail. Their primary interest is in the guidance that the decision of this Court should provide for future decisions.

Facts

32. Kahawai stocks were introduced into the Quota Management System (QMS) with effect from 1 October 2004 by the Fisheries (Declaration of New Stocks subject to the Quota Management System) Notice 9 (No 2) 2003. The species was divided into six fish stocks for the purpose of management in the QMS; namely, KAH1, KAH2, KAH3, KAH4, KAH8 and KAH10.[10]

33. Before introduction into the QMS, Kahawai fishing was subject to Commercial Catch Limits on the purse seine catch and daily bag limits for recreational fishers. Since the late 1970s kahawai fishing, although of relatively low value to commercial fishers,[11] had formed an integral element of the annual fishing plan

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10 A map showing the area included in each of these stocks is at Case volume 4 p 527 tab "2004 – Letter".

11 Case volume 4 p 551 para 129 tab "2004 – IPP"

for purse seine vessels.[12] Kahawai was also valued as a sport fish by recreational fishers.[13]

34. The nature of the interests of the recreational and commercial sectors are outlined briefly in the decision of the Court of Appeal at CA [16]-[17].

Decisions in 2004 – proportionate reduction of 15% from estimated catch levels

35. As part of the introduction of kahawai into the QMS, the then Minister was required to set a TAC under s 13 of the Act, and under ss 20-21 he was required to:

    35.1 allow for Māori customary non-commercial fishing interests;

    35.2 allow for recreational interests;

    35.3 allow for all other fishing-related mortality; and

    35.4 set a TACC.

36. That process required the Ministry to undertake consultation on the Minister's behalf. It published proposals in the form of an Initial Position Paper ("IPP"),[14] considered submissions in response, and prepared a Final Advice Paper ("FAP").[15]

37. This process sought to bring together all the available information that was relevant to the Minister's decision, whether scientific or anecdotal. It included a summary of decades of commercial landings, widely varying estimates of recreational landings, and information resulting from a study of the comparative value of kahawai to recreational and commercial fishers commissioned by the Ministry from the South Australian Centre for Economic Studies. In the FAP the Minister was given a choice between allocating the kahawai stocks between fishing sectors according to "utility value" (ie, the value of kahawai to each fishing sector) and a "claims-based" approach (ie,

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12 Case volume 4 p 543 para 83 tab "2004 – IPP"

13 Case volume 5 p 1009. Further detail on the biology of Kahawai and pre-QMS history is conveniently provided in the High Court decision at HC[8]-[13].

14 Case volume 4 p 527 tab "2004-IPP"

15 The 2004 FAP included all the documents in Case volume 4 pp 503-635, at tabs "2004", "2004 – IPP", "2004-FAP" and "2004 – Final Recs".

proportionally to recent landings by each sector, so far as those could be estimated in the case of recreational landings), for the reasons set out in paragraph 30 above.[16]

38. The Minister decided on the TAC, TACC and allowances for the different stocks, and explained his reasons in a letter to stakeholders.[17] The Minister adopted the proportionate "claims-based" approach. In doing so he adopted a TAC that should have reduced the kahawai catch across all stock by 15% from estimated recent catch levels and also imposed a 15% reduction on recent commercial and recreational catch levels.[18] The amounts of the TAC, TACC and allowances set by the Minister in 2004 can be seen in a table at Case volume 4 p 639 para 21.

39. The Minister also indicated an intention to review the recreational daily bag limit in order to constrain the recreational catch to the amount of the recreational allocation, but ultimately he did not do so. His failure to consider the measures later proposed by the Ministry was set aside by the High Court on the grounds that his failure to consider the Ministry's proposal was unreasonable.[19] That conclusion was not challenged in the Court of Appeal.[20]

Decisions in 2005 – proportionate reduction of 10%

40. In 2005 the then Minister again reviewed catch limits for kahawai stocks. The same process was followed.[21] In light of information, principally anecdotal from recreational fishers that kahawai stocks were decreasing, he reduced the TACs for all stocks by 10% and proportionately reduced the individual allocations in respect of each stock.[22]

16 The discussion of the competing claims to allocations of the TAC in the FAP are at tab "2004" pp 521-524 at paras 64-80 (general outline); and at tab "2004 – FAP" pp 583-597 at paras 178-274 (relating to kahawai stocks specifically). That discussion refers back to material in the IPP at paras 31-52 at pp 532-535 (referring back to table 1 at p 528) and pp 542-551 paras 82-130.

17 Case volume 4 p 636 tab "2004 – Letter". The passage in his affidavit referring to this decision is at paras 20-25, at case volume 3 pp 498-500.

18 A different approach was taken to the customary allowance: paras 208-211 at Case volume 4 p 587.

19 HC [125]-[126]

20 The intended review of TACs, TACCs and allowances will necessarily also include consideration of the recreational bag limit as required by the High Court decision.

21 The 2005 IPP is at Case volume 4 p 728 tab "2005 – IPP" and the 2005 FAP is at Case volume 4 p 642 tab "2005" (including the IPP). The attribution of this decision to Minister Anderton at CA [32] is incorrect.

22 The passage in the FAP discussing this information is at Case volume 4 pp 773-775 paras 37-58 and the passage concerning use of anecdotal information generally is at pp 695-697 at paras 145-154.

41. The individual decisions on each TAC, TACC and allowance are summarised at Case volume 4 p 829 tab "2005 – Letter". The reasons for the Minister's decision were set out in a letter signed out by his successor, Minister Anderton.[23]

Course of this litigation

42. This litigation was commenced by recreational fishing interests in late 2005. Their statement of claim challenged the Minister's decisions on a number of grounds, to which the commercial fishing interests added a counter-claim filed in early 2006.[24]

43. Only the question of the lawfulness of the Minister's allocation decisions under s 21 remains to be considered by this Court. The other issues have been resolved by the Courts below in the following ways:

43.1 The Minister's TACC decisions in respect of KAH1 were unlawful for failing adequately to "have particular regard" respectively to ss 7 and 8, Hauraki Gulf Marine Park Act 2000. However, his decisions in respect of the TAC for KAH1 did have adequate regard to those provisions.[25]

43.2 The Minister's other TAC decisions were also lawful.[26]

43.3 The Minister's failure to consider reductions in the recreational daily bag limit in order to keep recreational fishers within their allocation was unreasonable and therefore invalid.[27]

43.4 Both the High Court and Court of Appeal declined to declare that the Ministry's monitoring of recreational Kahawai fishing was insufficient.[28]

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23 Case volume 4 p 969 tab "2005 – Letter". The passage in Minister Benson-Pope's affidavit referring to this decision is at paras 65-114, at Case volume 3 pp 511 – 528, especially paras 109-114 at pp 526 - 528.

24 The relevant pleadings are the amended statement of claim and the amended statement of counter-claim. The amended statement of claim is at Case volume 1 tab 1, but the counter-claim has been omitted from the bundle.

25 CA [117]

26 HC [53]

27 HC [125]-[126]

28 CA [127]

43.5 The treatment of scientific and other information in preparing the advice to the Minister was not erroneous.[29]

43.6 The Minister was not obliged to re-consult following changes to the proposals between the 2004 IPP and the options put forward for the Minister's consideration in the 2004 FAP.[30]

Substantive submissions

44. As background to the questions of principle raised by this litigation, the Crown addresses first:

44.1 The obligation to consider "recreational interests" under s 21; and

44.2 The nature and scope of those interests.

45. The purpose of doing so is to assist the Court in identifying the matters in dispute between the parties.

The obligation to consider "recreational interests"

46. The reference to "recreational interests" in s 21 imposes on the Minister a mandatory consideration in setting or varying a TACC, and making the related allocations. This requires the Minister to:

46.1 have a reasonable understanding of what those interests are, and

46.2 have regard to information about those interests when allowing for the "recreational interest" in the relevant stock.

47. Apart from common law principles about mandatory considerations, the Minister's obligations are reflected in the obligation to take into account that decisions should be based on the best available information[31] and the obligation to consult with, among others, representative persons and organisations, including representatives of recreational interests.[32]

29 HC [84]; [85]; [95]; [104]

30 HC [107]

31 Section 10(a), and that the Minister should also be cautious when information is uncertain, unreliable, or inadequate (s 10(c)).

32 Section 21(2).

The nature and scope of "recreational interests" required to be considered under s 21

48. It would be difficult to provide a comprehensive definition of the range of factors that must be considered in allowing for "recreational interests". If one were to attempt a comprehensive description, it would naturally incorporate the social, cultural and economic "well-being" factors referred to in s 8(2) as those factors relate to recreational fishers and the people they provide fish to:

48.1 social, in that fishing is a recreational activity;

48.2 cultural, in that fishing and consuming seafood are to some an important part of being a New Zealander; and

48.3 economic, in that fish often have value as food.

49. There may well be matters raised by recreational fishers that do not neatly fit within any one of these three individual factors, such as the impacts on recreational fishers of historic management decisions and historic fishing activity. However, the issue is not whether such matters fall within the scope of one or more of the three "well-being" factors. Consistent with the Court of Appeal's view that the primary provision governing the Minister's TACC decision-making is 21, it is submitted that the correct approach (and the approach that facilitates a decision on the merits of the competing claims between the different fishing sectors) is simply to ask whether the matters raised fall within the scope of "recreational interests".

50. In the case of kahawai stocks, the interests of recreational fishers raised during consultation included:

50.1 a desire for larger fish, which provide better sport;[33]

50.2 greater abundance of kahawai, thereby reducing the amount of time spent at sea waiting for a bite on the line;[34]

50.3 the value of kahawai to some fishers as a source of food;[35] and

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33 For example "Submission on behalf of non-commercial fishers" dated 16 April 2004, Case volume 5 p 1020 at 1028 (reference to *Fighting Fins* by Neil Illingworth).

34 Ibid at 1041

35 Ibid at 1036

50.4 the fishers' enjoyment of fishing, including fishing for kahawai, as a form of recreation.[36]

51. The factual underpinning for the submissions by recreational fishers was hotly debated by representatives of commercial fishers, as was the question whether commercial fishers had over-fished kahawai stocks.[37] There appears to be no dispute, however, that these are the sorts of factors that the Minister should take into account when allowing for "recreational interests".

Matters in dispute

52. Accordingly, the Minister's obligation to consider "recreational interests" is not in dispute in this litigation, nor is the fact that the range of "recreational interests" is potentially very broad, including both quantitative and qualitative matters. Rather, the matters in dispute between the parties relate to the permissible (or required) reasoning process for allocating the TAC under s 21, and in particular, how the Minister is to recognise "recreational interests" within that allocation.

Recreational fishers' argument in relation to the purpose of the Fisheries Act 1996

53. The appellants' position on the permissible (or required) reasoning process for allocating the TAC under s 21 draws principally on one central argument in relation to the purpose of the Act and the role of s 8(2). It is convenient to deal with that argument at this juncture, before turning to the four questions of principle.

54. The recreational fishers' submissions seek (1) to divide the purpose of the Fisheries Act into sustainability elements and utilisation elements; and (2) to characterise TAC decisions under s 13 as primarily about sustainability; and decisions under s 21 about TACCs and other allowances as primarily about utilisation. The reason for this approach is the recreational fishers' desire to have the qualitative factors referred to in the definition of "utilisation" in s 8(2), namely, the "social, economic and cultural well-being of the people", be determinative of the Minister's decision under s 21 of the Act.

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36 Ibid at 1037-1039

37 Ibid at 1022-1023; compare first Wilkinson affidavit paras 56-59 Case volume 3 pp 362-363.

55. The Crown submits that the recreational fishers' analysis is misconceived and that the Court of Appeal was correct to characterise the Fisheries Act as having one purpose that embraces both sustainability and utilisation for the reasons set out in its judgment.[38] The Crown further endorses the Court of Appeal's related finding, that it is not helpful to characterise individual sections as primarily about utilisation or sustainability. In response to the recreational fishers' specific submissions on this point at paragraphs [21] to [38]:

55.1 The Crown accepts that utilisation and sustainability are different concepts, and that this is reflected in the use of the disjunctive "or" to separate utilisation and sustainability in ss 9 and 10, and in the separate definitions given to the concepts in s 8(2). However, the purpose of the Act is an inherent balancing exercise between sustainability and utilisation that is not subdivisable (s 8(1)).

55.2 The TAC decision under s 13 and the TACC decision under s 21 cannot be categorised as sustainability and utilisation measures respectively:

55.2.1 The TAC decision has utilisation as well as sustainability aspects to it:

(a) The TAC decision determines the total harvest which can be collectively utilised;

(b) Section 13(3) provides a specific indication that utilisation factors ie social, economic, cultural factors, are relevant to some decisions under s 13;

(c) Utilisation factors may be used to justify a lower TAC than is required to manage a stock at or above a level that can produce MSY, for example to satisfy future utilisation interests in larger and more abundant stock.

[38] CA [47]; [53]-[59]; and *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA) - Authorities Volume 1, Tab 19 at [25] and *McGuire v Hastings District Council* [2002] 2 NZLR 577 at [21]

55.2.2 The TACC decision under s 21 is concerned with allocation of the TAC as is reflected in the heading of Part Four "Quota Management System"; there is nothing in the Act to suggest that it is solely a "utilisation" measure in terms of s 8(2). Further, the TACC decision has sustainability and other aspects to it, as well as being concerned with utilisation:

(a) In setting the TACC the Minister will often give thought to the mechanisms that prevent the different sectors from exceeding their allocations under s 21, and, ultimately the TAC, for example daily bag limits;

(b) Section 21(1)(b) requires the Minister to allow for "all other mortality to [the] stock caused by fishing": this is primarily a sustainability factor, as it is taken into account to reduce the likelihood that the allocations made under s 21 will in fact result in the TAC being exceeded. It is not a consideration to which the "well-being" factors in s 8(2) can be applied.

56. Thus, the Crown submits that the Fisheries Act has one purpose that embraces both sustainability and utilisation, and that it is not helpful to characterise individual sections as primarily about utilisation or sustainability. Instead, where there is any doubt each section should be interpreted in such a way that ensures it contributes to a statutory regime, which will achieve the singular purpose of the Act set out in s 8(1).

57. Accordingly, contrary to the recreational fishers' submission, s 8(2) and the "well-being" factors do not dominate the decision making process under s 21:

57.1 Any decision that the Minister makes must conform with the overall purpose of the Fisheries Act, but as stated by the Court of Appeal,

the primary provision governing the Minister's TACC decision-making is s 21;[39]

57.2 The "well-being" factors (as they relate to recreational fishers' and the people their fishing provides for) are relevant to that decision in so far as they fall within the scope of "recreational interests" which the Minister must consider under s 21.

Question 1: Consideration of "recreational interests" and catch-history based allocations under s 21

58. The first question of principle asks if the Minister's consideration of "recreational interests" under s 21(1) of the Act can be reduced to an estimation of recent recreational catch levels?

59. Both the High Court and the Court of Appeal noted the subjectivity and uncertainty involved with weighing up factors of the kind raised by the recreational fishers, especially when they must be weighed against the more easily quantified value of the same stocks to commercial fishers.[40] The inherent lack of precision in this sort of information was one significant factor that led the Ministry to recommend a policy preference for a catch history-based allocation.[41]

60. The Court of Appeal's decision contemplates that the Minister will consider qualitative factors[42] and that the Minister may base allocations on catch history only "if he is satisfied that that provides a reasonable basis for the assessment of the interests of the competing claimants to the TAC".[43] The Court held that the Act did not require the Minister to base the allocation decision primarily on a subjective evaluation of unquantified and unquantifiable "well-being" factors, and noted that such a requirement would not necessarily have led to a better decision.[44] However, the Court also proceeded on the basis that the Minister could not avoid consideration of those factors.

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39 CA [54]; [57]; [58]; [69]

40 HC [58]; CA [79].

41 Case volume 4 at p 586 para 200 tab "2002 – FAP"

42 CA [79]; [81]

43 CA [80]

44 CA [80]

61. Thus when the Court went on to hold that the Minister's decisions in 2004 and 2005 reflected an adequate consideration of recreational interests, it did so on the basis of a finding that the Minister had in fact adequately considered the relevant recreational interests and had formed the view that a catch-history based allocation would provide a fair allowance for those interests.[45]

62. Consistent with the Crown's analysis of the scope of "recreational interests" (at paras [48] to [51] above), it is submitted that the Court of Appeal was correct in requiring the Minister to consider the full range of recreational interests. The Minister's reasoning process cannot be reduced to consideration of a mere estimate of recreational catch levels. Thus if, for example, recreational catch levels had fallen dramatically in recent years because of the impact of commercial fishing, the fall in recreational catch levels would not reflect a diminution in the recreational interests in the stock. If the Minister focussed on the recent catch levels alone when making further decisions under s 21, the Minister would have an incomplete (and misleading) understanding of the relevant recreational interests.

63. It will be submitted below that the Minister has a reasonably broad discretion as to allocation of the TAC amongst the different fishing sectors, subject to the twin constraints of adequate consideration of relevant considerations and the reasonableness of the result in light of those considerations. If that submission is accepted, an allocation decision is not objectionable merely because it results in allocations in proportion to catch history; nor can there be any objection to a general policy favouring allocations based on catch history, where it is a reasonable basis for the assessment of (ie allocating for) the interests of the competing claimants to the TAC.[46] For example, the Minister may, after considering all the relevant recreational interests and weighing them against the interests of other sectors, take account of the desirability of predictable allocations over time, and adopt a catch history based allocation on that basis.

64. It is submitted that while the Minister may decide to base the fishing sector allocations on catch history if he or she considers that appropriate in a

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45 CA [81]

46 As the Court of Appeal indicated at CA [80]

particular case, an estimate of recreational catch history cannot be taken as a substitute for information about the full range of recreational interests.

Question 2: Does s 8 of the Act add to the scope of "recreational interests"?

65. As noted above, the range of factors relevant to "recreational interests" are broadly co-extensive with the social, cultural and economic "well-being" factors referred to in s 8(2) within the definition of "utilisation".

66. The High Court held that s 8(2) introduced the well-being factors into s 21 as mandatory considerations.[47] The Court of Appeal took a different view of the role of s 8 as a purpose provision.[48] The second and third respondents submit the Court of Appeal's approach was right. The "well-being" factors, while within the range of matters relevant to "recreational interests" in s 21, are not mandatory considerations by virtue of any special prominence given to s 8(2). It is therefore submitted that s 8(2) is consistent with the broad range of considerations that the Minister may be required to consider under s 21, but does not add to the scope or relative weight of those factors.[49]

Question 3: Whether a recreational interest in larger and more abundant fish ought to provided for under s 13 and/or under s 21

Section 13

67. A recreational interest in larger and more abundant fish can be considered and provided for by the Minister in setting the TAC under s 13. The most direct way to provide larger and more abundant fish is to manage the fish stocks above the level that can produce MSY so that the biomass increases; in other words, to reduce the TAC so that a greater proportion of fish live longer and grow larger, enabling the fish stock to increase.[50]

68. If the Minister does consider it appropriate to manage a fish stock in this way in order to improve recreational utilisation in the future, that does not mean

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47 For example at HC [55]

48 Discussion culminating at CA [69]

49 For completeness, it is submitted that s 21 also requires the Minister to consider a similarly broad range of factors in relation to non-commercial customary and commercial fishing interests. Again, s 8 does not add to or limit the range of matters that must be considered.

50 There may be other reasons why management above the level which can produce MSY is appropriate, such as the benefits of reducing the cost of fishing for commercial fishers, but those are not relevant here.

that "recreational interests" are generally considered under s 13, and/or that there is no need for further consideration of their interests under s 21. Other factors concerning the importance of the stock to recreational fishers will be considered under s 21 when allocating the TAC between the different fishing sectors.

Section 21

69. The Minister should not make an allocation to recreational interests under s 21(1) that is higher than recreational fishers can be expected to catch if the purpose of doing so is simply to rebuild or increase the biomass of the fish stock. Any change in the size of the fish stock is more appropriately achieved by reducing the TAC under s 13 as:

69.1 This provision contemplates the stock being managed at a level above that which can produce MSY for the purposes of increasing the biomass of the stock;

69.2 As the role of s 21 is to set allocations between sectors, it would seem outside the scope of the section to allocate a share of the TAC if there is an intention and/or expectation that some of that share will never be caught.

70. However, the Crown submits that the Minister may make an allocation to recreational interests under s 21 that is higher than recreational fishers can be expected to catch if the Minister believes that there are other qualitative and quantitative factors that support such a decision, for example, that the recreational fishers can be expected to, over time, catch greater numbers of fish and 'grow into' their allocation. Such an allocation will be reasonable where the TAC has been reduced and, as a result, an increase in recreational catch can be expected to occur over time. In this case, the purpose of setting the allocation at that level is not to increase the biomass of the stock (an objective that is, as above, more appropriately achieved under s 13). Instead the allocation truly recognises a "recreational interest" in the stock, albeit a future one.

Inability to leave part of TAC unallocated

71. The submissions for the recreational fishers suggest that part of the TAC could be left unallocated, and so the decision under ss 20-21 could be used to allow the fish stock to rebuild in recognition of recreational interests.[51]

72. This is inconsistent with their argument that the TACC is simply the balance of the TAC after deductions for the other matters that the Minister must allow for.[52] It is also inconsistent with the apparently comprehensive series of matters that the Minister must consider under s 21. Logically, if part of the TAC should remain uncaught in order to advance recreational interests, that is clearly part of the Minister's allowance for recreational interests. Recreational fishers cannot have their interests taken into account twice, once in a decision to leave some of the TAC unallocated, and again in the consideration given to "recreational interests" in setting the TACC under s 21.

Question 4: Scope of the Minister's discretion in making the allocation between fishing sectors

73. The High Court and Court of Appeal[53] both interpreted s 21 as not mandating any particular outcome. Both Courts favoured an interpretation that left to the Minister's judgement the appropriate allocation between fishing sectors (assuming of course that the Minister has regard to all mandatory considerations and makes a decision that is reasonable in light of those considerations). Neither Court went so far as the recreational fishers in suggesting that the well-being factors in s 8(2) drove the outcome of the decision under ss 20 and 21 (as opposed to affecting the matters that the Minister must consider in the course of making the decision).[54]

74. The recreational fishers, however, assert "a priority in the sense that their interests have to be allowed for [in whole or in part] with the balance forming the TACC".[55] They rely on three aspects of the legislation:

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51 Appellants' submissions [36]

52 Appellants' submissions [81]

53 HC [45]; CA [57]

54 Appellants' submissions [82]

55 Appellants' submissions [81]

74.1 Recreational fishers have a residual common law right of access to sea fisheries, although subject to statutory regulation, while the commercial fishing regime is now purely statutory.

74.2 The Minister is required "in setting or varying" any TACC to "allow for" recreational interests.

74.3 Section 21 is more about utilisation than sustainability, and so incorporates the provisions of s 8(2). Section 8(2) provides an "accessible public policy goal" which requires the Minister to "allow access to a sufficient level and quality … which will enable people to provide for their own well-being from fishing".[56]

75. These arguments are addressed in order.

Historical origins of legal fishing rights

76. The recreational fishers rely on the residual common law origins of their legal right to fish, and describe it as a "pre-existing legal right requiring protection".[57] That right was generally unconstrained and allowed fishing for sale as much as for sport or private consumption.[58]

77. Such an unconstrained right does not exist today. The Act recognises that sustainability of fishing stocks would be jeopardised if the unrestrained common law right to fishing remained. Now both recreational and commercial fishing are constrained by the Fisheries Act and regulations. A key difference between them is that commercial fishers must hold a fishing permit in order to take fish for sale and to be exempt from recreational daily bag limits, while recreational sea fishers are not subject to a permitting regime.[59] The absence of a permitting regime for recreational fishers means that the right of recreational fishers to fish, although regulated, still has a common law origin. Yet both recreational and commercial fishing is lawful, so long as the fisher complies with the applicable statutory and regulatory provisions.

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56 Appellants' submissions [82]

57 Appellants' submissions [78(b)]

58 18 Halsbury's Laws of England (4 ed) Volume 18 para 609 - Authorities Volume 1, Tab 6

59 Compare s 89 Fisheries Act

78. It is submitted that there is nothing in the Fisheries Act to suggest that either recreational or commercial fishers have an inherently superior right of access to fisheries, nor is there anything in the Act to suggest that any person is obliged to take active steps to protect the rights of recreational fishers over the rights or interests of commercial fishers. The absence of any such duty in the Act, plus the absence of any express indication of preference for common law rights in s 21 indicates that the theoretically different origins of the two sectors' legal rights does not affect the Minister's decision under s 21.

The Minister's obligation to "allow for" recreational interests

79. The recreational fishers' submissions refer to a passage from the Select Committee Report discussing the origin of the expression "allow for" in s 21(1);[60] and to two High Court decisions that construed "allowed for" as meaning "allowed for in whole or in part".[61] It is understood that the recreational fishers' position is that in allowing for recreational interests the Minister may not set their allocation at zero, if there is any recreational interest in the stock.[62]

80. The Crown's position is that s 21(1), and the requirement that the Minister "allow for" recreational and customary interests, does not mandate any particular outcome in the allocation between fishing sectors. As the Court of Appeal said, the obligation to "allow for" recreational interests ensures that recreational interests are considered before the TACC is set.[63] This means that the Minister will direct his or her mind to the extent of the allowance which should be made for the non-commercial interests before arriving at an

60 Appellant's submissions [49]

61 Appellant's submissions [81], referring to *Roach v Kidd* (High Court, McGechan J, CP715/91) – Authorities Volume 1, Tab 4; and *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* ("Snapper 1" proceeding) (Wellington, HC, CP237/95, McGechan J) – Authorities Volume 1, Tab 2 pp 150-151).

62 It is understood that the recreational fishers accept that the recreational allocation may be zero for fish stocks that are not fished recreationally, such as deep water fish stocks.

63 The commercial fishers would appear to agree with the Crown's interpretation of "allow for" (refer First Respondents' submissions [44]). However, it is unclear whether the commercial fishers mean to also endorse the interpretation of the High Court in Snapper 1 that "allow for" means "allow for in part or whole" (refer First Respondents' Submissions [47.3]). Although the Crown rejects this interpretation it notes that, in general, where there is a recreational interest in a fish stock some allocation to recreational fishers will be made by the Minister. However there may be circumstances that justify an exception. For example, limited non-commercial customary fishing of toheroa is allowed, but recreational and commercial fishing are prohibited for sustainability reasons.

allocation decision.[64] The Crown relies on the following submissions in support of its position:

80.1 The Crown's interpretation is consistent with the definition of "allow for" in AskOxford.com, which is:[65]

> "3. (allow for): take into consideration when making plans or calculations";

and with the definition in the Oxford English Dictionary, Second edition, which is:[66]

> "*to allow for*: To allow what is right or fair, to make due allowance for; also *fig.* To bear in mind as a modifying or extenuating circumstance."

80.2 If Parliament intended a priority to be given to recreational. and customary fishers in terms of the resulting allocation of TACC, this would have been made clear by the language of the section. Instead the section merely proscribes matters that must be taken into account in the decision-making process, as is made clear from the heading of s 21.

80.3 The Select Committee explained that the expression "allow for" would allow the Minister "to give consideration to these interests to the extent to which he or she considered appropriate on a case-by-case basis". That passage suggests that the allocation of the TAC between sectors is a matter of judgement for the Minister.

The recreational fishers emphasise that the Committee adopted the expression "allow for" in response to submissions that a "clear priority should be given to Maori customary fishing, recreational fishing or both". However, it is unclear from the Committee's report whether it agreed that those sectors should have a "priority" or whether it wished to emphasise that their interests must be taken into account. The statements that the Minister should give consideration

64 CA [57]

65 http://www.askoxford.com/concise_oed/allow?view=uk (Last accessed 7 January 2009)

66 JA Simpson & E.S.C, The Oxford English Dictionary (2nd ed, Clarendon Press, Oxford, 2004) Meaning 17 "to allow for"

to these interests as he or she "considered appropriate" and, later, that the allowance would be "quantified and enforced" through (among other things) bag limits, indicate that the recreational allocation is only what the Minister allows in the particular case; a position that is hard to reconcile with a "priority" for recreational interests.

Accordingly, in the Crown's submission, the recognition intended to be accorded to recreational and customary fishers by the use of the expression "allow for" is that the TACC will not be set without full consideration of their interests.

80.4 Finally, the High Court cases that the recreational fishers referred to have been superseded by the decision of the Court of Appeal in the Snapper 1 proceeding, which explains that:[67]

> "... the Minister in effect apportions [the TAC] between the relevant interests. He must make such allowance as he thinks appropriate for the other interest before he fixes the TACC ... what the proportion [between interests] should be ... is a matter for the Minister's assessment bearing in mind all relevant considerations."

81. Accordingly, it is clear that the obligation to "allow for" recreational interests does not mandate any particular outcome: it simply ensures that recreational interests are considered and taken into account before the TACC is set.[68]

Section 21 and the well-being factors in s 8

82. The recreational fishers' submissions are to the effect that s 21 is more about utilisation than sustainability and so incorporates the well-being factors in s 8(2); and these factors provide an "accessible public policy goal" which requires the Minister to "allow access to a sufficient level and quality ... which will enable people to provide for their well-being from fishing". As set out above, the purpose and provisions of the Fisheries Act are not subdivisible into "sustainability" and "utilisation" objectives, and the primary provision governing the Minister's decision in relation to allocation of the TAC is s 21, and not s 8(2).

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67 *New Zealand Federation of Commercial Fisherman Inc. & ors v Minister of Fisheries & ors* (Court of Appeal, CA 82/97, 22 July 1997) - Authorities Volume 1, Tab 3 at p 17.

68 CA [57]

83. The recreational fishers' submissions on this point assume that a goal of enabling people to provide for their well-being from fishing must necessarily promote recreational fishing interests over commercial interests. That is incorrect. Commercial fishing also provides for peoples' social, cultural and economic well-being, especially through creating investment and employment opportunities and by making fish available to people who cannot or do not want to go fishing themselves.

84. There may be particular social, cultural or economic factors that in any particular case appeal to the Minister as favouring a more generous allocation to one sector over another. That does not, however, mean that other recreational or commercial interests may not also become significant or even decisive. Instead, this suggests that the "well-being" factors in the definition of "utilisation" would not be appropriate as being determinative of decisions under s 21.

85. Moreover, these "well-being" factors would not provide a more certain or predictable touchstone to guide ministerial decision-making. As both the High Court and the Court of Appeal noted, fisheries management decisions generally involve inadequate information, and assessments of social, cultural and economic well-being will largely be subjective rather than objective. It is submitted that the "well-being" factors are too vague to be a useful measure of the legality of decision-making.

Summary

86. It is submitted for the second and third respondents:

86.1 The Minister must consider the available information about the full range of "recreational interests" when making allocation decisions under s 21.

86.2 While the recreational interests that must be considered will necessarily be broader than an estimate of recent recreational catch levels, the recreational allocation that results from the Minister's decision may well equate to the estimated recreational catch level.

86.3 The Minister's decisions under s 21 must involve consideration of the matters required by s 21, such as "recreational interests"; and must be reasonable in light of those considerations. Apart from those statutory and common law constraints, the Act does not provide a guiding principle to be applied to allocation decisions under s 21.

86.4 Instead, it falls to the Minister to weigh a number of different factors and to make such reasonable allocation to the different sectors as he or she considers appropriate. He or she may, as a matter of policy preference, generally choose to give greater weight to the well-being factors or to predictability of decision-making from year to year (and so give greater weight to catch history) but that is a matter for the Minister's discretion rather than something required by the Act.

14 January 2008

DB Collins QC/A Ivory/PA McCarthy/CA Brown
Counsel for Second and third Respondents

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The Appellants
AND TO: The First Respondents

List of authorities to be cited by the Second and Third Respondents

Statutes

1. Fisheries Act, ss 8, 13, 20-21.

Cases

2. *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] 3 NZLR 429 (CA)

3. *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC)

4. Snapper 1 proceeding:

    4.1 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* (Wellington, HC, CP237/95, McGechan J)

    4.2 *New Zealand Federation of Commercial Fisherman Inc. & ors v Minister of Fisheries & ors* (Court of Appeal, CA 82/97, 22 July 1997)

Texts

5. 18 Halsbury's Laws of England (4 ed) Volume 18 para 609

Other

6. AskOxford.com http://www.askoxford.com/concise_oed/allow?view=uk (Last accessed 7 January 2009)

7. JA Simpson & E.S.C, The Oxford English Dictionary (2nd ed, Clarendon Press, Oxford, 2004) Meaning 17 "to allow for"