IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2005-404-4495

UNDER	Part I of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for review
BETWEEN	THE NEW ZEALAND RECREATIONAL FISHING COUNCIL INC, AND NEW ZEALAND BIG GAME FISHING COUNCIL INC Plaintiffs
AND	MINISTER OF FISHERIES First Defendant
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF FISHERIES Second Defendant
AND	SANFORD LTD, SEALORD GROUP LTD AND PELAGIC & TUNA NEW ZEALAND LTD Third Defendants

Hearing: 6, 7 and 9 November and 11 December 2006

Appearances: Alan Galbraith QC and Stuart Ryan for Plaintiffs
Alan Ivory, Peter Carthy and Sara Ritchie for First and Second Defendants
Bruce Scott and Geoffrey Carter for Third Defendants

Judgment: 21 March 2007

JUDGMENT OF HARRISON J

In accordance with R540(4) I direct that the Registrar endorse this judgment with the delivery time of 2.30 pm on 21 March 2007

SOLICITORS
Hesketh Henry (Auckland) for Plaintiffs
Crown Law Office (Wellington) for First and Second Defendants
Chapman Tripp (Wellington) for Third Defendants

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Introduction

[1] The Minister of Fisheries walks a tightrope between two powerful interest groups whenever exercising his or her statutory powers to fix the Total Allowable Catch (TAC) and consequently the Total Allowable Commercial Catch (TACC) for an inshore or shared fish species like kahawai. One group is the recreational fishing interests represented in this proceeding by the New Zealand Recreational Fishing Council and the New Zealand Big Game Fishing Council. The other is the commercial fishers represented by Sanford Ltd, Sealord Group Ltd and Pelagic & Tuna New Zealand Ltd.

[2] The Minister's allocation decisions for kahawai in 2004 and 2005 reflect that tension (the latter was based primarily on the former and remains in current effect). The recreational fishers commenced this litigation by alleging that both decisions are flawed in numerous respects. The commercial fishers joined in, also alleging numerous flaws but of a different nature and for a different purpose. Each side seeks a greater share of the available resource through the medium of judicial review of the Minister's decisions.

[3] At the heart of the dispute is the manner in which the Minister has discharged the statutory purpose of 'providing for the utilisation of fisheries resources while ensuring sustainability': s 8(1) Fisheries Act 1996 (all subsequent statutory references will be to that enactment unless otherwise stated). The Minister is given certain tools to achieve that purpose. Ultimately, though, the statute provides a wide measure of discretion to take account of a spectrum of quantitative and qualitative factors. That is because, as Mr Alan Ivory for the Minister accepts, the process in setting both the TAC and TACC is crude. While fisheries science spans a range from the truly scientific to pure guesswork, there is no objectively accurate measure for assessing and monitoring kahawai stocks.

[4] There is another compounding factor. The Fisheries Act is a statutory attempt to accommodate the two competing interests represented in this proceeding where the fish species is a shared resource. The commercial interests acquire

property rights to fish according to the fixed allocation of quota. There is, however, no tangible means of measuring the rights of recreational fishers, although methods of limitation are available. Accordingly, the only formal way to satisfy their interests is to allow them a defined share of a TAC, with the balance constituting the TACC. Again the tool is crude but the best available.

[5] It should have been unnecessary to recite that it is not my function to determine whether the Minister's decisions were objectively right or correct. It is not within the High Court's power to second-guess the merits of his decisions; this Court's jurisdiction is limited to determining whether the Minister acted in accordance with his statutory powers and obligations and, if not, to grant relief where appropriate. Judicial review is not a right of appeal from a decision but a review of the manner, including its lawfulness, by which it is made: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) at 155.

[6] Nevertheless both challengers filed voluminous amounts of written material, much of it of an opinion nature and amounting to submissions camouflaged as evidence. Its size and content constituted an invitation to revisit the merits and may have served to raise unrealistic expectations about this Court's powers. The Minister made the mistake of responding in kind. All this was largely irrelevant to an examination of the principal documents produced by the Minister and his officials which are central to my inquiry. The same observation applies to the many case authorities cited by all parties.

[7] I am not the first to voice these frustrations. In judicial review proceedings between the commercial interests and the Minister in 1997 the Court of Appeal expressed its dissatisfaction with 'the forest of paper' with which it was presented and the 'improper' treatment of the proceedings 'as if they were an appeal on matters of fact': *New Zealand Fishing Industry Association v Minister of Fisheries* (CA82/97 22 July 1997 at pp25-26). Counsels' failure to heed these authoritative words, which with respect reflect orthodoxy when embarking on what is essentially an exercise in statutory interpretation, has led to a proliferation of issues, particularly from the commercial interests, which plainly fall outside the legitimate scope of an application for judicial review.

Kahawai

[8] The Initial Position Paper (IPP) prepared by the Ministry of Fisheries (MFish) for the Minister on 12 January 2004 describes kahawai in this way:

> Kahawai (*Arripis trutta*) occurs throughout New Zealand, the Kermadec and Chatham Islands as far south as Foveaux Strait. They are most abundant around the North Island and northern South Island. *A. xylabion* (northern kahawai), although having a longer tail fin, can be difficult to distinguish from *A. trutta*. This species is commonly found at the Kermadec Islands and although rare around mainland New Zealand, is found in northern latitudes. *A. trutta* and *A. xylabion* is included in the QMS as a species assemblage.
>
> Kahawai live in a variety of habitats, ranging from tidal intrusions into rivers, estuaries and coastal embayments, through to open waters many miles offshore. Kahawai are most often found in surface schools of similarly sized fish often in association with schools of jack mackerels, blue mackerel and trevally. Schools of kahawai typically contain between 10-40 tonnes of fish.
>
> Adult kahawai feed mainly on small pelagic fishes such as anchovies, pilchards and yellow-eyed mullet, but also on pelagic crustaceans, especially krill. Benthic species such as crabs and polychaetes are also eaten on occasion, especially during the summer months, when spawning takes place on the sea floor. Juvenile kahawai feed primarily on copepods.
>
> Biological information suggests no differences in the growth rate, length weight relationship and onset of maturity between the sexes. The onset of maturity occurs at about 40 cm, which equates to ages of three to five years, growth rate is moderate and the maximum-recorded age of kahawai is 26 years. Natural mortality is unlikely to be higher than 0.2 and is likely to be close to this estimate.

[9] Kahawai are known as the people's fish. The species has traditionally been readily available for recreational fishers because of its behaviour and the formation of visible schools in near-shore waters. Recreational fishers claim that where schools of mature kahawai were once plentiful, they are now rarely seen in the Hauraki Gulf Marine Park area; they attribute the decline to the advent of purse seine fishing practices by the commercial sector, principally in the North Island region, since the mid 1970s. The commercial interests argue to the contrary. I am not required to resolve this dispute.

[10] Until 2003 kahawai fishing was subject to a range of miscellaneous statutory and regulatory controls. Commercial Catch Limits (CCLs) had been imposed on the purse seine catch since the 1990 fishing year; limits were set on the issue of new

commercial fishing permits; set net mesh size restrictions were imposed for both recreational and commercial fishers; and daily bag limits were imposed on recreational fishers.

[11] Part 4 of the Act provides a Quota Management System (QMS) for nominated species of fish; any stock can be subject to the system by the Minister making an appropriate declaration on notice: s 18. This notice defines the Quota Management Areas (QMAs) to which the notice relates: s 19(1). On 1 October 2003 the Minister introduced kahawai to the QMS: The Fisheries (Declaration of New Stocks Subject to the Quota Management System) Notice (No 2) 2003. The Minister identified six major QMAs for kahawai. KAH 1 is the largest in terms of volume of fish but not area. It runs from North Cape to East Cape. It is of most relevance to this proceeding.

[12] The 2004 IPP summarised the commercial landing histories of kahawai in these terms:

Table 3. Reported commercial landings (tonnes) of kahawai by QMA from 1993-94 to 2001-02

Fishing Year	**1**	**2**	**3**	**QMA 4**	**8**	**10**	**Total**
1993-94	2023	706	1820	0	550	0	5489
1994-95	1788	1063	1014	0	465	<1	4483
1995-96	1570	1072	1882	0	452	<1	5207
1996-97	1884	1084	1391	0	389	0	4965
1997-98	1358	191	343	<1	572	0	2674
1998-99	1566	729	1078	0	845	<1	4468
1999-00	1602	928	484	<1	725	0	3921
2000-01	1592	875	403	0	552	0	3610
2001-02	1287	832	152	<1	475	0	2874

> Between 1970-1975 the annual average commercial catch of kahawai was 500 tonnes, much for use as bait. However, fishing practices evolved to utilise this relatively low value commercial species. Since the mid 1970s purse seine vessels fish for skipjack tuna around the North Island over summer. For approximately five months of the year (December to May) the northern fleet, based in Tauranga, targets skipjack tuna (*Katsuwonus pelamis*). When skipjack is no longer available during the winter and spring months the fleet fish for a mix of species including kahawai, jack mackerels (*Trachurus* spp.), and blue mackerel (*Scomber australasicus*). These species are caught 'on demand' as export orders are received (to reduce product storage costs).
>
> Reported landings of kahawai progressively increased from 1977 to 1980 stabilising at about 5000 tonnes between 1980 and 1985 and increasing thereafter to peak at 9800 tonnes during 1987 to 1988. Commercial landings

of kahawai declined between 1988 and 1998. Landings thereafter have stabilised particularly in KAH 1 and KAH 2.

For the 1990-91 fishing year, the total commercial catch limit for kahawai was set at 6500 tonnes, with 4856 tonnes set aside for purse seining. While national catches decreased during 1991-92, landings in KAH 1 increased and for 1993-94 the competitive catch limits for purse seining in KAH 1 were reduced from 1666 tonnes to 1200 tonnes and purse seine catches reported for KAH 9 were included in this catch limit. Since, despite fluctuating between 1993-94 and 2001-02, purse seine landings reported for KAH 1 have averaged 1200 tonnes.

No changes have been made to the purse seine limit of 851 tonnes for KAH 2. The KAH 2 purse seine fishery was closed early each year between 1991-92 and 1995-96. Apart from a reduced purse seine catch of 200 tonnes reported for 1997-98, landings have been consistently around 800 tonnes per year.

The purse seine catch limit for KAH 3 was reduced to 1500 tonnes from 1995-96. In the past a southern fleet, based in Nelson, fished exclusively for the mackerels and kahawai when fishing in southern waters. With the transfer of some of these vessels to Tauranga the purse seine catch in KAH 3 has declined from landing 1500 tonnes in 1995-96 to 150 tonnes in 2001-02.

…

Over the past nine years, catches by purse seining account for 75% of reported landings. Despite purse seine catch limits, catches by purse seining have fluctuated largely because of variable fishing effort in KAH 3.

…

Most kahawai is taken as a target species almost entirely by purse seining apart from a small amount by setnet. Target fisheries for jack mackerels, trevally, snapper and grey mullet, and occasionally blue mackerel, report bycatches of kahawai.

…

The number of vessels reporting landings of kahawai decreased between 1993-94 and 1998-99, however since then the number of vessels reporting kahawai has stabilised. The eight purse seine vessels operating in the fishery always take the bulk of the commercial catch.

[13] The IPP also summarised recreational catch history:

Kahawai is one of the fish species most frequently caught by recreational fishers and the recreational catch estimate is 83% of the average commercial catch during the past five years. The size of the recreational fishery is restricted by the application of daily bag limits but there is no minimum legal size for kahawai.

A survey of the Value of New Zealand Recreational Fishing undertaken by the South Australian Centre for Economic Studies (SACES) compared

kahawai fishers with other recreational fishers. Kahawai anglers are characterised as follows: they go fishing significantly more times per year and are more likely to fish for eating purposes. They are more likely to fish from jetty or land platforms and are slightly more likely to catch and keep additional fish. They have a lower average fishing expenditure, have a higher male participation and are more likely to be a member of a fishing club.

Obtaining estimates of the total recreational catch of kahawai is difficult. Recreational fishing surveys are designed to estimate the fish caught and killed by adult anglers. Many children target kahawai and kahawai is commonly used for live baiting when targeting other species. The survey estimates are likely to be an underestimate of the actual level of catch (and hence measure of fish available to the sector and the potential mortality associated with fishing). MFish considers that it is unlikely that survey estimates include all fish caught and landed, used as bait or released by the recreational sector. Since 1991 there have been four telephone and diary surveys conducted to estimate national landings by recreational fishers. Survey estimates for 1992-94, 1996 and 1999-00 are reported below. Preliminary results from the national survey undertaken in 2000-01 have been provided for KAH 2 and KAH 3 as the 1999-00 estimates are likely to be biased by a pool of diarists in those fishstocks that reported fishing much more extensively than any other fishers.

Table 7. Recreational landings of kahawai (number of fish and tonnes greenweight) by QMA for 1991-94, 1996, and 1999-2000.

	1991-1994		1996		1999-2000	
Year	Number	Tonnes	Number	Tonnes	Number	Tonnes
KAH 1	724,000	980	666,000	960	1,860,000	2195
KAH 2	190,000	290	142,000	217	492,000	800#
KAH 3	223,000	200	222,000	134	353,000	570#
KAH 4	-	-	-	-	-	-
KAH 8	254,000	330*	199,000	204*	337,000	441*
KAH 10	-	-	-	-	-	-

- no estimate
Based on preliminary results from the 2001 national survey
* estimate pertains to FMA 9 only.

A national survey estimated annual recreational landings of kahawai during the 1991-94 period to be 1800 tonnes. A national survey conducted in 1996 produced an estimate of 1515 tonnes that was broadly consistent with the earlier estimate. However, the survey conducted in 1999-2000 produced an estimate of kahawai landings of 2195 tonnes for KAH 1 (compared to 960 tonnes in 1996). There remains some doubt about the estimates from the 1996 and 1999-00 surveys. The uncertainty revolves around the participation rates of recreational fishers used in each survey. Those for 1999-2000 may be too high and those for 1996 may be too low. Assuming a common participation rate for both surveys will have the effect of lowering the 1999-2000 estimate and increasing the 1996 estimate.

The average of the two most recent estimates of recreational landings are proposed as the best basis for estimating current recreational utilisation. Because the recreational harvest surveys report on the fishstock codes an arbitrary amount (54 tonnes) was removed from the KAH 3 estimate and

added to the KAH 9 estimate to account for area changes in establishing KAH 8.

Statutory Framework

[14] The arguments addressed by Mr Alan Galbraith QC for the recreational fishers and by Mr Bruce Scott for the commercial interests do not require a close analysis of the relevant provisions of the Fisheries Act. That is because the legal nature of both challenges is principally that the Minister gave no or inadequate consideration to mandatory obligations or made mistakes of fact amounting to errors of law. The arguments do not suggest failures to comply with natural justice or procedural requirements but focus more upon the discretionary means adopted by the Minister to meet the statutory purpose of providing for the utilisation of the kahawai resource while ensuring its sustainability. Thus I will be able to refer to the important or touchstone steps to be applied in fixing the volume of a sustainability measure and in the consequential allocation exercise without subjecting them to a detailed review.

[15] First, Part 2 articulates the purpose and principles of the Act: s 8:

> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
>
> (2) In this Act—
>
> *Ensuring sustainability* means—
>
> (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
> (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment:
>
> *Utilisation* means conserving, using, enhancing, and developing fisheries resources **to enable people to provide for their social, economic, and cultural wellbeing**.
>
> [Emphasis added]

[16] The word ‘conservation’ means: s 2:

> … the maintenance or restoration of fisheries resources for their future use.

[17] I accept Mr Scott's submission that there is no hierarchy between the two objectives of providing for utilisation while ensuring sustainability and that utilisation should be allowed to the extent that it is sustainable. I agree, though, with Mr Ivory that on a plain reading of s 8 the bottom line is sustainability. That must be the Minister's ultimate objective. Without it, there will eventually be no utilisation.

[18] Second, Part 2 also requires the Minister to take account of certain information principles: s 10:

> All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:
>
> (a) Decisions should be based on the best available information:
>
> (b) Decision makers should consider any uncertainty in the information available in any case:
>
> (c) Decision makers should be cautious when information is uncertain, unreliable, or inadequate:
>
> (d) The absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

[19] Third, Part 3 is concerned with the sustainability measures available to the Minister: s 11:

> (1) The Minister may, from time to time, set or vary any sustainability measure for one or more stocks or areas, after taking into account—
>
> (a) Any effects of fishing on any stock and the aquatic environment; and
>
> (b) Any existing controls under this Act that apply to the stock or area concerned; and
>
> (c) The natural variability of the stock concerned.
>
> (2) Before setting or varying any sustainability measure under subsection (1) of this section, the Minister shall have regard to any provisions of—
>
> (a) Any regional policy statement, regional plan, or proposed regional plan under the Resource Management Act 1991; and
>
> (b) Any management strategy or management plan under the Conservation Act 1987; and

> (c) **Sections 7 and 8 of the Hauraki Gulf Marine Park Act 2000 (for the Hauraki Gulf as defined in that Act)—**
>
> that apply to the coastal marine area and are considered by the Minister to be relevant.
>
> …
>
> (3) Without limiting the generality of subsection (1) of this section, sustainability measures may relate to—
>
> (a) the catch limit (including a commercial catch limit) for any stock or, in the case of a quota management stock that is subject to section 13 or section 14 of this Act, any total allowable catch for that stock:
>
> …
>
> [Emphasis added]

[20] The Minister is bound to consult before introducing a sustainability measure: s 12. Where that sustainability measure is the setting of a TAC, the Minister is then subject to this obligation: s 13:

> (1) Subject to this section, the Minister shall, by notice in the *Gazette*, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varied under this section, or until an alteration of the quota management area for that stock takes effect in accordance with sections 25 and 26.
>
> (2) The Minister shall set a total allowable catch that—
>
> (a) Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
>
> (b) Enables the level of any stock whose current level is below that which can produce the maximum sustainable yield to be altered—
>
> (i) In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; and
>
> (ii) Within a period appropriate to the stock, having regard to the biological characteristics of the stock and any environmental conditions affecting the stock…

> (3) In considering the way in which and rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under paragraph (b) … of subsection (2) of this section, **the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant**.
>
> [Emphasis added]

[21] The term 'maximum sustainable yield', in relation to any stock means: s 2:

> … the greatest yield that can be achieved over time while maintaining the stock's productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.

[22] Fourth, Part 4 governs the Quota Management System: s 17. The Minister is bound to make a species subject to a QMS if satisfied that the current management of it is not ensuring its sustainability or providing for its utilisation: s 17B. He or she is then subject to an obligation to set the TACC for that stock which shall continue to apply in each fishing year unless varied: s 20(1). The TACC shall not be set unless the TAC has been set. Nor should the TACC be greater than the TAC: s 20(5).

[23] Part 4 provides the matters which the Minister must take into account in setting the TACC: s 21:

> (1) … the Minister shall have regard to the total allowable catch for that stock and shall allow for—
>
> (a) The following non-commercial fishing interests in that stock, namely—
>
> (i) Maori customary non-commercial fishing interests; and
>
> (ii) Recreational interests; and
>
> (b) All other mortality to that stock caused by fishing.

[24] Mr Galbraith accepts Mr Ivory's submission that s 21 does not give priority for recreational interests but subject to this qualification. He points out that a TACC cannot be set without the Minister first allowing for non-commercial fishing interests in the stock. It would be open to him or her to set the TACC at zero but not the allowance for recreational fishers. In that sense non-commercial interests, both Maori and recreational, must be provided for where they exist. The same does not apply for commercial interests. I agree.

Decisions

[25] Mr Ivory emphasises the uncertainty of the decision making process for kahawai allocation. He refers to the unique combination of factors including highly qualified technical information, estimates subject to uncertain factors and likely methodological errors, limited departmental resources and funding, and the diametrically opposed self-interest of two or more groups seeking allowances and allocations. I accept that these circumstances dictate that the ultimate decisions should be made by a Minister of the Crown and not by scientists or departmental officials. However, the terms of both decisions made in this case and the processes followed show the Minister's complete reliance on MFish advice in fixing both the TACs and the TACCs.

[26] Copies of the Ministry's IPP issued on 12 January 2004 were provided to iwi, sector groups and interested individuals and organisations. The document comprehensively identified the key issues for consideration; a list of management options; the Ministry's proposal for a TAC management policy; allocation of TAC; statutory considerations; and a list of preliminary recommendations.

[27] The IPP identified two alternative criteria for setting the TACs. One was current utilisation or catch history, both commercial and non-commercial. The other was an assessment of the actual fishing stock. It is important to record now that the level of the former should always be lower than the latter; it is based upon fish caught, not the total amount of the stock in existence. By definition, current utilisation or catch history is necessarily the more conservative measure for fixing a TAC.

[28] The IPP proposed fixing the TACs for each QMA according to the catch history criterion. It estimated the combined annual catch at a total of about 7600 tonnes. While accepting its relevance, MFish's opinion was that stock assessment information was uncertain and outdated for kahawai. MFish's viewpoint was that:

> 33 There is information available for both catch history (current utilisation) and for utility value. In shared fisheries MFish has a policy preference in favour of the catch history allocation model in the absence of

> clear information to the contrary. While the utility based model is not discounted altogether, its application to kahawai is problematic as the information is uncertain.
>
> 34 MFish notes that current levels of utilisation for all sectors combined can be accommodated within the proposed TACs. This suggests that currently there is no scarcity within the fishery and therefore no clear cut requirement to consider reallocating the fishery between sector groups on the basis of utility value or any other considerations.
>
> 35 Accordingly, the proposed allowances and TACCs have been calculated using average commercial landings for the period between 1997 and 2002 as MFish considers this relatively stable period provides the best available information on current levels of commercial utilisation. It is also broadly consistent with the method for evaluating the current non-commercial utilisation.

[29] The IPP recommended TACs of 3910, 1510, 960, 18, 1210 and 18 tonnes for KAH 1, KAH 2, KAH 3, KAH 4, KAH 8 and KAH 10 respectively, to a total of 7626 tonnes. Within those TACs, it recommended TACCs for the same areas of 1480, 710, 490, 10, 635 and 10 tonnes respectively, to a total of 3335 tonnes. So about 45% of the TACs was provisionally allocated to commercial interests.

[30] MFish reviewed these recommendations in a Final Advice Paper (FAP) prepared for the Minister, the Honourable David Benson-Pope, on 29 June 2004 following receipt of submissions from a number of parties. The most significant feature to emerge from this process was MFish's revised view that recreational utilisation of the fishery was greater than portrayed in the IPP with a consequential effect on its assessment of the sustainability of the current catch: para 313. In conformity with the IPP advice, the FAP proposed two alternative bases for setting TACs: either estimates of yield from the 1996 stock assessment model; or estimates of its revised current use of the fishery, taking account of the recreational adjustment or a proportion of it: para 310.

[31] The FAP repeated MFish's view that "… the stock assessment information is too uncertain and dated for using as a basis for setting TACs": para 311. The FAP recommended the current utilisation option which it described as having the advantage "of reflecting public policy considerations already made for the fishery and current reliance on the fishery by each sector": para 312. MFish described its preferred options as: para 319:

> … to either base combined TACs on current utilisation or on an arbitrary 15% reduction in recreational and commercial use of key kahawai stocks (KAH 1, KAH 2, KAH 3 and KAH 8). If you consider that current utilisation is at levels that present a risk to the stock you might consider that in these circumstances a reduction is indicated. A level of reduction of 15% of current utilisation is recommended. Such a level is significant but it is proposed as a balance between certainty and impact. Should you consider that an alternative combined TAC should be considered then TAC options proposed by stakeholders are available for your consideration.

[32] The essence of MFish's advice was that: para 325:

> … the allocations shown in Table 12 appropriately reflect competing demands, current use in the fishery, and the socio-economic effects of current versus reduced use. To a large extent the options for determining allowances and TACCs will be driven by the TAC option you consider reasonable. If you agree to set TACs based on a 15% reduction to average landings, MFish considers that catch history information is a more certain basis for considering allowances for non-commercial use and has a policy preference for this option. MFish support a proportional reduction to recreational allowances and TACCs for the fishery if the lower TAC option is chosen.

[33] The Minister's decision was given in a letter to stakeholders dated 5 July 2004. His letter summarised the MFish advice given in the IPP and FAP supplemented with frequent statements that the Minister had considered and taken into account the relevant submissions and advice. The Minister accepted the second of the two MFish options; that is, he based the TACs on current utilisation but subject to a 15% proportional reduction in the interests of stock preservation and ensuring sustainability. He expressed himself in this way: para 19:

> Accordingly, I am not satisfied that setting TACs based on current utilisation in KAH 1, KAH 2, KAH 3 and KAH 8 appropriately mitigates the risk that abundance may have declined over time and further decline is possible at levels based on current catches. I consider that the TACs for these stocks should at least maintain and preferably provide for an increase in the kahawai biomass. I have therefore decided to set a TAC for kahawai in KAH 1, KAH 2 and KAH 8 that is 15% below revised estimates of current utilisation. TACs in other areas are to be based on conservatively derived, nominal values. TACs for all stocks are outlined in Table 1.

[34] Table 1 quantified the Ministry's revised advice to set TACs at 3685, 1705, 1035, 16, 1155 and 16 tonnes for KAH 1, KAH 2, KAH 3, KAH 4, KAH 8 and KAH 10 – a total of 7612 tonnes. He set TACCs for the same areas of 1195, 785, 455, 10, 580 and 10 tonnes – a total of 3035 tonnes. Both figures, particularly the TACCs, were lower than the IPP recommendations.

[35] In summary, the significant event between preparation of the IPP and the FAP was MFish's acceptance that it had originally underestimated the total recreational catch over the relevant period, justifying a higher than originally advised starting point for fixing the TACs. This increased level of non-commercial use also satisfied MFish that the sustainability of the current combined catch was at risk. Accordingly, it recommended the offset of 15% against the adjusted starting point. The net result was a calculation of a total TAC tonnage which was marginally reduced from the IPP.

[36] The same process was followed for 2005. The Minister set TACs and TACCs for all areas which were proportionately 10% less than for the previous year. The 2005 allocations remain current.

Recreational Interests

(i) Allegations

[37] The recreational fishers challenge the legality of both decisions on the ground that each is based upon the same erroneous statutory premises. Their statement of claim alleges that the Ministers erred when setting the TACs by:

(a) failing to address, including failing to be sufficiently informed of, social, economic and cultural wellbeing which required a qualitative assessment of recreational interests: ss 8(2), 13(4);

(b) relying solely on catch history information when that information was uncertain as to recreational harvest while excluding qualitative information including CPUE (Catch Per Unit of Effort) and anecdotal evidence; i.e. not using all of the best available information: ss 10, 11;

(c) failing to separately consider the kahawai fisheries situation and in particular failing to: (i) consider the implications of an assumed (not considered) national stock; (ii) consider the consequences of excess

commercial exploitation in the 1970s and 1980s in the present lower biomass and degradation of kahawai stocks; (iii) recognise information of likely low level of kahawai biomass in the Hauraki Gulf and the increasing adverse effect on recreational fishers competing in a degraded fishery when compared with the superior resources and technology of the commercial sector (the commercial take from KAH 1 outside the Hauraki Gulf being an explanation for the sustainability risk and failure of the Hauraki Gulf fishery to rebuild in a mobile fish stock); and (iv) recognise that it was concentrating the largest catch allowances on KAH 1 (the smallest QMA) when that was the most degraded fishery: ss 8 and 11;

(d) similarly failing to address critical statutory provisions and as a consequence failing to critically respond to the evidence of poor CPUE, size, age information from Hauraki Gulf boat ramp surveys and anecdotal evidence: ss 7 and 8 Hauraki Gulf Marine Park Act 2000;

(e) as a consequence making arbitrary reductions and/or failing to consider the possibility of setting the TAC in each QMA at such lower level as would rebuild the kahawai stock to meet the social, economic and cultural wellbeing of recreational fishers, and in KAH 1 the provisions of the Hauraki Gulf Marine Park Act.

[38] The recreational fishers allege the same errors in making allowances for recreational interests when setting TACCs, and in addition allege that the Minister erred by:

(a) misconstruing the nature and extent of recreational interests for estimates of total harvest;

(b) applying an arbitrary proportional reduction – 15% in 2004 and 10% in 2005 – to recreational fishers without considering or being informed on the matters set out above; without recognising that such a

reduction worsened the existing recreational advantage; and being influenced by Ministry concerns of litigation and compensation;

(c) as a consequence unnecessarily reducing the allowance for the recreational interests: i.e. action of reduction did not equate with the objections of improvement of recreational harvest.

(ii) Submissions

[39] In closing Mr Galbraith narrowed his argument to two principal errors of law. The first and most significant error, he says, was the Minister's failure to consider and apply adequately the mandatory qualitative factors of social, economic and cultural wellbeing: ss 8, 13(4) and 21. This was because the Minister focused unduly on catch history as the touchstone for his decisions. While agreeing with Mr Ivory that much of the so-called quantitative or scientific information available was uncertain, Mr Galbraith says that is not the real issue in this case.

[40] Mr Galbraith submits that the Minister, in reliance on MFish advice, treated the criterion of 'people's social, economic and cultural wellbeing' as an incidental matter to policy preferences for catch history and proportionality. In effect, he says, the Minister was blinded to his statutory obligations. Mr Galbraith concedes that the Minister was conservative but says that if the Minister had taken all relevant factors into account, then his options were to reduce the TAC (and the bag limit) even further, reduce the TACC commensurately, or reduce the TACC to allow for by-catch only.

[41] Mr Galbraith further submits that as a consequence of this erroneous policy preference the TACs, the TACCs and allowances for recreational fishers were calculated from the uncertain recreational catch history information and then proportionally reduced; the Minister excluded even the limited information he had as to the non-commercial sector's 'social, economic and cultural wellbeing'; and the Minister failed to make any real attempt to consider the effect of a proportional reduction approach on the recreational fishers' 'social, economic and cultural

wellbeing' – that is, the preferred policy approach may have had a disproportionate effect on the non-commercial fishers.

[42] Mr Ivory did not expressly address Mr Galbraith's argument but Mr Scott, in a spirited defence of the Minister's decisions in this respect (in contrast to his equally spirited attack in other respects), submits that the Minister was well informed by MFish of the qualitative factors relevant to recreational fishers; and that the Minister properly took these factors into account, and made decisions relating to TACs and TACCs which significantly preferred the recreational sector. He characterises the recreational fishers' submission as one of weight, not of error of law or of relevant considerations. Mr Scott identified references in the IPPs and FAPs to qualitative factors and to the recreational fishers' argument that kahawai had a special value for them. He says that both the 2004 and 2005 decision letters emphasised the importance of recreational perceptions about the decline of the stock and socio-economic impacts of production. He says that the recreational fishers were generously treated by the Minister's decisions and have no basis for complaining.

(iii) TACs

[43] In my judgment Mr Galbraith's global approach fails to distinguish between the statutory elements of the two discrete steps which the Minister must follow when setting a TAC and then fixing a TACC. Different considerations apply to each step. The first is a sustainability measure; the second is a mechanism for allocating a resource between competing interests, where utilisation principles have a direct bearing.

[44] The Minister's statutory obligation is to exercise his powers for two complimentary purposes: s 8. He must allow people from all sectors to use a fisheries stock while ensuring that its potential to meet the reasonably foreseeable needs of future generations is maintained. In other words, the Minister must not allow current utilisation of a stock at a level which puts its future sustainability at risk. He is obliged to take the long view. Fixing a TAC for a particular stock is the primary sustainability measure available to him for this purpose. None of the parties suggested that he should not have employed that step here.

[45] The Act is silent on the means to be applied by the Minister in fixing a TAC. His duty is to maintain the stock at or above a level that can produce the maximum sustainable yield – that is, the greatest yield that can be achieved over time while maintaining the stock's productive capacity. How and where he fixes the level in carrying out what is essentially a balancing exercise is a matter for the Minister's discretion to be exercised in accordance with his statutory powers and obligations. The Minister's decisions are of a uniquely judgmental nature, requiring an evaluation of present and potential stock availability against the total demands of those wishing to use the resource at the time the decision is made.

[46] In my judgment, in the context of the recreational fishers' challenge, the Minister's decisions on the volumetric level of a sustainability measure like a TAC are beyond challenge unless it can be shown that they were so unreasonable or so plainly and materially wrong in fact as to prevent or frustrate compliance with the complimentary objective of providing for and allocating current utilisation of the stock. A TAC necessarily incorporates the utilisation objective to the extent that a sustainability measure which maintains the potential of the fisheries resource to meet the reasonably foreseeable needs of future generations by definition conserves, enhances and develops that resource. The allowable catch provides for the resource's use in the form of the greatest yield that can be achieved over the relevant period.

[47] As noted, MFish identified two possible objective measures for fixing the appropriate sustainability level for a TAC – past catch history and stock estimate assessments. MFish gave detailed reasons for its preference for the former, thereby identifying numerous uncertainties in the latter. However, the FAP's departure from the IPP and proposal of a 15% reduction in current use was in express recognition of the recreational fishers' concerns that levels of current utilisation may not be sustainable. MFish was conscious of the potential consequences for current users in the Minister's adoption of its advice: para 130:

> … In terms of choosing a combined TAC option for kahawai there is a balance between the risk to the stock and the level of impact on current fishers you may wish to impose given the uncertain information on the status of kahawai stocks. Lower TACs represent least risk but also impose a more significant impact on current users of the fishery.

[48] MFish concluded by opining that the 15% reduction from the level of catch history or utilisation to 7,612 tonnes would move landings close to its preferred estimates of maximum constant use for the fishery; and that the estimate although uncertain provided the best indication of possible sustainable yield for the fishery at the time: para 143. MFish acknowledged that: para 144:

> … this combined TAC option is based on an arbitrary reduction from current levels of use but considers that a reduction of this amount provides a balance between providing greater certainty that kahawai stocks will be maintained and the level of impact imposed on existing users of the fishery.

[49] While it may not have been articulated in this way, MFish's advice to the Minister to apply an arbitrary 15% reduction was a measure designed to result in kahawai being restored to or above a level that can produce the maximum sustainable yield: s 13(2)(b)(i). It was a cautious step, proposed in recognition of the effect upon the stock of the higher than originally assessed level of recreational catch or use. In considering the way and rate at which this objective was carried out the Minister was bound to 'have regard to such social, cultural and economic factors as he … considers relevant': s 13(3). It is significant that these factors do not constitute the criterion for setting the level of the TAC itself but only arise for discretionary consideration when determining the manner and speed of restoring the stock to the level of maximum sustainable yield.

[50] Mr Galbraith's argument is that when advising the Minister on the TACs MFish was blinkered or blinded by its reliance on catch history data as the primary criterion to the exclusion of people's 'social, economic and cultural wellbeing'. But the argument must fail once it is recognised that 'social, economic and cultural wellbeing' is not the mandatory statutory guideline for fixing a sustainability measure. The Minister was not bound to have regard to the concept of wellbeing at all but to 'such social, cultural and economic factors' which he considered relevant, and then only in structuring the stock's return to maximum sustainable yield, not in setting the level of the TAC itself. In practice, it would be difficult to prove a breach of this duty. It would be open to the Minister, for example, to conclude that no such factors were relevant when considering a TAC for a particular stock.

[51] Mr Galbraith does not point to any failure by the Minister to discharge this duty. I am satisfied that he directed his mind to the relevant requirement. He had advice from MFish's FAP that 'a reduction of current utilisation will have socio-economic impacts on non-commercial fishers': para 320. It recorded that much of the recreational opposition to commercial fishing for kahawai, and purse seining in particular, was based upon a perception that recreational fishers value the fishery more highly than the commercial sector. The Minister's decision also took express account of 'the socio-economic benefits associated with harvesting [when imposing] management steps that will at least maintain, if not improve, current biomass': para 6.

[52] Mr Galbraith's argument ultimately reduces to a proposition that the Minister while conservative was not sufficiently conservative when imposing a TAC at a level 15% below estimated current utilisation. It echoes the non-commercial fishers' submission to MFish following publication of the 2004 IPP that the Minister should impose a total TAC of 6,900 tonnes instead of accepting MFish's advice of a level of 7,600 tonnes or Sanford's proposal for 8,200 tonnes. The recreational fishers advocated a level which was only 10% below that which was finally fixed while Sanford's figure was less than 10% above. Once the argument is seen within these marginal volumetric parameters, and in its proper statutory context, it does not approach the threshold for establishing an error of law by the Minister. The same conclusion applies to the 2005 year where the Minister, again driven primarily by the requirement to preserve stocks, decided to reduce the TAC by a further 10%.

[53] Accordingly, I am not satisfied that the Minister, when setting the TACs for 2004 and 2005, failed to have regard to such social, cultural and economic factors as he considered relevant by providing measures designed to result in the stock being restored to or above a level that could produce the maximum sustainable yield.

(iv) TACCs

[54] Setting a TACC and non-commercial allowances falls into a different category. It is a mechanism for allocating the utilisation or use of the TAC between competing interests once the appropriate level of sustainability has been set. The

distinction between the concepts of sustainability and utilisation is recognised in the different purposes of a TAC and a TACC. In setting the TACC the Minister is obliged, first, to have regard to the TAC and, second, to allow for non-commercial fishing interests in the stock. The issue is whether or not he erred in law in the criteria he adopted for making the allocative allowance.

[55] In my judgment, given that a TACC is a means of 'provid[ing] for the utilisation of [a] fisheries resource …', the criterion of enabling people 'to provide for their social, economic and cultural wellbeing' is a mandatory consideration at this stage of allowing for recreational interests in the stock: ss 8 and 21(1). The concept of utilisation where used in s 8(2) involves conservation, **use**, enhancement and development of a fisheries resource. The allowance for recreational interests reflected in the level of a TACC should appropriately recognise the extent to which kahawai provides for their 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.

[56] The statute recognises the significance of fish to the wellbeing of New Zealanders and the importance of providing a right of consumption of a particular species where demand exists. That right can only be secured for people who do not fish recreationally by ensuring that commercial fishers have the access to the stock necessary to satisfy consumer demand. (It is, though, a regrettable fact of economic life over the past 20 years or so, since fishing quotas were introduced, that people's wellbeing has suffered due to the market forces of supply and demand driving the retail prices for some desirable fish, most notably snapper, out of the reach of many households.)

[57] Also, utilisation of a fisheries resource provides for the economic wellbeing of commercial fishers whose livelihood depends on income from that activity. So it is appropriate, indeed necessary, when allocating a TAC by fixing a TACC and allowance to take account of commercial interests to the extent that they provide for people's wellbeing. However, that step cannot be undertaken in a vacuum based solely upon the stock's financial value, whether in actual terms for the commercial

sector or notional terms for recreational fishers. Allowances must be made for other values.

[58] When setting a TACC the statutory starting point is to identify and make an appropriate allowance for recreational interests by reference to the social, economic and cultural value of the resource to their wellbeing. The components of 'wellbeing' are both quantitative – 'economic' – and qualitative – 'social and cultural'. The qualitative component defies an objective or tangible measure. It requires consideration of a range of factors. While the result of the TACC and allowances evaluation will necessarily be expressed in quantitative or volumetric terms, the process requires a qualitative or non-quantitative assessment of the type suited to the Minister's exercise of judgment.

[59] Some qualitative factors applying to kahawai (but not necessarily all) are:

(1) Recreational fishers' progressive loss of access to other, more highly prized, inshore species, principally snapper. Among the particular characteristics of kahawai fishers identified in the 2004 IPP are that they fish frequently, and for eating purposes, from jetties or platforms rather than boats, and have a lower than average fishing expenditure. Arguably as a group they are less affluent than other recreational fishers, and less able to afford to fish for other species in deeper waters;

(2) Kahawai's minimal value to people other than recreational fishers, as reflected in its small retail market. Correspondingly, its inherent value for recreational fishers has been enhanced by their loss of access to other species;. Also, as the 2004 IPP notes, the stock is targeted by children for use as live bait when fishing for other species;

(3) A recreational fisher's well settled common law right, subject only to express statutory limitation, to fish and provide for his or her needs: *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153 (PC) at 169-170. That right has particular

value in a country where easy proximity to the sea in a temperate climate contributes to the popularity of fishing as a recreational pastime;

(4) Patterns and levels of recreational catch history. This factor, as I shall shortly explain, is not decisive. But, providing it is capable of accurate assessment, it will assist in determining whether proper allowance is being made for recreational fishers' interests, subject to the Minister's satisfaction that it meets current needs.

[60] The Minister must weigh these factors in the mix. Also relevant is the tangible value of the stock for commercial interests to the extent that they provide for people's wellbeing and for employment. Mr Scott does not dispute Mr Galbraith's estimate of total annual revenues of $3.2 million generated for the commercial sector by kahawai catches, of which $2.5 million is earned by Sanford's purse seine fleet operating from Tauranga; nor does he dispute that 80% of Sanford's catch is exported mainly as bait or pet food. The balance of the commercial catch is made by small fishers using less intensive methods, such as set netting, for sale in a smoked form.

[61] This information is significant in two respects. It establishes that kahawai is of low, if not minimal, value for the commercial sector. And it shows that public or consumer demand for kahawai is also low, reflecting the extent to which commercial interests provide for people's wellbeing (other than through employment).

[62] While the IPPs and FAPs refer to some of these factors, in particular the recreational fishers' argument about kahawai's special value to them and the amount of annual revenue generated for the commercial sector, there is no evidence that either MFish or the Minister followed the necessary process of evaluating or taking account of both the quantitative and qualitative elements of people's wellbeing when setting the TACCs and allowances.

[63] In my judgment this failure arose as a result of two errors by MFish – first, in failing to advise the Minister expressly on the meaning and effect of s 8(2) and its

relevance in assessing recreational interests in a stock when fixing a TACC and, second, in proceeding on the premise that quantitative measures also served to provide an exhaustive measure of intangible or qualitative factors. The 2004 IPP adopted a measure of value based upon the marginal willingness of recreational fishers to pay for the stock. When discussing social, cultural and economic factors, MFish said this:

> 126 The results of the SACES survey produced estimates of the value of the recreational fishery for kahawai based on non-market estimation techniques (contingent valuation to determine the willingness of a fisher to pay to catch a kahawai). These results were used to estimate the value of the recreational fishery based on the 1996 estimate of recreational catch of 1515 tonnes.
>
> 127 The results estimate a total recreational expenditure of $158 million in 1996. It is important to note that total expenditure is not a measure of the net benefit of the fishery and cannot be directly compared to the value of kahawai taken commercially. Also of note is the fact that estimates of expenditure and value are based on what is likely to be an under-estimate of current recreational landings.
>
> 128 MFish considers that the best comparative measure of recreational value is determined from the marginal willingness to pay (the change in willingness to pay with respect to a unit change in the amount of fish caught and kept). Using the estimates provided by SACES of a marginal willingness to pay of $2800 per tonne and capitalising this amount at rates of 5% and 10% provides a range of values from $28,000 to $56,000 per tonne.
>
> 129 Commercially caught kahawai is a relatively low value species although some is sold as a popular smoked product… In order to determine possible future quota value of kahawai MFish has assessed two comparable QMS species… These average prices suggest a commercial value for kahawai in the range of $1700-$5100 per tonne, which is approximately one sixteenth to one eleventh of the estimated value of one tonne of kahawai caught by recreational fishers.
>
> 130 However, there is considerable uncertainty in information used to assess utility in the absence of a market for tradable rights between sectors. This uncertainty relates to ability to compare non-market values (willingness to pay) with market values (price of quota) and the static nature of the value estimate. The estimate of value is valid only for the time the survey was undertaken. Since that time social, cultural and economic values may have changed.

[64] MFish's IPP evaluation of social and cultural wellbeing was an exclusively economic exercise; in other words, it applied a solely quantitative or economic measure as the index for assessing the requisite social or cultural value of kahawai to recreational fishers – those who wish to provide for their wellbeing by fishing for the

stock. A micro analysis was used to satisfy a distinctively macro purpose. The marginal willingness to pay test may have provided some guidance but it could never be determinative. And even if viewed through a solely quantitative or economic lens, MFish's exercise showed that the value of kahawai for recreational fishers was comparatively 11 times greater than its value for commercial interests.

[65] MFish's error was compounded in its 2004 FAP. When advising the Minister on setting a TACC, MFish did not refer to his statutory obligation to take into account the utilisation principles in s 8(2): at paras 178-180. But it did refer to 'two fundamental policy approaches for addressing competing demands': at para 181, characterised as either claim based or utility based. In the latter situation:

> … allocations are based on the utility (or quantum of well being) that would flow from a particular allocation. This method tends to favour allocations to those who value the resource most …

[66] MFish expressly recognised that the s 8(2) utility or wellbeing concept applies to the allocative process and favours recreational fishers. But instead of recommending its adoption, which was mandatory, the Ministry preferred its IPP method of estimating utility value. MFish noted the uncertainty associated with information used in this analysis particularly for the recreational sector and, when advising on the subject of allocation principles, said this:

> 197 … **your discretion in regard to factors you can take into account when determining allocations is wide**. These factors are outlined in the generic section of the IPP. The utility concept is one of these relevant factors.
>
> 198 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.
>
> 199 MFish considers that there is **subjectivity** attached to both considerations of catch history and utility…
>
> 200 **MFish considers that catch history information is a more certain basis for allocation than utility and has a policy preference for its use. Utility information for kahawai is uncertain.** You should weigh this uncertainty if you consider the use of utility information as a basis for allocations for kahawai.
>
> [Emphasis added]

[67] These passages are significant for a number of reasons. First, contrary to MFish's advice, the Minister did not have a wide discretion on what factors he took into account when determining allocations; he was bound to consider social, economic and cultural wellbeing when allowing for recreational interests in the stock. Second, MFish actually recognised the recreational fishers' qualitative argument for preference based upon comparative values in terms of social or cultural wellbeing, but then discarded it on the ground of subjectivity – the very quality it possesses. Third, MFish rejected the utility approach in favour of a policy preference for catch history as providing a more certain basis for allocation. However, a policy preference for catch history cannot take precedence over a mandatory requirement to adopt a utilisation approach.

[68] In a later discussion about recreational allowances, the FAP noted as follows:

> 218 MFish notes that the statutory basis for determining allowances within a TAC is clear. You do not need to provide for the needs of the recreational sector (or any other sector group) in full. You will need to make an assessment as to the competing needs of the sector groups for a limited resource.
>
> 219 There is no constraint (within the scope of the Act) on the basis upon which you can decide to allocate the TAC or on the quantum you elect to allocate to each sector. **As noted previously, it is important for you to have regard to the relevant social, economic and cultural implications when making your decision. MFish considers that landings history information is a more certain basis for allocation than utility.** Utility information for kahawai is uncertain. You should weigh this uncertainty when considering the use of utility information as a basis for allocations for kahawai.
>
> 220 There are competing demands for the use of kahawai. Recreational fishers constitute the largest fishing sector and account for about 60% of all kahawai currently caught. Kahawai is one of the few species that has this characteristic. It is highly sought after by recreational fishers…
>
> 221 MFish considers it is appropriate that due recognition be given to the importance of the stock to recreational fishers. However, it is problematic to ascertain what the precise needs of recreational fishers are. **Recreational landings of 4025 tonnes per annum are not satisfying current recreational needs as measured by perception surveys. While recognising the recreational importance of kahawai, MFish does not support fully allocating the fishery to recreational fishers or endeavouring to provide for the needs of recreational fishers in full.**
>
> 222 The recreational solution is to remove the purse seine target fishery. There would be substantial economic consequences associated with removing the target component of commercial landings and no legal

> mechanism for effecting it. MFish considers that the critical decision is the level of TACC you decide after allowing for non-commercial use. MFish considers that industry should be free to operate within that TACC as they see fit (regarding the choice of fishing method).
>
> 223 MFish recommends that the recreational allowance be based on either the MFish estimate of current recreational utilisation or a 15% reduction of current utilisation depending on which TAC option you elect.
>
> [Emphasis added]

[69] These passages reinforce MFish's reliance on catch history, rather than utilisation, as the exclusive basis for advising allocation of the TAC and thus fixing the recreational fishers' interest in kahawai stocks. In conformity with this approach, the allowances proposed by MFish for the various KAHs mirror its calculation of the recreational fishers proportionate share of the total catch, despite its acknowledgement that recreational landings were not satisfying current needs. Again MFish identified but then advised rejection of the 'social, economic and cultural implications' of the Minister's decision on the ground of uncertainty. Also MFish was apparently concerned that the existence of the purse seine commercial fishery presented a real obstacle to granting greater allowances to recreational fishers. I cannot follow the relevance of that factor.

[70] In reliance on MFish's advice the Minister's 2004 letter stated:

> 21 There are a number of competing demands for the available yield from kahawai stocks. This was clearly apparent from submissions. I recognise that there will be socio-economic impacts from making allowances and setting TACCs. **I have noted in particular the potential of catch reductions on commercial operations that rely on kahawai as an integral component of their annual catch mix. I have carefully considered these impacts in coming to a decision. I have examined options for increasing the value to society from allocation decisions.** However, in the case of kahawai, given the uncertainty in the available information I believe that the information on current use provides the best basis for allocating between each interest group. Accordingly I have decided to set allowances and TACCs that reflect current use in the fishery, reduced proportionally to fit within the bounds of the TAC set to ensure sustainability. My decisions on allowances for kahawai are outlined in the Table 1 below.
>
> [Emphasis added]

[71] With respect, this statement is uninformative. It illustrates that the Minister placed considerable weight, when setting TACCs, on the potential effect of catch reductions on commercial operations, which is not the correct statutory test. He

referred to examining 'options for increasing the value to society from allocation decisions', but they are not identified, are not apparent from MFish's advice and were not adopted. Significantly, he confirmed adoption of the catch history or current use criterion as the basis for allocation. His 2005 letter was written in similar terms; if anything, it suggests that sustainability considerations dictated the amount of allowances for recreational fishers. Both documents omitted any reference to or discussion of the necessary statutory criteria.

[72] In summary, when setting a TACC for kahawai, the Minister must have regard first to the TAC and then allow for non-commercial fishing interests in the stock. This is an exercise in judgment, to be carried out by weighing up and balancing the recreational fishers' right to provide for their social, economic and cultural wellbeing by fishing for kahawai against the extent, if any, to which the peoples, in the sense of the wider general public, wellbeing is served by commercial interests in satisfying consumer demand. Also relevant, in this latter respect, is the extent to which commercial fishing for kahawai provides for the wellbeing of employees; but this factor will assume little significance if the volumes of the resource at issue are unlikely to imperil employment.

[73] Adoption of financial modelling to assess the qualitative factors of cultural and social wellbeing, such as the hypothetical marginal willingness of a recreational fisher to pay for the stock, might provide assistance as a reference point but it is neither exclusive nor determinative. An analysis of catch history falls into the same category, especially where there is evidence that current levels of use do not satisfy need. Self-evidently, the characteristic availability and value of the particular species will be very material; the approach to setting the TACCs and allowances for kahawai will differ from another species. There are no truly reliable objective criteria. Whether the results of the Minister's review are the same as, similar to or materially different from the current TACCs and allowances will depend upon the Minister's subjective evaluation of all relevant factors.

[74] The Minister's 2004 and 2005 letters were silent on the utilisation requirement to allow for the recreational fishers' interests by reference to the right to provide for their wellbeing when allowing for their interests in the TACs, and I must

infer from his wholesale adoption of MFish's advice and the terms of his decisions that he did not separately consider this issue. In my judgment the Minister, acting on MFish advice, erred materially when fixing the TACCs for 2004 and 2005.

(v) KAH 1 : Hauraki Gulf Marine Park Act

[75] Mr Galbraith's second argument is that the Minister erred in 2004 and 2005 when fixing both the TAC and the TACC for KAH 1, which runs from East Cape to North Cape, in failing to have regard to ss 7 and 8 Hauraki Gulf Marine Park Act 2000 (the HGMPA). His written synopsis undertook a close review of those and other statutory provisions. But, with respect, it is unnecessary for me to follow the same path. The issue is relatively straightforward. It is not so much one of statutory construction as of whether or not the Minister took any or proper account of his legal duty relating to KAH 1.

[76] The Minister is bound to have regard to the relevant provisions of the HGMPA when setting a sustainability measure such as a TAC: s 11(2). There is no comparable requirement when fixing an allocative mechanism like a TACC. Both ss 7 and 8 recognise the national significance of the Hauraki Gulf, and identify six overlapping objectives for its management. Of particular relevance are the statute's recognition of: s 7(2):

> The life-supporting capacity of the environment of the Gulf and its islands includes the capacity—
>
> (a) to provide for …
>
> (ii) the social, economic, recreational, and cultural well-being of people and communities;
>
> (b) to use the resources of the Gulf by the people and communities of the Gulf and New Zealand for economic activities and recreation.

[77] Among the relevant management objectives are: s 8(1):

> (b) the protection and, where appropriate, the enhancement of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments: …

(d) the protection of the cultural and historic associations of people and communities in and around the Hauraki Gulf with its natural, historic, and physical resources:

(e) the maintenance and, where appropriate, the enhancement of the contribution of the natural, historic, and physical resources of the Hauraki Gulf, its islands, and catchments to the social and economic well-being of the people and communities of the Hauraki Gulf and New Zealand.

[78] Mr Ivory observes that it is difficult to identify what the HGMPA adds materially to the Fisheries Act provisions. What is material, in my view, is the statute's emphasis upon the social, economic, cultural and recreational wellbeing of the people of the Gulf, mirroring the s 8(1) utilisation requirement under the Fisheries Act and supplemented by the additional and important element of recreational wellbeing. In this context also ss 7 and 8 HGMPA import what would otherwise be a utilisation concept into adoption of a sustainability measure such as a TAC for KAH 1. This change is significant.

[79] The 2004 IPP referred to MFish's knowledge of the HGMPA provisions, defined the physical area of the Hauraki Gulf, described the HGMPA's objectives as to 'maintain the natural resources of the Hauraki Gulf as a matter of national importance' and, after observing that 'kahawai are known to occur within [its boundaries] …', expressed the opinion that '… the setting of sustainability measures for kahawai will better meet the purpose of the [HGMPA]': at para 65. The FAP does not refer to the statute at all, and nor does the Minister's letter. The former acknowledges, though, that landing rate data from boat ramp surveys shows that recreational catches in the Hauraki Gulf have been lower in recent years than experienced in the mid 1990s, but similar to those observed in 1991.

[80] The 2005 IPP referred to the HGMPA, but only in passing, and expressed a brief opinion that under both its TAC options – maintaining the status quo or applying a 10% reduction – 'the management measures for KAH 1 will meet the purposes of the [HGMPA]': at para 104(k). This advice was repeated in the FAP, noting that adoption of the second option will provide a more certain position for KAH 1: at para 243, and that most of the area is closed to purse seine fishing for kahawai by voluntary agreement: at para 244.

[81] I am in no doubt that the Minister failed to have regard for the HGMPA's provisions when setting the TAC for KAH 1 in 2004 and 2005. In my judgment both statutes placed upon him 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. Messrs Ivory and Scott drew attention to some of the references to the HGMPA from the IPPs and FAPs which I have cited. But, with respect, they fall well short of satisfying the Minister's statutory obligations.

[82] The Minister was bound to give discrete consideration to the Hauraki Gulf when setting the TAC for KAH 1. A self-contained inquiry was necessary by express reference to the wellbeing factors relating to people in the Gulf. It may have been best recognised by identifying a new KAH within the Gulf's boundaries from Bream Head to Cape Colville. In this respect, as Mr Scott suggests, it is not enough to rely on the fact that Sanford's purse seine fleet has voluntarily refrained from fishing there for some years. The Gulf requires special consideration whenever a sustainability measure is proposed or implemented. It is for the Minister to determine its volumetric expression in accordance with the statute. His failure to carry it out constituted a material error of law.

[83] In summary, therefore, I am satisfied that the Minister's decisions in 2004 and 2005 were in material error in, first, fixing the TACCs for all KAHs without taking into account the social, cultural and economic wellbeing of all people including recreational fishers and, second, in failing to take account of ss 7 and 8 HGMPA when fixing the TAC for KAH 1.

Commercial Interests

[84] The commercial interests led by Sanford allege a raft of reviewable errors by the Minister. However, they suffer from a distracting failure to discriminate between the one argument that is tenable and the many that are not, preferring a scorched earth analysis of MFish's advice in a search for a pretext to review the merits of the Minister's decisions. On analysis, most of the arguments are really appeals alleging factual errors, and do not approach the threshold of qualification as questions of law

sufficient to justify judicial review. The time taken to deliver this judgment and its length have been unnecessarily prolonged as a result.

(i) Recreational Harvest Estimates

[85] The first argument advanced by Mr Scott exemplifies my criticism. It is to the effect that MFish erred in establishing and using recreational harvest estimates when advising the Minister on setting the 2004 and 2005 TACs, TACCs and allowances. Mr Scott says that these alleged errors gave rise to three overlapping and mutually supportive grounds of review. I must deal with each.

(a) MFish Misrepresentation

[86] First, Mr Scott submits that MFish's 2004 FAP wrongly advised the Minister (contrary to the earlier IPP) that the 2000-2001 recreational harvest survey estimates were the best available information. He says MFish misrepresented the earlier opinion of what was known as the Recreational Technical Working Group (RTWG) when advising the Minister that (a) the 1996 recreational survey estimates 'should not be used': FAP paras 11(d) and 98; and (b) that the 2000-2001 estimates were 'implausibly high for many important fisheries'. He says that what the RTWG actually recommended was that:

> … the harvest estimates from the [1996 and 2001] diary surveys should be used only with the following qualifications: (1) they may be very inaccurate; (2) the 1996 and earlier survey contained a methodological error; and (3) the 2000 and 2001 estimates were implausibly high for many important fisheries.

Mr Scott says that the 2005 FAP repeated the same errors: para 98.

[87] Mr Scott submits that MFish's two alleged misrepresentations are so factually important as to constitute errors of law or amount to breaches of the Minister's obligation in relying on them to use the best information available: s 10; and that but for them it is likely that the Minister would not have accepted MFish's recommendation of an arbitrary 15% reduction of current utilisation levels when

fixing the TACs. He says, thought, that it is unnecessary to prove the decisions would have been different but for the errors.

[88] Mr Scott has subjected the RTWG's findings to a detailed dissection. He examined the evidence of members of the group who attended its meetings. Some swore affidavits in support of the commercial fishers' counterclaim. This approach was diversionary and I was not assisted by it.

[89] The starting point for considering Mr Scott's submission is to record what MFish actually advised in its 2004 FAP:

> 89 A meeting in December 2003 of technical members of [the RTWG] examined the methodologies used for each of the 1996, 1999-00 and 2000-01 surveys. The [RTWG] considered that the 1996 results should not be used as absolute estimates of recreational catch. Overall the estimates for 1996 were considered at that time to be substantially under-estimated. More recently the 1996 estimates are reported as containing methodological errors and they are considered to be unreliable. Given the size of the more recent estimates of recreational catch MFish considers that it is possible that the 1996 estimates of recreational catch remain under-estimates.
>
> 90 More recent advice from the technical members of the [RTWG] is that the estimates of recreational catch from the 1999-00 and the 2000-01 surveys may be implausibly high for some important fisheries and have cautioned against their use.

[90] I interpolate to note that this summary is an accurate explanation of the RTWG's collective opinion. The group's conclusions were cautious and qualified. It was warning against the unconditional use of either the 1996 or 2001 surveys, saying 'they may be very inaccurate'. Moreover, in the group's view, the 1996 estimate, favoured by Sanford in its submissions to MFish following publication of the IPP, contained 'a methodological error'. The RTWG was saying that, while the survey estimates may be the best available published data, MFish should only place qualified weight upon them.

[91] The 2004 FAP then said this:

> 96 In conclusion, internal and external experts have reviewed the 1996, 1999-00 and 2000-01 recreational surveys. Since the IPP was released the [RTWG] has confirmed that the 1996 estimates contain methodological errors and should not be used as absolute estimates of recreational catch. Technical advice is that even the results from the 1999-00 and 2000-01

> surveys should be treated with caution, as some estimates are implausibly high for some important fisheries.
>
> 97 MFish now proposes basing estimates of recreational current utilisation of kahawai on the lowest of the estimates for each stock from the 1999-00 and 2000-01 surveys as outlined in Table 3. Despite the uncertainty in the recent estimates of recreational catch, MFish considers that these constitute the best available information with which to determine the current recreational utilisation of the kahawai fishery and with which to consider an allowance for recreational fishing interests.
>
> 98 MFish has relied on expert advice from the [RTWG] regarding the reliability of survey results when deciding on the best estimates of current recreational use of kahawai. MFish acknowledges that the Pelagic Working Group has not reviewed the alternative estimates presented. This is an issue of particular concern to Sanford, which suggests that the recent estimates should not be used because of this. **You should be aware of and take into account this concern when considering the alternative estimates of current recreational utilisation proposed. However, MFish reiterates the current advice that the 1996 recreational survey (the Sanford preferred option) contains methodological errors and the estimates should not be used.**
>
> [Emphasis added]

[92] In the end, Mr Scott's argument comes down to an assertion that this last sentence was wrong. But it was not. At the risk of repetition it correctly reported the RTWG's advice that the 1996 recreational survey contained methodological errors. It may be arguable that the second part of the sentence, that the 'estimates should not be used', also purports to represent the group's conclusory finding. Or it may be no more than a summary repetition of MFish's previously expressed advice against using the 1996 estimates. To that minimal extent a degree of ambiguity may exist.

[93] However, whatever construction is favoured, the distinction is minimal. What matters is that the RTWG expressly advised that the 1996 survey contained a methodological error. It followed that MFish should not rely upon it other than in very qualified circumstances. I agree with Mr Ivory that it was open to MFish to advise the Minister accordingly. Moreover, MFish expressly drew to the Minister's attention and for his consideration Sanford's reliance on the 1996 survey and its grounds. And it could never be seriously argued that the Minister's decision would have been otherwise but for this one sentence.

[94] MFish and the Minister reviewed this issue in 2005. Its FAP recorded as follows:

> 179 Sanford submits that when allocating kahawai during 2004, MFish had a clear recommendation from the [RTWG] regarding the use of the 1996 and 2000-2001 diary surveys [the FAP recorded the recommendations that 'the harvest estimates from the diary surveys should be used only with the following qualifications: (a) they may be very inaccurate; (b) the 1996 and earlier surveys contain a methodological error; and (c) the 2000 and 2001 estimates are implausibly high for many important fisheries]. It submits that these recommendations have not been referred to in the IPP and that MFish has removed itself from the RTWG recommendations, and rejected the recommendations. Sanford submits that for MFish to state that the 2000-2001 surveys are considerable overestimates, but that the Ministry does not consider this to be the case for the kahawai species is wrong and misleading.
>
> …
>
> 184 MFish accepts that there is uncertainty about the results of the 1999 and 2000 recreational harvest surveys. However, as discussed further in the information section in Appendix AI, this does not mean that this information should be disregarded. It is the best available information for basing allowances. Further reasons are outlined in Appendix I as to why MFish does not agree with the submissions claiming that the information used for setting allowances was inconsistent or outside RTWG recommendations. In summary, MFish remains of the view that there was little information to suggest that the caveats relating to the 2000 and 2001 estimates applied to kahawai at the time initial allowances were set.

[95] This advice could not be clearer. MFish recited the RTWG's findings with absolute accuracy, as Mr Scott now acknowledges. It then explained its reasons for advising against the use of the information from the more recent surveys, with proper repetition yet again of an acknowledgement about the uncertainty of this data. It was entitled to advise the Minister that the 1999 and 2000 survey estimates should not be disregarded. It was not bound to advise rejection based upon the RTWG's conclusion. It explained in considerable detail in Appendix I that the RTWG's third qualification that the latest estimates are 'implausibly high' did not apply to kahawai: paras 306-310. This argument for the commercial sector must fail.

(b) Interrelationship between surveys

[96] Second, Mr Scott submits that even if MFish did not err in the first respect it failed to properly advise the Minister about the interrelationship between (a) higher estimates of recreational kahawai harvests in the 2000-2001 survey adopted by the

Minister and (b) 1996 stock yield estimates against which the Minister was benchmarking his TAC decisions. He submits that these were errors of law for failing to make decisions on the best available information, for mistake of fact and for irrationality.

[97] Mr Scott says that (a) the Minister's 2004 decision on TACs was based upon MFish's advice to apply a 15% reduction to its revised estimates of current utilisation, which themselves had been substantially increased as a result of adopting the 2000-01 recreational survey estimates; and (b) the Minister applied this reduction because MFish's revised estimates of current utilisation exceeded the best available yield estimates from the 1996 stock assessment. Mr Scott says this approach was erroneous because the 1996 estimates were based on an assumption that the non-commercial catch was much lower than MFish's increased estimates of utilisation by that sector, using increased estimates of non-commercial utilisation with significantly increased yield estimates, and MFish failed to analyse adequately the effect of its revised estimates of non-commercial catch on yield estimates.

[98] In support Mr Scott closely reviewed the 1996 stock estimate itself, the terms of the 2004 IPP and FAP and the Minister's decision. He says that the Minister's decision may have been different if he had known the full picture. He says the same error or errors tainted the 2005 decision.

[99] This submission is effectively consequential and dependent upon, and a reformulation of, Mr Scott's first argument in postulating that MFish should have revised the 1996 yield estimates upwards because it was or should have been aware that utilisation figures for both recreational and customary fisheries were understated in that year. It is unnecessary to address its detail. It loses sight of an essential fact, mentioned only incidentally in Mr Scott's submissions.

[100] At very best for the commercial interests, the Minister used the 1996 stock assessment yield estimates simply as a reference point for measuring sustainable yield, based principally upon the 2000-2001 surveys of current recreational utilisation. The Minister's 2004 letter said this:

> 7. I have carefully considered the available information for setting TACs. There is a 1996 stock assessment for kahawai, historical commercial catch information and estimates of current use for all sector groups available.
>
> 8. I have noted that the 1996 stock assessment provides estimates of annual national yield ranging between 5,100 – 14,200 tonnes. However, I note there is some agreement in submissions and MFish advice for considering that the best available interpretation of annual yields from the 1996 stock assessment is either 6,900, 7,600 or 8,200 tonnes. Some commercial and recreational submissions supported basing TAC decisions on these yields but differed on the level that should be chosen. **The stock assessment is dated (1996) and the inputs into the assessment are increasingly regarded as unreliable. Although relevant as a reference point for TAC setting, I have noted that there is considerable uncertainty associated with the 1996 stock assessment.**
>
> 9. The alternative basis for setting TACs is to base them directly on the current use of the kahawai fishery (or a proportion of that use). This method has the advantage of reflecting public policy and other decisions already made for the fishery and the current reliance on fishery by each sector. These considerations are reflected in the current management arrangements for the fishery and current catch. I have noted that some industry submissions supported adopting this option.
>
> [Emphasis added]

[101] Then, later after explaining the existence of the two options for setting TACs (one based on current utilisation, the other based on a 15% reduction of both commercial and recreational utilisation: para 14), the Minister said:

> 16. I am concerned about the state of kahawai stocks given that the combined estimates of recreational catch, customary catch, fishing related mortality and reported commercial landings exceeds the best available yield estimates, **based on the 1996 stock assessment. I note that these 1996 yield estimates are outdated and uncertain. However, they remain as a reference point of sustainable yield for kahawai.**
>
> 17. I am also aware of the widespread perception of recreational fishers that there is a marked decline in the amount and size of kahawai available. While I recognise that anecdotal information is uncertain, I consider these perceptions to be important given the size of the recreational fishery.
>
> 18. I am obliged by legislation to ensure that the overall TAC for each kahawai stock is sustainable. While accepting that the information on landings is uncertain, I consider that the available data suggests that there is a risk attached to the status of some kahawai stocks, in particular KAH 1, KAH 2, KAH 3 and KAH 8.
>
> 19. Accordingly, I am not satisfied that setting TACs based on current utilisation in [the same KAHs] appropriately mitigates the risk that abundance may have declined over time and further decline is possible at levels based on current catches. I consider that the TACs for these stocks should at least maintain and preferably provide for an increase in the

> kahawai biomass. I have therefore decided to set a TAC for kahawai in [the same KAHs] that is 15% below revised estimates of current utilisation.
>
> [Emphasis added]

[102] The point is plain. The Minister had concluded, based on MFish's advice formed from a number of sources, that kahawai stocks may have declined and may continue to decline. The 1996 stock assessment was one source. Another was MFish's view that recreational use of the stocks was higher than it had originally assumed when preparing its IPP. Also the Minister took into account, as he was entitled, anecdotal evidence from recreational fishers.

[103] Nevertheless, the Minister's reliance on catch history remained as his primary benchmark. Against this, he was entitled to take account of all information when deciding whether to allow a reduction for sustainability risk and if so the amount. These were matters of judgment. The Minister was not separately obliged to undertake the dense re-constructive exercise favoured by Mr Scott to reassess or adjust the figures from an eight year old stock assessment, the inputs to which he regarded as unreliable and which he had rejected as the primary criterion for setting TACs. It would have served no relevant purpose.

[104] Mr Scott submits that the Minister did not correct his error in 2005 even though MFish had ample opportunity to undertake a formal analysis of the effect of higher non-commercial catch estimates on the 1996 stock assessment yield estimates. Accordingly, he says, the Minister aggravated his mistake from the previous year by imposing a further 10% reduction. He subjected MFish's calculations on natural mortality to a close mathematical analysis to show that it was 'scientifically unsound and erroneous'. Again, with respect, I was not assisted by this approach. I repeat that the purpose of the yield estimates was limited to provision of a reference point for a sustainability measure. This ground of challenge must also fail.

(c) Re-consultation

[105] Third, Mr Scott submits that the Minister erred in failing to re-consult on the significant changes represented by MFish's revised advice following publication of the IPPs and receipt of submissions. He says that a decision-maker is obliged to engage in further consultation with parties effected by a significant change which occurs between consultation and a final decision. He cites common law authority and the interests of fairness in support.

[106] Again it is unnecessary to address this argument in detail. I am not satisfied that there is an arguable basis for requiring re-consultation. All parties, including the commercial interests, had a full opportunity to influence the Minister through written submissions following publication of the IPP. Mr Scott does not suggest that MFish failed to consider his clients' submissions or that the FAPs misrepresented them. Both documents contain full and fair summaries of the competing arguments. Rejection of an interested party's submission does not oblige a Minister to re-open the issue for further debate. What Mr Scott advocates is a continuum of discourse with the probable effect of indefinitely deferring a ministerial decision.

[107] For completeness, I note that even if there was a duty to re-consult in 2004 and the Minister breached it, its effect was negated or rectified by the fact that the commercial fishers' submissions on the 2005 IPP apparently addressed the Minister's approach adopted in the previous year of applying an arbitrary reduction from the TAC benchmark.

(ii) Failure to follow MFish advice

[108] Mr Scott's second argument is principally a challenge to both decisions for failing to reduce daily bag limits on recreational fishers or to impose other management measures or to ensure that the recreational catch remained within the recreational allowances and TACs. He submits that the Minister erred in law by failing to ensure sustainability; failing to make decisions based on the best available information; failing to exercise caution when information relating to the total level of the recreational catch for kahawai was uncertain, unreliable or inaccurate; and using the absence of or uncertainty in information as a reason for failing to ensure sustainability: ss 8, 10(a), 10(c) and 10(d). He alleges that the Minister fettered or

predetermined his discretionary power. Alternatively, he acted inconsistently, arbitrarily or irrationally.

[109] The commercial interests' counterclaim on this issue is prolix and repetitive. Mr Scott's original written submissions did not assist but his abbreviated, supplementary written synopsis brought the necessary focus. The commercial fishers appear to advance three substantive arguments; all the rest are factually contentious, supported by references to affidavits from various witnesses, both direct and expert. It is inappropriate, in the context of an application for judicial review, to make determinations of an essentially factual nature.

(a) Reducing recreational share

[110] First, Mr Scott submits that in 2004 the Minister, having satisfied himself that the sustainability of the kahawai stock was then at risk, failed to take any steps to consider the measures which might be necessary to reduce the recreational share and ensure that the beneficial effect of the 15% TAC reduction was not lost. In this sense, it is said, the Minister either acted irrationally or failed to comply with his sustainability obligation.

[111] The 2004 FAP advised the Minister: para 326:

> If you agree to set an allowance for recreational fishing less than the current level of use, MFish considers that consultation with the recreational sector will be required on the best way to achieve this. MFish's initial view is by a reduction in daily bag limit, however, MFish will provide you with further [advice] on how this might be achieved following consultation with recreational fishing interests.

[112] The Minister's decision stated: para 22:

> I note that setting an allowance for recreational fishing less than the current level of use will require adopting other management measures to achieve this. A reduction in the daily bag limit per person is the most likely outcome, however, MFish will provide me with further advice following consultation with recreational fishing interests on how best to achieve the required restraint on recreational catches.

[113] Later he referred to the prospect of recreational fishers' agreement: at para 27:

> … to an effective new recreational management measure for the fishery and by ensuring this measure is complied with to improve the abundance of kahawai.

[114] Less than six weeks later, on 5 November 2004, MFish wrote to the Minister. Its letter of advice was detailed. It outlined options for the Minister's consideration on the best means of consulting recreational fishing interests on measures proposed for constraining the recreational catch to support the sustainability measures implemented by the 2004 decision. The principal options were imposing a minimum legal size or setting a separate and reduced daily bag limit.

[115] MFish advised that there was no minimum legal size limit for kahawai taken recreationally and daily bag limits for the stock were based on a mixed bag of species with a limit of 20 per person. MFish's preference was to consider a reduction in the daily bag limits. Its intention was to '… consult stakeholders on a proposal to reduce the daily bag limit from the current mixed bag limit of 20 (15 in the south) to no more than 6 kahawai per person on a national basis …': para 9.

[116] MFish also suggested two alternative periods for undertaking the review; in April and October 2005, concluding with this advice: at 18:

> Adopting either option will result in no change to the recreational bag limit for the 2004-05 summer season, the period of most intensive recreational fishing. Postponing consulting until June 2005 will have some impact. There will be no constraint on recreational landings for the 2004-05 fishing year and commercial interests will oppose this lack of constraint. This lack of constraint will need to be balanced against any preference you may have to incorporate the determination of a new daily bag limit for recreational fishers within a wider review of sustainability measures for kahawai in the 2005 year.

[117] The Minister wrote across the top of the letter the words "Not Approved". He did not give any reasons for rejecting MFish's advice. In an affidavit sworn in this proceeding, the Minister confirms that he rejected the advice. But, other than saying that at a meeting with representatives of the recreational fishers on 2 December 2004 he affirmed his decision not to alter bag limits, the Minister remains silent on his reasons.

[118] The Minister then apparently sought further advice from MFish on bag limits. On analysis, MFish's letter dated 13 December 2004 was a revision of its letter of advice dated 5 November. Unusually it referred to receipt of legal advice. It said this about sustainability risks: at para 8:

> In the short term the sustainability risk to kahawai stocks of not making a change to effect a reduction in recreational catch is unknown. Annual variability in recreational catches is to be expected and recreational perceptions are that current fishing success for kahawai is low. If this is in fact the case and current recreational catch is within allowances set for each stock (ie, less than 85% of the 2000-01 surveys) then the sustainability risk, under the current recreational rules, is small.

[119] In contrast to its earlier advice, MFish proposed two revised options for the Minister. One was to proceed with consideration of recreational controls for the 2005 year based on current available information, requiring consultation with interested parties about which if any controls were appropriate. The other was to make no change to recreational controls for the 2005 year. The Minister apparently accepted the latter.

[120] Consistently with MFish's revised approach, the Minister's 2005 decision did not introduce any management measures or limitations on recreational fishers. MFish revisited this issue in a letter of advice to the Minister dated 10 June 2005. The tenor of its letter favoured reconsideration of the catch limit possibilities. It said this:

> 21. MFish is also concerned to ensure that management measures are in place for protecting the integrity of TACs set for QMS stocks. In the context of the 2004 decisions, this may require additional constraint on recreational catch and MFish considers that management measures should be applied to affect this constraint to the best extent possible. MFish would review the current allowances and management measures if you agree that the review proceeds.
>
> …
>
> 24. A review of kahawai catch limits and allowances in the longer term is more likely to have improved information available to consider both sustainability and allocation issues and be a more informed review as a consequence.

[121] A handwritten note made by the Minister on 13 June 2005 suggests that he agreed with MFish's advice subject to qualifications to include a review of catch

limits in the October 2005 review of sustainability measures, in particular relating to the Hauraki Gulf. In his affidavit the Minister construed MFish's letter as a paper outlining the relevant background including his inclination to monitor recreational catches '… but not to change recreational management arrangements until new information came to hand'.

[122] Again Mr Scott embarked upon a detailed assessment of the facts. He emphasised the absence of evidence from MFish officials explaining their change of heart or more accurately advice. He analysed media statements by the Minister. He referred to inconsistencies of accounts. His challenge was in unusually subjective, even pejorative, terms.

[123] With respect, all of this was unnecessary. Mr Scott's essential point is unanswerable. I have previously reviewed, when dealing with the recreational fishers' application, the nature and extent of the Minister's statutory obligation to ensure sustainability of stock. His concerns in this respect were expressed through his decisions in 2004 to reduce TACs by 15% below MFish's original benchmark and in 2005 by a further 10%. He recognised that the long-term sustainability of kahawai was at risk.

[124] The Minister's statutory obligation extended, in these circumstances, to a reasoned consideration of all measures reasonably available to ensure sustainability: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA). In that sense, as Mr Scott correctly submits, the Minister was bound to act rationally. In November 2004 MFish advised him to consider setting a separate and reduced daily bag limit for recreational fishers, specifically identifying it as a step designed to support the 2004 TAC sustainability measures, presumably in 2005. Reduction of a daily bag limit for recreational fishers was an obvious and potentially effective sustainability measure available to the Minister. His official's advice to that effect was consistent with this reality.

[125] The Minister's rejection of considered and informed advice, without reasons, leads inexorably to a conclusion that he acted irrationally. His conduct is inexplicably inconsistent with his stated intention in his 2004 letter of decision to

implement management measures in the form of bag limits for recreational fishers. His subsequent silence, when the circumstances called for an explanation, coupled with his statement to recreational fishers in December 2004 that he was not going to alter bag limits, suggests predetermination. It is well settled that a Minister of the Crown exposes his decision to review where he fails or refuses to give reasons, leading to an inference that he is frustrating the policy and objects of the relevant statute: *Padfield v Minister of Agriculture* [1968] AC 997 per Lord Reid at 1032-1033.

[126] Mr Ivory has attempted to support the Minister's decision by reliance on MFish's letter dated 13 December 2004 and its subsequent advice. Without an explanation from the Minister or the relevant official to explain the reasons for MFish's revision of advice following the Minister's arbitrary rejection, I infer that its subsequent correspondence was window dressing. I agree with Mr Scott that its apparent purpose was to provide an ex post facto justification for the Minister's arbitrary decision. I place no weight on it. This ground of challenge to the Minister's 2005 decision must succeed.

(b) Predetermination

[127] Second, Mr Scott submits that the Minister predetermined his 2005 decision on TACs. He relies on a press release issued by the leader of the Green Party, Ms Jeanette Fitzsimons, on 31 August 2004. It stated that the Minister had given a written commitment to the party that TACs for kahawai would be reviewed in 2005, with substantial funding for collection of data on the state of the fishery and the size of the recreational catch. Mr Scott says that the commitment was given as a trade-off to secure Green Party support to block a supplementary order paper being introduced by another politician. He attaches significance to what he says is the Minister's failure to deny an allegation by fisheries representatives that he had reached such an agreement. In confirmation of the agreement's existence, Mr Scott points to the Minister's arbitrary decision to lower TACs by a further 10% in 2005.

[128] On 26 August 2004, Ms Fitzsimons had said this in the House:

> I have talked with the Minister today, and I have a personal undertaking from him that $1 million will be put into getting good information on the kahawai fishery over 1 more year, at which time quota will be reassessed – not after 3 to 5 years, but after 1 year and that if there has been no recovery in the stock, the commercial quota will be reduced in order to protect the recreational catch. At this stage there is no other way that can be done.

[129] The Minister wrote to Ms Fitzsimons on 31 August 2004 as follows:

> I am pleased to confirm that I indicated last Tuesday to officials that I want the kahawai decision kept under close scrutiny and the TAC and the recreational/commercial balance reviewed at this time in 2005 for the 2005/06 fishing year. I will reinforce that instruction at my meeting with Ministry of Fishery officials today.
>
> In this regard I expect an appropriate amount of the budgeted funds for research into the recreational fishery to be directed to providing more robust information about the quantum of recreational kahawai catch.
>
> As you know I am keen to ensure that this species is available to recreational fishers but am also constrained to make quota decisions on the basis of information not anecdote, and through a public process which in the case of this decision began in 2001 and has been subject to extensive public submission. I consider this year's decision of an overall 15% reduction in TAC both cautious and appropriate. You will also note that the take in KAH 1 is strongly weighted in favour of recreational fishers…

[130] The Minister's affidavit deposes to the accuracy of his letter to Ms Fitzsimons. Both Mr Scott and Mr Ivory addressed extensive competing argument to the legal issue of whether or not parties to litigation can bring into question in this Court anything done or said in the House. I am inclined to agree with Mr Ivory that *Prebble v Television New Zealand* [1994] 3 NZLR 1 (PC) is decisive against admission of Ms Fitzsimon's statement made on 24 August 2004. But, even if it was admissible, it makes no difference.

[131] The Minister has sworn on oath that the terms of his letter to Ms Fitzsimons dated 31 August 2004 accurately record their dialogue. I must accept his deposition; Ms Fitzsimons who is, as Mr Ivory says, compellable, has not suggested otherwise. I do not construe what the Minister wrote as approaching predetermination of his decision to reduce TACs by a further 10% made over a year later on 30 September 2005. In summary, it properly and uncontroversially advised that the TACs and TACCs for 2005 would be kept under review; that the Minister expected to be able to allocate more funds for research into more accurate kahawai information; that he

had to rely on such information, rather than anecdote, when making decisions; and that the decision making process was public and open.

[132] In deciding to reduce the existing TACs for 2005 by 10%, the Minister plainly acted in accordance with MFish advice. The 2005 IPP and FAP are, like their predecessors, comprehensive. MFish gave the Minister two options for 2005. One was to maintain the status quo pending receipt of new scientific information. The other, and favoured alternative, was to impose the 10% reduction, to take account of the continued uncertain information about the status of kahawai stocks. The Minister adopted the latter, in accordance with Ministerial advice. There is nothing to suggest that he acted for the ulterior motive of implementing a predetermined TAC level struck independently with Ms Fitzsimons. This argument must fail.

(c) Catch monitoring regime

[133] Third, Mr Scott submits that the Minister failed to impose a catch monitoring regime for 2004 and 2005. He refers to the Minister's recognition of the importance of monitoring when making decisions for those years. In 2004 the Minister said this:

> The recreational sector holds the majority share of the fishery. Improved information from the recreational fishery is crucial for gauging the success or otherwise of management measures. Improved techniques for estimating recreational catch are being developed.

[134] The Minister's 2005 decision confirms that monitoring recreational catches 'will be a matter of priority', and that 'measures will be implemented to ensure the positive effects of the TAC reductions are not compromised' if monitoring establishes that allowances are being exceeded. Stripped to its essence, Mr Scott's submission is that these words are hollow. He says that in 2004 and 2005 MFish had no comprehensive catch monitoring or estimation system in place. No future national surveys had been approved. There was nothing positive in the pipeline. Some work was being done in KAH 1 only.

[135] Mr Scott says that a primary reason for the commercial interests' decision to pursue this counterclaim is to force the Crown to accept its statutory responsibilities

to properly manage the recreational sector, not only in terms of imposing management measures to reasonably constrain them to their allocated share of the TAC, but also to put in place some form of reliable catch evaluation or reporting regime. By this means, he says, the Minister would be properly informed when making sustainability decisions on the level of recreational catch and its changes over time. He disclaims any suggestion that the commercial interests are attempting to impose a full licensing regime on the recreational sector.

[136] Mr Scott says that, while it is not for the commercial fishers to advise the Minister on the proper manner for performance of his statutory functions, it is the proper domain of the Court to communicate to the Minister that what he is doing or not doing is inadequate and to reinforce his statutory responsibilities. The context of his submission is that 40% of this shared fishery, the commercial share, is intensively managed; the other 60% is essentially unmanaged. He relies on affidavits from experts about effective management and collection of good and reliable information for shared fisheries undertaken by Government authorities in North America and Australia.

[137] The commercial fishers seek this relief:

(1) A declaration that when making the 2004 and 2005 decisions the Minister failed to put in place regulatory measures to ensure that the level of recreational catch of kahawai was monitored and assessed;

(2) An order that the Minister ought to reconsider what regulatory measures are necessary to ensure that the level of recreational catch of kahawai is accurately monitored and assessed;

(3) A declaration that the Minister has failed to take the appropriate or necessary steps to ensure that:

(a) the records and returns that are required to be provided to MFish … are provided as required by [regulation]; and

(b) once such records and returns have been provided, the information contained in them is then collated and analysed to enable its use by the Minister for the purpose of setting and varying sustainability measures or developing management controls.

[138] Mr Ivory's submissions are directed primarily at the question of whether or not a power exists to licence for recreational fishing, which Mr Scott says is not his point. Mr Ivory also relies on a divergence of expert opinion on whether a reporting regime would be enforceable or effective.

[139] I can address Mr Scott's argument by reference to the terms of the declaration sought by the commercial interests. A declaration that the Minister 'failed to put in place regulatory measures' would be barren without identification of those measures. The commercial interests have shied away from identifying them. It is not enough to seek refuge in a position to the effect that identification of those measures is for the Minister, and not for the complainant. In any case, I would not make a declaration where there is dispute, on Mr Ivory's submissions, about the utility of such measures, even if they were available. More significantly, perhaps, I have no knowledge of critical policy information such as whether or not MFish has the resources for this purpose.

[140] Similarly, I would not make a declaration of failure by the Minister to take the appropriate or necessary steps to ensure that records and returns are provided, collated and analysed for the purpose of setting and varying sustainability measures. The only regulatory provisions nominated by Mr Scott are the Fisheries (Kaimoana Customary Fishing) Regulations 1998 and the Fisheries (South Island Customary Fishing) Regulations 1998. Self-evidently, they cover only part, and a relatively small part, of the total kahawai catchment. And I am not satisfied that I have jurisdiction to order the Minister to reconsider what regulatory measures are necessary, again where the commercial interests have avoided formulation of them.

[141] There is no doubt that the Minister must do everything possible, within the constraints of the Ministry's resources, to monitor recreational catches of kahawai

and employ improved information gathering techniques for the recreational fishery. The Minister said so himself, on two occasions. MFish advice was to the same effect. It is reinforced by Mr Scott's emphasis on the fact that recreational fishers have access to over 50% of the kahawai stocks. I can only assume that in the period since 2005 MFish has made considerable progress in this respect. However, in the absence of developed argument from all sides, and in particular information about the Ministry's resources, I cannot go further.

[142] I have attempted in this part of the judgment to isolate and address what seem to be the principal arguments for the commercial fishers; those which have escaped express attention fall into the rubric of patent untenability or factual contention.

Relief

[143] The recreational and, to a limited extent, the commercial fishers have satisfied me that the Minister erred in some respects when making his 2004 and 2005 decisions. The statements of claim and counterclaim filed by both seek a range of relief, starting from the premise of quashing or setting aside the decisions and then progressing through consequential orders or declarations. This is not the occasion on which to embark upon a discourse about the status of the decisions. Arguably, and because parts of them are the subject of unlawful or irrational acts, they are ultra vires and thus potentially a nullity. Nevertheless, the decisions remain operative and valid until set aside, subject to the Court's willingness to grant relief in a particular case: *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 (CA) per Cooke J at p4; *Hill v Wellington Transport District Licensing Authority* [1984] 2 NZLR 314 (CA) per McMullin J at 319.

[144] I am satisfied that it would be pointless to quash either decision. The 2004 decision was spent upon the advent of the 2005 decision. The latter has been in full force and effect for the past 18 months. It would be contrary to the purposes of the Fisheries Act to set aside sustainability and utilisation measures without substitutes in place. In my judgment it is, in the circumstances, appropriate to treat the decisions as operative, despite their unlawful aspects, until the Minister makes a fresh and legally effective decision.

[145] Accordingly, it is appropriate to grant this relief:

(1) A declaration that the Minister's decisions in 2004 and 2005 were unlawful to the extent that the Minister:

(a) fixed the TACCs for kahawai for all KAHs without having proper regard to the social, economic and cultural wellbeing of the people;

(b) failed to take any or proper account of ss 7 and 8 Hauraki Gulf Marine Park Act 2000 when fixing the TAC for KAH 1;

(c) failed without giving any or proper reasons to consider advice from MFish to review bag catch limits for recreational fishers;

(2) A direction that the Minister reconsider or review his 2005 decisions forthwith to take account of the terms of the declarations of unlawfulness.

[146] In the event that the terms of this relief are inadequate or insufficient, I reserve further leave to the parties to apply. However, I trust that course will not prove necessary, and that the Minister will act in accordance with the spirit of this judgment.

Costs

[147] As is normal, costs should follow the event. There are two relevant events in this case. One is that the recreational fishers have succeeded on what emerged at the end of the hearing as their two primary challenges. The other is the commercial interests' success on one among a wide range of challenges. In the latter proceeding, I would categorise the event as success for the Minister, given that all but one of the challenges have failed.

[148] A compounding factor is that both the recreational and commercial interests have put the Minister to unnecessary expense in defending the proceeding. I have previously referred to the proliferation of material and submissions which it spawned. The bulk of the documents, including affidavits, were irrelevant to the issues properly falling for determination. It is easy with the benefit of hindsight to observe that the Minister should not have fallen into the trap of responding in kind. No doubt, though, he was acting on legal advice, and in an attempt to cover all possible bases.

[149] Counsel are entitled to file memoranda. However, I record my provisional views that (1) the recreational fishers are entitled to costs and reasonable disbursements (excluding witnesses expenses) against the Minister according to category 2B for two counsel; and (2) costs should lie where they fall on the commercial fishers' counterclaim, although the Minister may have a case for limited costs. I consider provisionally that neither the recreational fishers nor the commercial interests should be entitled to costs as against each other's claim and counterclaim.

[150] I assume that counsel will confer; and I trust that they are able to reach agreement. In the event that the parties are unable to agree, they are to file memoranda of submissions, of no more than five pages in length, by 23 April 2007; the order is irrelevant, and there are to be no written submissions in reply. I will then convene a hearing at 9 am one day in early May suitable to counsel, and with the objective of delivering a decision immediately afterwards.

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Rhys Harrison J