



HESKETH HENRY
Lawyers

The Minister of Fisheries
Parliament Buildings
Wellington

Telephone: +64 9 375 8700

Facsimile: +64 9 309 4494

Attention: Hon David Benson-Pope

41 Shortland Street, Auckland
Private Bag 92093, Auckland 1030
New Zealand DX CP 24017

Monday, 20 September 2004

lawyers@heskethhenry.co.nz

www.heskethhenry.co.nz

Dear Minister

KAHAWAI DECISION

Background

1. We have received instructions from the New Zealand Recreational Fishing Council Inc and the New Zealand Big Game Fishing Council Inc (together "Non-Commercial Fishers"). Both Non-Commercial Fishers provide advocacy for a large percentage of New Zealanders who fish non-commercially.

Your Decision

2. In a decision dated 10 August 2004 you brought the kahawai species into the Quota Management System and purported to allocate quota ("ITQ") for that species. As may be apparent from the extensive submissions made on the proposal, Non-Commercial Fishers have a major interest in, and now major concerns arising out of, the Minister's decision.
3. Section 21 of the Fisheries Act requires the Minister, when setting the total allowable commercial catch ("TACC") to allow for Maori customary and recreational fishing interests before considering any allocation to commercial fishing interests.
4. We consider that the decision dated 10 August, and largely adopting Ministry of Fisheries ("MFish") advice, fails ensure that non-commercial fishing interests are allowed for. In particular the decision:
 - a. Applies a "proportionality" rationale for reducing the non-commercial fishing allowance, contrary to the decision of the Court of Appeal in the Snapper 1 case.
 - b. Fails to allow for non-commercial fishing interests by recognising that such interests have an *a priori* entitlement, to be "allowed for" before determining the TACC, if any, as required by section 21.
 - c. Fails to allow for non-commercial fishing interests, by only evaluating allocation options based on a catch history depleted by purse seine fishing. The decision fails to recognise the "perverse incentive" purse seine fishers had to target kahawai as a non QMS species and therefore acquire "catch history", to the detriment of the non-commercial sector. The recreational and customary

kahawai fishery has yielded smaller fish, fewer fish or both, in most quota management areas where the purse seine fleet has operated.

- d. Does not recognise the accessibility differences between kahawai (a fish known as “the people’s fish” being the most accessible non-commercial species) and solely commercial species.
 - e. Fails to ensure that non-commercial fishing interests are allowed for by ensuring that the allocation decision enables non-commercial fishers (both land-based and boat-based) to actually catch kahawai.
 - f. Involves obvious circularity by omitting consideration of discouraged recreational fishers who have abandoned attempts to fish because of low recreational catch rates.
 - g. Fails to properly provide for the significance of human population increases within the upper North Island. Specifically the decision purports to allocate kahawai based on purported historical catch rates, which makes no allowance for population growth.
 - h. Fails to consider the cause and effect of commercial fishing upon this important non-commercial species, in particular, the effects of the purse seining method of catching whole schools of kahawai. The effect of a catch history based allocation decision will be to have a disproportionately large allocation of TACC to a handful of purse seine fishers who in turn sell this valuable non-commercial species as low value fish bait.
 - i. Discounts the benefits of non-commercial fishing to the national and regional economies. Specifically the decision fails to give effect to the MFish commissioned research establishing that kahawai have greater value as a non-commercial fish species, including as an important food fish.
 - j. Does not give proper consideration, or at all, to:
 - i. the criteria within sections 7 and 8 of the Hauraki Gulf Marine Protection Act 2000; or
 - ii. the relevant provisions of regional coastal plans.
 - k. Fails to recognise likely imbalances in quota management for non-purse seine fishers through the inevitable result of dumping by-catch and other unsustainable practices, caused by allocation of the majority of the TACC to the purse seine fleet. These unbalanced quota portfolios will inevitably lead to the dumping of kahawai at sea and add risk that the Minister's decision to reduce commercial catches of kahawai will be rendered ineffective.
 - l. Makes mistakes of fact, being based on incorrect scientific advice on the status and sustainable yield of kahawai in New Zealand.
5. We understand that provisional quota has been allotted (prior to your decision of 10 August) and that MFish is proposing to allocate the final quota prior to 1 October 2004. We are instructed to issue proceedings, and to seek interim orders preserving Non-Commercial Fishers’ position until such time as the High Court may consider any substantive application.

6. To avoid the cost to all parties of interim proceedings, we are instructed to seek your undertaking that the final quota will not be allocated until any substantive proceedings can be determined by the High Court. It is recognised that this may necessitate some provision for controlled commercial fishing to continue pending any Court decision.
7. Could you please advise by no later than **5:00pm Wednesday, 23 September 2004** as to whether you are prepared to provide such an undertaking, upon which we will proceed to commence substantive proceedings in a prompt manner.

HESKETH HENRY

David Connor / Stuart Ryan

Partner / Partner
Direct Dial - 09 375 8744 – David Connor
Direct Dial - 09 375 8778 - Stuart Ryan
Direct Fax - 09 375 8771
Email - david.connor@heskethenry.co.nz
Email - stuart.ryan@heskethenry.co.nz