FISHING FOR THE BIG BOYS: COMPETING INTERESTS UNDER THE FISHERIES ACT 1996

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This article examines the effect of two recent and connected developments on fisheries management in New Zealand. The first development is a change to s 13 of the Fisheries Act 1996, that Act's central operative sustainability provision. The second development is the Supreme Court's decision in the Kahawai *case. This article argues that these two developments mean that the operation and interpretation of the Fisheries Act favour commercial interests over recreational ones. It argues that the minority's interpretation in the* Kahawai *case was correct and that, therefore, the change to s 13 was unnecessary. This article concludes that the structural bias in the Fisheries Act is undesirable, as catch allowance decisions are (and should be) essentially political.*

I INTRODUCTION

A number of fish species valued by both commercial and recreational fishers are regulated under the Fisheries Act 1996 (the Act) using the quota management system. The inherent tension this creates is exacerbated by competing aspirations as to how a fishery should operate. Commercial fishers believe fisheries should provide maximum sustainable yields. This involves removing a large portion of a species' biomass allowing the remaining fish to grow more quickly, enabling greater yield. Recreational fishers want larger fish that are easier to catch, meaning they want a higher biomass. This biomass conflict is part of a broader policy fight contemplated by s 8 of the Act, which states: "The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability." This article will analyse the effect on the balance between recreational and commercial fisheries in light of two recent, connected developments. The first is the change to s 13, the central operative sustainability mechanism in the Act, prompted by a 2008 High Court decision.[1] This change enables the Minister of Fisheries (the Minister) to set a quota even where he or she does

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1 *Antons Trawling Co Ltd v The Minister of Fisheries* HC Wellington CIV 2007-485-2199, 22 February 2008.

not have information regarding the health of a fish stock. The second development is *New Zealand Recreational Fishing Council Inc v Sanford Ltd* (the *Kahawai* case), handed down by the Supreme Court in 2009.[2] This is an important topic, and the intersection of property rights, environmental concerns and the rights of those who wish to fish makes it a vexed issue. Consequently, the law has been sculpted by frequent litigation as each side tries to tip the balance in its favour.

Broadly, this article argues that the change to s 13 and the *Kahawai* case have the effect of favouring commercial interests. It argues that the decision of the Supreme Court is more than the narrow judicial review case it appears to be; rather it reflects competing philosophies for the operation of the quota management system. The Court was split as to how the Minister should set the total allowable commercial catch. This article argues that the dissenting judgment fits better with the context of the Act and gives the Minister more latitude to give effect to competing aspirations. This article will also analyse how the change to s 13 is linked to the judgments in the *Kahawai* case, demonstrating that, had the minority's interpretation been taken, the change to s 13 would be unnecessary. The effect of the change is also considered, and it is further argued that it is undesirable to reduce the informational requirement of the Act in the way the section contemplates. The article concludes that a fisheries regime structurally favouring any interest is undesirable, and that it should be up to the Minister to make what is essentially a political decision.

To make these arguments, this article will do four things. First, it will summarise the operation of the quota management system. Second, it will outline the change to s 13. Third, it will analyse the *Kahawai* case, demonstrating that the minority judgment better fits with the wording and policy of the Act. This also involves analysis as to how the change to s 13 alters the mechanics of the Act. Fourth, it will demonstrate how the changes to the Act have implications for both interested parties and the future of the Act itself.

II MANAGEMENT OF FISHERIES IN NEW ZEALAND

A Inception of the Quota Management System

Before the 1960s, the New Zealand fishing industry was relatively small and underdeveloped. From the mid 1960s, foreign vessels began fishing in New Zealand waters, and between 1970 and 1977, yield from New Zealand fisheries increased from 50,000 tons to 500,000 tons.[3] This dramatic increase led to concerns that fishing was becoming unsustainable. The creation of exclusive economic zones (EEZs) in international law provided New Zealand with the opportunity and

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2 *New Zealand Recreational Fishing Council Inc & Ors v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 [the *Kahawai* case].

3 Marguerite Quin "The Fisheries Act 1996: Context, Purpose and Principles" (1996) 8 Auck U LR 503 at 515.

responsibility to ensure that marine resources were sustainably managed.[4] The EEZ meant that New Zealand had exclusive control of the area within 200 nautical miles of the coast, a total area more than 15 times the size of New Zealand's land mass.[5]

Prior to 1986, this massive marine resource was regulated by input controls. Input controls are designed to limit the amount of pressure exerted on a fishery through a regulatory regime including licenses, minimum fish sizes, fishing seasons and vessel controls.[6] The Fisheries Act 1983 marks the high water mark of input controls in New Zealand. However, the 1983 Act failed to deal adequately with the problems of overfishing and overcapitalisation of the industry (too many boats chasing too few fish), leading to eventual consensus that a new approach was required.[7] In 1986, the quota management system was implemented. This approach added a layer of output controls to the existing regime. These controls focus directly on controlling harvest levels by restricting the amount of fish taken.[8]

B Principles and Operation of the Fisheries Act

1 Part 2: purpose and principles

In order for the marine environment to generate the maximum benefit for New Zealand, the quota management system must ensure it is used in a way that both protects fish stocks for future generations and enables use by the current generation. Section 8 of the Act strikes the balance in the following way:[9]

> (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—

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4 The exclusive economic zone was set up under the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, which was passed when it became clear that the concept would be recognised under the United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS].

5 Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977.

6 Brookers *Introduction to Brookers Fisheries* (online looseleaf ed, Brookers) at [Intro.03(4)]; Quin, above n 3, at 518.

7 Quin, above n 3, at 519.

8 Kelly Lock and Stefan Leslie *New Zealand's Quota Management System: A History of the First Twenty Years* (Motu Economic and Public Policy Research, 2007) at 3; Brookers, above n 6, at [Intro.03(4)].

9 Fisheries Act 1996, s 8.

(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 well-being.

In the *Kahawai* case, the Supreme Court held that the competing social policies of sustainability and utilisation express a single statutory purpose.[10] The Court recognised that because it is unlikely decision makers will be able to accommodate both policies in full, "[the weight] given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured".[11]

Section 9 of the Act lists environmental factors decision makers are to take into account:

(a) associated or dependent species should be maintained above a level that ensures their long-term viability;

(b) biological diversity of the aquatic environment should be maintained;

(c) Habitat of particular significance for fisheries management should be protected.

These principles are drawn from the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the United Nations Convention on Biological Diversity.[12] They reflect an acknowledged "change in course" for the Ministry of Fisheries (the Ministry).[13] Instead of resource management, the principles supposedly recognise the resource in an environmental context, enabling ecosystem-based management.[14]

An obvious challenge for the Minister is that decisions made under the Act must be made with imperfect information; information is both physically difficult and expensive to collect, and the resulting data is inherently uncertain. Section 10 addresses informational 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;

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10 The *Kahawai* case, above n 2, at [39].

11 Ibid.

12 UNCLOS, above n 4, arts 61, 62 and 192; Convention on Biological Diversity (5 June 1992, entered into force 29 December 1993).

13 Ministry of Fisheries *Changing Course – Towards Fisheries 2010* (1996) at 6-9.

14 Ibid.

(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.

Section 10 was designed to incorporate the precautionary principle, enabling prevention of serious environmental damage even where there is not full scientific certainty.[15] Incorporation of the precautionary approach was an explicit motivation of the Minister when the Fisheries Bill was introduced:[16]

> To help decision makers achieve the purpose of this Bill, guidance is provided through the statement of high-level principles ... the clause provides information principles. This allows the adoption of precautionary approaches.

While the high level principles in ss 8, 9 and 10 focus on the fishery resource itself, other principles can be elicited regarding the operation of the fishing industry. In order for a quota management system to be viable, it must create appropriate economic incentives. This works in two ways. First, incentives should act to make fishing a desirable economic activity, enabling the creation and continuation of a fishing industry. Second, it should be in the interests of the fishers to be within the quota management system, meaning severe penalties must be applied to those outside the system.

2 Parts 3 and 4: sustainability measures and the quota management system

The effect of ss 8, 9 and 10 can be seen in the operation of the quota management system. The system works by first dividing New Zealand's territorial sea into a number of quota management areas.[17] Fish species regulated by the quota management system are subdivided into stocks that are defined by their quota management areas. For example, the snapper stock in quota management area one is known as SNA1. By managing each stock individually, the quota management system recognises that managing stocks at a national level is not always feasible or desirable. Instead, quota management areas are determined according to a biological understanding of the distribution of a species, meaning that some species will only have one quota management area, while others will have more.[18] By managing smaller areas, the quota management system enables a greater degree of control over a particular stock.

Within each stock, the Minister sets a total allowable catch (TAC) under s 13 that enables the stock to produce maximum sustainable yield (MSY). MSY is defined in s 2:

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15 *Rio Declaration on Environment and Development* UN Doc A/CONF.151/26 (Vol I) (1992) Principle 15.

16 (6 December 1994) 545 NZPD 5390.

17 Fisheries Act 1996, s 24.

18 Lock and Leslie, above n 8, at 3.

> **Maximum sustainable yield**, in relation to any stock, means 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.

The basic science underpinning the MSY concept is important to understand. Where a fishery exists in an un-fished state, its biomass will be 100 per cent, a level known as the carrying capacity of an environment. The yield of that fishery will be zero. Put simply, at a biomass of less than 100 per cent, a fishery will grow back towards its carrying capacity. At a lower biomass, a fishery will grow more quickly, as the fish are generally younger, have less competition, and grow more rapidly. This harvestable growth is the yield.[19] In the *Kahawai* case, the commercial fishers filed an affidavit of a fishery scientist who indicated that, while it differs from stock to stock, the biomass that can produce MSY is generally around 25 per cent. For kahawai, it is thought to be about 17 per cent.[20]

Section 13 is the "key operative provision"[21] through which sustainability is ensured. Section 13 is a sustainability measure in the Act; through it the Minister can give effect to the high-level principles in ss 8, 9 and 10. Section 13(1) provides that, once set, the TAC stays in force until varied. Sections 13(2) and (3) are the key provisions:

> (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; or
>
> (c) enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

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19 *New Zealand Recreational Fishing Council Inc & Ors v Sanford Ltd* [2009] NZSC 54 pleadings transcript (the *Kahawai* case pleadings transcript) at 64 per Mr Scott.

20 Ibid, at 65 per Mr Scott.

21 The *Kahawai* case, above n 2, at [41].

...

(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 subsection (2)(b) or (c), or (2A) (if applicable), the Minister shall have regard to such social, cultural, and economic factors as he or she considers relevant.

Beyond restricting the TAC under s 13, the Minister can impose a number of other sustainability measures by regulation. These can include the creation of a fisheries plan,[22] limiting catch based on the size, sex or biological state of any stock,[23] restricting the areas from which fish may be taken,[24] restricting fishing methods,[25] or imposing a fishing season.[26]

Out of the TAC comes the total allowable commercial catch (TACC). The TACC is part of the quota management system in Part 4 of the Act. As with s 13(1), s 20(1) provides that, once set, the TACC stays in force until varied. The setting and variation of the TACC is also governed by s 20:[27]

(2) The Minister may from time to time, by notice in the *Gazette*, vary any total allowable commercial catch set for any quota management stock by increasing or reducing that total allowable commercial catch.

(3) Without limiting the generality of subsections (1) and (2) of this section, the Minister may set or vary a total allowable commercial catch at, or to, zero.

...

(5) A total allowable commercial catch for any quota management stock shall not—

(a) be set unless the total allowable catch for that stock has been set under section 13 or section 14; or

(b) be greater than the total allowable catch set for that stock.

Section 21(1) provides that, when setting the TACC, the Minister must have regard to the TAC and allow for:

(a) The following non-commercial fishing interests in that stock, namely–

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22 Fisheries Act 1996, s 11A.

23 Ibid, s 11(3)(b).

24 Ibid, s 11(3)(c).

25 Ibid, s 11(3)(d).

26 Ibid, s 11(3)(e).

27 Ibid, s 20.

(i) maori customary non-commercial fishing interests; and

(ii) recreational interests; and

(b) All other mortality to that stock caused by fishing.

Sections 21(2) and 21(3) require the Minister to consult with stakeholders and provide reasons for his or her decision. In making a decision, the Minister has to take into account matai reserves under s 21(4) and any regulations that restrict fishing under s 21(5).

Once determined, the TACC is split between commercial fishers who hold quota for that fish stock. The quotas held by commercial fishers are known as "individual transferrable quotas". An individual transferable quota generates a holder's annual catch entitlement, which gives the fisher a right to catch the specified percentage of the annual TACC for a particular fishery. This property right means that fishers are stakeholders, which theoretically facilitates the purposes of the Act in two ways. First, it creates an incentive for fishers to adopt sustainable fishing practices, as to do otherwise is harmful to their stake holding. This should also result in greater industry responsibility, reducing the need for government intervention. Second, it means that fishers do not race against each other to catch a limited amount in the shortest time possible; instead, their catch can be over the full year. The effect of this is to ease the "race to fish", meaning fewer resources are required to catch the same number of fish over a year, subsequently reducing overcapitalisation and putting the focus on quality of fish rather than quantity.[28]

While this structure of fisheries management is fairly well entrenched in New Zealand, its future success depends on how it manages to balance competing interests. This challenge is increasingly urgent. The quota management system is expanding, with ever more species falling under its ambit. Even more significantly, the number of people wishing to use the marine environment is increasing. Their interests include not just fishing, but aquaculture, tourism, mineral extraction and environmentalism. The next two parts of this article will analyse the two recent developments mentioned to demonstrate how, structurally, they push the balance in favour of commercial fishing interests.

III THE CHANGE TO SECTION 13

In 2008, the High Court, in *Antons Trawling Co Ltd v The Minister of Fisheries* (*Antons Trawling*) reviewed a decision of the Minister to reduce substantially the TAC for orange roughy in ORH1.[29] In setting the TAC under s 13(2)(b), the Minister was motivated by a perceived need to rebuild the stock to a level at or above that which could produce MSY.[30] However, the decision was

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28 Quin, above n 3, at 520.

29 *Antons Trawling Co Ltd v The Minister of Fisheries*, above n 1.

30 Ibid, at [35].

made with no knowledge of the biomass, nor of the way and rate at which the stock should be rebuilt. Instead, the Minister opted for a precautionary approach based on the uncertainty about the biomass required to produce MSY.[31]

Miller J held that s 10 applies to TAC setting under s 13, meaning information is required when setting the TAC:[32]

> … s 10 does not allow the Minister to set TAC under s 13(2)(b) without assessing stock levels at all. Only when such an assessment has been made can he determine whether s 13(2)(b) is available to him on the facts.

In the case, a topographical survey had been available. However, officials discounted it, believing it would not produce "'conclusive' information".[33] This was an error of law. Miller J provided guidance, stating that:[34]

> A TAC-setting decision should begin by identifying the best available information, being information that is available without unreasonable cost, effort, or time, and decisions may be based on such information although it is incomplete or inadequate or unreliable.

Section 14(1) enables the Minister to set a TAC other than by s 13 where he or she thinks the purpose of the Act would be better served by doing so. This is tempered by s 14(8), which sets out the grounds on which the Minister may rely on s 14:

> (8) The Governor-General may from time to time, by Order in Council,—
>
> (a) Omit the name of any stock from Schedule 3;
>
> (b) Add to that Schedule the name of any stock if—
>
> (i) it is not possible, because of the biological characteristics of the species, to estimate maximum sustainable yield; or
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> (ii) a national allocation for New Zealand has been determined as part of an international agreement; or
>
> (iii) the stock is managed on a rotational or enhanced basis; or
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> (iv) the stock comprises 1 or more highly migratory species.

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31 Ibid, at [36].

32 Ibid, at [50].

33 Ibid, at [61].

34 Ibid.

Miller J held that this provision could not apply to the Minister's decision in *Antons Trawling* for two reasons. First, although not deciding the matter, Miller J indicated that invocation of s 14 would encounter resistance as the difficulty in estimating MSY for orange roughy may not be attributable to their "biological characteristics" as required by 14(8)(b)(i).[35] Second, s 14(8)(b)(i) requires the high standard of impossibility before it can be relied upon.[36] In this case, it was possible to determine MSY, meaning the provision could not apply.

The decision in *Antons Trawling* meant that the Minister would need to ascertain the current stock level as well as the level required to produce MSY before setting a TAC under s 13. The perversity of this outcome was recognised in the case:[37]

> ... because an existing TAC continues until changed, any attempt under section 13 to reduce a TAC that has been set without benefit of a stock estimate may summon a challenge on the ground that there is no stock estimate. The lay observer might think that perverse, but it aptly summarises this case.

The implications of this ruling were wide. For 50 per cent of stocks almost no information is available, meaning the Minister would be unable to set and adjust TACs for the majority of fish stocks.[38]

A The Response: A Change to s 13

The Government responded swiftly to undercut the effect of *Antons Trawling*. In July 2008, the Fisheries Act 1996 Amendment Bill (No 2) 2008 (the Bill) was introduced before Parliament. By September of the same year the Bill passed its third reading.[39] The new provision is 13(2A):

> (2A) For the purposes of setting a total allowable catch under this section, if the Minister considers that the current level of the stock or the level of the stock that can produce the maximum sustainable yield is not able to be estimated reliably using the best available information, the Minister must—
>
> (a) not use the absence of, or any uncertainty in, that information as a reason for postponing or failing to set a total allowable catch for the stock; and
>
> (b) have regard to the interdependence of stocks, the biological characteristics of the stock, and any environmental conditions affecting the stock; and

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35 Ibid, at [55].

36 Ibid.

37 Ibid.

38 Ministry of Fisheries "Briefing Note: Process for Urgent Amendment of the Fisheries Act" 20 March 2008 (obtained under Official Information Act 1982 Request to the Ministry of Fisheries) at 1.

39 (23 September 2008) 648 NZPD 17520.

(c) set a total allowable catch—

(i) using the best available information; and

(ii) that is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield.

The Hon Steve Chadwick, moving the Bill to be read for a second time, characterised the amendment as "allow[ing] the management of fishing to continue as it has in the past."[40] Members of Parliament also stressed that the change would have no impact on the principles of s 10.[41]

IV THE KAHAWAI CASE

A Background

The *Kahawai* case is the most important recent decision on the quota management system.[42] The case was a judicial review brought on appeal by the New Zealand Recreational Fishing Council and the New Zealand Big Game Fishing Council (the recreational fishers) of the Minister's decision when setting the TACC for kahawai in KAH1 in 2004 and 2005. While the decisions of the Minister in setting the TACC had been overtaken by the passage of time, the statutory interpretation involved continues to have relevance as it provides guidance to ministerial decision-making under the Act.

Kahawai is a species of fish that has been subject to the quota management system since 1 October 2004. It is valued highly by recreational fishers, but is also of importance to commercial fishers.[43] Because the resource is limited, the Minister had to decide how best to allocate it. While it was the Minister's decision in question, the first respondents in the Supreme Court were the fishing companies Sealord, Sanford and Pelagic & Tuna New Zealand (the commercial fishers). The Minister and the Chief Executive of the Ministry were second and third respondents.

Both sides accepted that s 20 enables the Minister to determine which part of the TAC will be allocated to commercial fishers and which part to recreational fishers.[44] The recreational fishers argued that the Minister's decision when setting the TACC must "enable people to provide for their social, economic, and cultural well-being" as required by s 8. In setting the TAC and TACC in both 2004 and 2005, the Minister relied on the recent catch history of commercial and recreational

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40 Hon Steve Chadwick MP (Labour) (23 September 2008) 650 NZPD 19010.

41 For example, The Hon Phil Heatley MP (National) said: "To clarify, the Fisheries Act 1996 Amendment Bill (No 2) is concerned with section 13 of the Fisheries Act. It is not concerned at all with section 10, and it does not address any issues relating to that section." (29 July 2008) 648 NZPD 17520.

42 The *Kahawai* case, above n 2.

43 The *Kahawai* case, above n 2, at [33].

44 Ibid, at [2] per Elias CJ dissenting.

fishers, subject to reductions to ensure sustainability.[45] The recreational fishers argued that this quantitative measure failed to give effect to the qualitative requirements of s 8.[46] In their view, had the Minister correctly applied the Act, he would have recognised and given effect to the priority of recreational fishers.[47] The commercial fishers argued that no such priority exists and that the s 8 principles relied on by the recreational fishers have no application in setting the TACC under s 20.[48]

Underlying the dispute was a philosophical disagreement reflecting the parties' competing aspirations as to how a fishery should be run. Recreational fishers have an interest in a TAC set below the level required to produce MSY. A smaller TAC means more fish are left in the sea, making fish easier to catch and increasing the likelihood of larger fish. Similarly, a smaller TACC means that there is more for recreational fishers, even if they do not catch their full entitlement. Commercial fishers have an interest in realising MSY. This means they can catch more fish, giving them a greater return on their investment and a higher value for their quota property.[49]

B Majority

The majority rejected the recreational fishers' submission that the qualitative factors identified in s 8 governed the Minister's decision under ss 20 and 21.[50] In their view, the sections had different aims: "Section 8 expresses a composite policy that is concerned with providing for utilisation subject to ensuring sustainability."[51] This is relevant in s 13, which provides an obligation to move to a biomass at or above the level that will produce MSY.[52] However, s 13 gives the Minister some flexibility to consider the aspirations of various interests for utilisation of the resource:[53]

> In considering the way in which and rate at which a stock is moved towards or above a level producing a maximum sustainable yield, the Minister must have regard to "social, cultural and economic factors as he or she considers relevant". This imports into the process for setting the total allowable catch a key aspect of the definition of "utilisation" in s 8(2).

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45 Ibid, at [50].

46 Ibid, at [3] per Elias CJ dissenting.

47 Ibid.

48 Ibid, at [2] per Elias CJ dissenting.

49 Ibid, at [3] per Elias CJ dissenting.

50 Ibid, at [60].

51 Ibid.

52 Ibid, at [43].

53 Ibid, at [44] quoting the Fisheries Act 1996, s 13(3).

Because the policy of sustainable utilisation in s 8 is given effect when setting the TAC, that policy was found to be "not of direct relevance to decisions [made] under ss 20 and 21".[54] Instead, setting the TACC involves a policy choice. The Minister must allocate a fixed resource between competing interests.[55] However, s 21 provides that the Minister "shall allow for ... recreational interests".[56] The Act does not define recreational interests. The majority looked to statutory context for meaning. They noted that s 21 makes it clear "that recreational interests are non-commercial fishing interests which are not Māori customary non-commercial fishing interests", while s 8 indicates that recreational interests are interests in the utilisation of fisheries resources.[57]

The majority found that common usage of "allow for" means there *must* be some allowance:[58]

> On their ordinary meaning the words "allow for" require the Minister both to take into account those interests and to make provision for them in the calculation of the total allowable commercial catch. That makes plain that there is to be an allocation for recreational interests.

Despite the requirement for an allowance, instruments such as bag limits and minimum size requirements mean the Minister can control how much recreational fishers catch.[59] "The allowance accordingly represents what the Minister considers recreational interests should be able to catch but also all that they will be able to catch."[60]

So as a matter of procedure, the Minister must first set the TAC under s 13 and then set the TACC under ss 20 and 21.[61] The TACC cannot exceed the TAC.[62] As sustainability has been ensured when setting the TAC, the Minister is generally expected to allocate the whole TAC to the various interests referred to in s 21.[63] The majority expressed the Minister's obligations in the following terms:[64]

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54 Ibid, at [60].

55 Ibid, at [61].

56 Fisheries Act 1996, s 21(1)(a)(ii).

57 The *Kahawai* case, above n 2, at [54].

58 Ibid, at [55].

59 Ibid, at [55]-[56].

60 Ibid, at [56].

61 Ibid, at [52].

62 Ibid; Fisheries Act 1996, s 20(5)(b).

63 The *Kahawai* case, above n 2, at [52].

64 Ibid, at [53].

> ... the total allowable commercial catch is ultimately determined by a calculation. Starting with the figure for the total allowable catch, the Minister must decide what allowances to make for what will be taken by the specified non-commercial fishing interests, and all other mortality caused by fishing. The Minister deducts the sum of these allowances from the total allowable catch and the difference is the total allowable commercial catch.

Moreover, "[t]he sequential nature of the method of allocation provided for in s 21 does not indicate that non-commercial fishing interests are to be given any substantive priority over commercial interests."[65] It also follows from this analysis that the majority rejected the possibility that s 21 envisages less than the whole TAC being allocated; the majority noted pithily: "It is implicit in the scheme of the Act that the total *allowable* catch is the total that is allowed to be caught."[66]

C Minority

Elias CJ would have allowed the appeal, though not for the reasons given by the recreational fishers. In her view, s 21(1) exists to ensure the TACC does not exceed the TAC.[67] Thus, the Minister is required to ascertain the amount of fish removed other than by commercial fishing (be it by recreational fishing, customary fishing or poaching), and deduct this from the TAC. What remains may be allocated as TACC.[68]

However, the TAC does not have to be fully allocated. Section 21(2) ensures that interested parties are consulted before the Minister sets the TACC. In Elias CJ's view, this provision "serves a different purpose" to s 21(1).[69] It is "concerned not with compliance with the total allowable catch ... but with the substantive assessment of what the total allowable commercial catch should be, applying the policies of the legislation".[70] After ascertaining what *can* be allocated as TACC, the Minister must look to the interests provided for in s 21(2) and decide whether the full TACC *should* be allocated. Thus, s 21(2) is a standalone provision "concerned with sustainability ends which are not fully addressed by a total allowable catch which maintains the stock at or above maximum sustainable yield."[71]

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65 Ibid, at [61].

66 Ibid, at [62] (emphasis added).

67 Ibid, at [4] per Elias CJ dissenting.

68 Ibid, at [21] per Elias CJ dissenting.

69 Ibid.

70 Ibid.

71 Ibid.

The effect of this is that the Minister can set the TACC at a level that leaves some of the TAC unallocated in order to provide for other interests, or to move a stock towards sustainability.[72] The Minister may also set a more conservative TACC because of imperfect information, thus giving effect to s 10's precautionary approach.[73] This represents a departure from the majority's approach which sees the TACC as an allocative decision to which the s 8 principles are not directly relevant.[74]

The Chief Justice believed that the TACC is not an allocative decision for five reasons. First, the TACC provisions do not contain an explicit parallel "total allowable recreational catch" and, if it is implied, s 21 is an odd place for it.[75] Second, there is no equivalent to s 20(3) to set the recreational allowance at zero, as can be done with commercial catch. The lack of such a provision is not consistent with an allocative regime under s 21.[76] Third, Elias CJ doubted whether the Minister in "allowing for" recreational and Māori interests was required to keep commercial interests in mind. Instead, those interests were limited by other parts of the Act, meaning s 21(1) is merely an estimate of what is lost, not what *should* be lost.[77] Fourth, if the decision under s 21(1) is merely allocative, it seems strange that s 21(2) provides for consultation with environmental interests.[78] Fifth, she viewed it as a "long step" to turn a requirement "to allow for" recreational interests into "an allowance" for recreational fishers, particularly so given the lack of statutory machinery in Part 4 to enforce such an allowance.[79]

D Analysis

It will be apparent that the differences between the judgments are founded on differing views of what is meant by "allow for" in s 21(1). For the majority, setting the TACC is an allocative decision. Sustainability, provided for when setting the TAC, is irrelevant. The task for the Minister is to determine what *allowances* should be made for non-commercial fishing interests and other mortality, with the remainder of the TAC going to commercial fishers. For the minority, "allow for" has a meaning closer to "recognise". Thus, s 21(1) ensures the TAC is not exceeded when the Minister allocates the TACC. After recognising cumulative non-commercial fishing mortality, the Minister must determine how much of the remainder of the TAC *should* be allocated to commercial fishers.

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72 Ibid, at [22] per Elias CJ dissenting.

73 Ibid.

74 Ibid, at [60].

75 Ibid, at [24] per Elias CJ dissenting.

76 Ibid, at [25] per Elias CJ dissenting.

77 Ibid, at [26] per Elias CJ dissenting.

78 Ibid, at [27] per Elias CJ dissenting.

79 Ibid, at [28] per Elias CJ dissenting.

1 Majority approach

The advantage of the majority's approach is its simplicity and transparency. It is consistent with sustainability of the stock and movement towards a biomass that can produce MSY. The Minister decides, under s 13, how much is available for utilisation. He or she then considers cultural and economic factors associated with moving towards MSY. After the TAC is set, the Minister merely needs to make an allocative decision between competing users.

However, the majority's interpretation does not sit comfortably with the statute's wording. An allowance system for non-commercial interests seems incongruous in a section determining entitlements under the quota management system (of which recreational interests are not a part). More specifically, s 21(1) requires the Minister to "allow for" both non-commercial fishing in s 21(1)(a) and "[a]ll other mortality caused by fishing" in s 21(1)(b). The phrase "all *other* mortality" in s 21(1)(b) means that s 21(1)(a) is also concerned with mortality. Thus, s 21(1) seeks to ascertain the cumulative non-commercial mortality, making it likely the intention is to ensure that non-commercial mortality, when added to commercial mortality, does not exceed the TAC.[80]

The majority's approach also appears to put Māori customary non-commercial fishing interests in the same boat as recreational interests. In "allowing for" these interests, the Minister must keep commercial interests in mind.[81] Similarly, there would be no priority for Māori customary non-commercial fishing interests as "[t]he sequential nature of the method of allocation provided for in s 21 does not indicate that non-commercial fishing interests are to be given any substantive priority over commercial interests."[82] Yet, the majority held that:[83]

> It is unnecessary in this judgment to discuss the basis on which the allowance for Maori customary non-commercial fishing interests is to be determined. There is detailed provision in the Act for such interests (in Part 9) but no equivalent provision outside of s 21 for recreational interests.

However, the wording of s 21(4) requires the Minister to take into account any mataitai reserve just as s 21(5) requires consideration of regulations restricting the commercial catch under s 311.[84] This makes it appear as though the provision is concerned with ascertaining cumulative fishing mortality rather than allocating between competing interests.

Moreover, the majority's interpretation of s 21(1) leads to absurd conclusions. The "all other mortality" referred to in s 21(1)(b) "will principally, if not totally, be that caused by illegal

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80 Ibid, at [26].

81 Ibid, at [53].

82 Ibid, at [61].

83 Ibid, at footnote 21.

84 Ibid, at [28] per Elias CJ dissenting.

fishing."[85] If the words "shall allow for" are to apply consistently across s 21(1), the Minister is required to provide poachers with an allowance. Similarly, recreational fishers are unable to catch species too far offshore to be readily targeted. The majority recognised this, stating that, in such a case, the considered allowance would be nil.[86] An "allowance" of nil does not conform to common usage, making it less likely that the legislature intended s 21(1) to mandate allocation. The better view is that of Elias CJ, namely that s 21(1) provides for an estimate of total loss, not of what *should* be lost.[87]

Such a view is supported by the statutory history. Initially the Bill required the Minister to "have regard to" the interests expressed in s 21(1).[88] The Select Committee agreed that this language was too weak, stating:[89]

> We agree with this point and recommend that the Minister "allow for", non commercial interests. The non-commercial allowance will be quantified and enforced through bag limits and other controls or customary fishing regulations.

In changing the language from "have regard to" to "allow for" the Select Committee cited submissions which "felt that a clear priority should be given to Maori customary fishing, recreational fishing, or both".[90] As Elias CJ noted, these statements are consistent with s 21(1) being an estimate of total loss, as "have regard to" is too weak to achieve this.[91]

The majority viewed s 21(2) as a consultative provision attached to the allocative provision under s 21(1).[92] Consultation with competing fishing interests is understandable in light of this interpretation. However, if the TACC is divorced from considerations of sustainability (those being dealt with under the prior setting of the TAC), the requirement to consult environmental interests has less apparent justification. The majority's argument was that "[t]he environmental sector is also interested and will be concerned that the allocations, on which the integrity of the total allowable commercial catch depends, are enforceable."[93] The problem with this, as Elias CJ notes, is that if

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85 Ibid, at [48].

86 Ibid, at footnote 28.

87 Ibid, at [26] per Elias CJ dissenting.

88 Ibid, at [31] per Elias CJ dissenting.

89 Primary Production Committee *Report on the Fisheries Bill* (New Zealand Parliament Primary Production Committee, 1996) at xv.

90 The *Kahawai* case, above n 2, at [31] per Elias CJ dissenting.

91 Ibid.

92 Ibid, at [57].

93 Ibid.

environmental interests have an interest in the TACC, they also have an interest in the total recreational catch, for which there is no requirement of consultation under s 21(2).[94]

2 Minority approach

The advantage of the minority approach is that it gives effect to the wording of s 21. It means that s 21(1) is concerned with cumulative non-commercial fishing mortality. This makes the reference to poaching a pragmatic recognition to ensure the TAC is not exceeded. However, the minority's approach complicates the Minister's decision. By not fully allocating the TAC, the minority's approach requires the Minister to make two policy decisions: first, what the TAC is; and then whether it should be fully apportioned. Section 13(3) requires social, cultural and economic factors to be considered when setting a TAC that will produce MSY. But, as the majority notes, "there is no requirement of that sort expressed in s 21."[95] This means the second decision must have different considerations not covered by s 13(3), but Elias CJ does not explain what those are.

It is also arguable that the minority does not give effect to the Act's purpose. Elias CJ's approach requires that the TAC does not mean the total *allowed* to be caught. The upshot is that this could artificially inflate the TAC by having it at a level above that which is utilised. Seemingly, the simpler solution is to reduce the TAC under s 13 rather than to have unallocated TAC. While this is a necessary consequence of her approach, Elias CJ does not justify how such a method facilitates the policy of the Act. The risk of this approach is that it will be viewed as dislocating competing interests; that is, each sector will have an allocation made in isolation, an approach that fails to recognise the interconnectedness of the decisions involved.

3 Differing philosophies

While the differences between the majority and minority appear fairly technical in nature, they mask competing philosophies regarding the purpose of the quota management system. This makes the effect of the differences much more significant. The majority views s 13 as wholly providing for both sustainability and utilisation. Thus, any TAC set will "enable people to provide for their social, economic, and cultural well-being" as required by the s 8(2) definition of utilisation. However, the driver of s 13 is the requirement to move towards or above MSY.[96]

In contrast, the minority view is that the TAC may not provide for all utilisation or sustainability demands. Unallocated TAC is consistent with this: TAC may be held back if the purpose of the Act

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94 Ibid, at [27] per Elias CJ dissenting.

95 Ibid, at [60].

96 Ibid, at [43].

would be better fulfilled by doing so. Elias CJ's approach means the Minister has two ways of providing for the interests of non-commercial fishers:[97]

> To the extent that non-commercial fishers are interested in more plentiful fish and larger specimens, their interest is served by the total allowable catch being set to maintain a stock above a level that can produce the maximum sustainable yield and by the total allowable commercial catch being set at a level that does not exhaust the total allowable catch.

While Elias CJ's judgment stressed the sustainability function of s 13, her decision implicitly acknowledges the utilisation component involved when the Minister acts to set a biomass above that producing MSY. This acknowledgement is common to both the majority and minority decisions. It is based on the wording of s 13(2)(a) which enables the Minister to set a TAC "at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks". Both the minority and majority view this provision as enabling the Minister to set a TAC *above* a level that can produce MSY. Setting a TAC above the biomass required to produce MSY will enhance the quality of the fishery, meaning that fish are larger and easier to catch. Given that sustainability is provided for in ascertaining maximum *sustainable* yield, any further increase in biomass must be based on utilisation considerations. The key question left unanswered by Elias CJ's approach is why the Minister needs the discretion to apply the purpose of the Act when setting the TACC as well as the TAC.

4 Evaluation

(a) Operation of the Act

The minority's approach is more consistent with the way in which it appears the Act was intended to operate. The Act requires the Minister first to set a TAC under s 13.[98] Given the principles in ss 9 and 10, this should be set using the best possible information. This approach was recognised as correct in *Antons Trawling*.[99] Once set, the TAC remains in effect until changed. In *Antons Trawling*, while reluctant to accept that there was no duty to review TACs, Miller J recognised that "the Minister is not required to review TACs at regular intervals."[100] When the Minister does decide to review the TAC, *Antons Trawling* demonstrates that the Act envisages the Minister doing so with information.[101]

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97 Ibid, at [18] per Elias CJ dissenting.

98 Ibid, at [53].

99 *Antons Trawling Co Ltd v The Minister of Fisheries*, above n 1, at [61].

100 Ibid, at [60].

101 Ibid, at [50].

The TACC, by contrast, is much easier to change. During the operation of the TAC, the Minister may be faced with an exigency that requires him or her to increase biomass. This could be the product of a natural fluctuation of biomass (perhaps due to disease) or the product of overfishing. In either case, the legislation envisages that the Minister can reduce the TACC (as well as reducing non-commercial take through regulations) in response. This alternative response to reducing the TAC can be taken without the need to use the best possible information. This in effect enables the Minister to take a precautionary approach. If on further research it becomes apparent that the TAC is set at an unsustainable level, the Minister has a power to alter it under s 13.

This context indicates how the TACC may be reduced even though the TAC remains constant. Rather than viewing this as an artificial inflation of the TAC, it should be seen as a pragmatic method by which the Minister can increase biomass. Although the Minister does not necessarily have regard to considerations outside s 13, he or she acts within different constraints. This also explains the consultation provision in s 21(2). Where the Minister deems it necessary to alter the TACC, this will have an impact on biomass that concerns commercial, non-commercial and environmental interests.

On this approach, the law change prompted by *Antons Trawling* was unnecessary. Instead of reducing the TAC with no information, the Minister should have been able to reduce the TACC until such time that he had information enabling him to make an informed decision regarding the TAC. The advantage of this approach is that it incentivises a higher standard of information. If commercial fishers want the TAC or TACC to be increased, they can improve their chances by proving the sustainability of the increase. In contrast, s 13(2A) risks creating the opposite incentives, a point analysed further below.

(b) Alternative operation of the Act

It may also be that s 13 was never intended to have a utilisation component beyond s 13(3). A number of factors support this interpretation. First, s 13 appears in Part 3, entitled "Sustainability Measures". Second, s 13 requires the Minister to set a TAC that maintains the stock at or above a level that can produce MSY, having regard to the interdependence of stocks. Thus, it seems to contemplate a biomass above MSY only where the interdependence of stocks makes this a desirable outcome. This interpretation is consistent with the ecosystem approach to fisheries management, an explicit aim of the Ministry of Fisheries described above. This is also consistent with the wording of s 13(3), which requires the Minister to have regard to social, cultural, and economic factors when considering *how to move* the TAC towards a biomass that will produce MSY. If it were contemplated that the TAC was to provide for utilisation, it would make sense for the Minister to have regard to social, cultural and economic factors when considering how, *and whether*, to move to MSY. That is not what the section says. Instead, a plain reading of the section indicates that utilisation may only be relevant to s 13(3) to ensure interests do not go unrecognised when a stock is being "fished down" to a biomass that produces MSY. The rest of s 13 is concerned with ensuring

that the TAC does not exceed the biomass that can produce MSY, as a sustainability measure. This lower biomass limit is an environmental bottom-line within which the Minister must work.

If this were the intention of s 13, the minority approach would be the only tenable one. Only when allocating the TACC could the Minister choose not to allocate all of it in order to provide for people's social, economic and cultural well-being. Without such a provision, the Minister would be obliged to set the TAC at a level that produced MSY, and then fully allocate it. Under this interpretation, if s 13 provided for all utilisation aspirations, it would assume that a fishery producing MSY would adequately cater for people's social, economic and cultural well-being. However, in reality, this is not the case. Differing interests will have competing aspirations for a fishery. An obvious example is the *Kahawai* case itself, with recreational fishers desiring larger fish that are easier to catch – an outcome achieved by a biomass set above that which will produce MSY.

Interestingly, this approach appears to be supported by changes between the 1983 and 1996 Acts. Under the 1983 Act, the concept of MSY was part of the definition of TAC in s 2. That section provided that the:

> [TAC], with respect to the yield from a fishery, means the amount of fish, aquatic life, or seaweed that will produce from that fishery the maximum sustainable yield, as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards.

McGechan J in the High Court said this definition meant "[t]he Minister [was] expected, implicitly, to progress the stock to [a biomass that produces MSY], subject to [the] qualifiers".[102] The "qualifiers" referred to are those listed in the definition of TAC. This interpretation was confirmed on appeal, where the Court of Appeal referred to the obligation to move to MSY as a "prima facie duty".[103] However, the duty was subject to the qualifiers, which "were relevant to *whether*, and if so, by what means and over what time the prima facie duty should be implemented".[104] This means that if the qualifiers were strong enough, the Minister could decide that the prima facie duty to move to MSY should not be implemented.

The 1996 Act moved the "qualifiers" to s 13(3), limiting their application to the Minister's determination of the way and rate (but not whether) a stock is moved towards MSY. The Court of

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102 *New Zealand Federation of Commercial Fishermen (Inc) v Minister of Fisheries* HC Wellington CP294/96, 24 April 1997, at 85.

103 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997 at 13 per Tipping J.

104 Ibid (emphasis added).

Appeal construed this as strengthening the obligation to move a stock towards MSY. This indicates that Parliament never envisioned s 13 as having a utilisation component beyond s 13(3):[105]

> In short, the Minister now has a clear obligation to move the stock towards MSY and when deciding upon the time frame and the ways to achieve that statutory objective the Minister must consider all relevant social, cultural and economic factors.

(c) Giving effect to differing values

The primary policy advantage of the minority's approach is that it gives effect to different values put on fish by users. The majority decision in the *Kahawai* case that recreational fishers do not have primacy means that all interests are considered to be equal.[106] This makes allocation of the TAC a quantitative (catch history) decision, not a qualitative one. The majority held:[107]

> Section 8's purpose does not, however, extend to a requirement that the Minister proceed on the basis of a comparative analysis of well-being factors in relation to recreational interests and other interests affected by the setting of the total allowable commercial catch.

This means the Minister cannot have regard to the different values put on fish when allocating the TAC. This ignores the fact that different interests may have different values within utilisation. For example, a Kahawai caught and eaten by a recreational fisher may be of higher value to one caught and sold as pet food by a commercial fisher. A South Australian study indicated that recreational fishers valued the species they caught at 11 to 16 times the value estimated for the same species caught by commercial fishers.[108]

In this context, it is understandable that the recreational fishers argued that they should have some form of priority under the Act.[109] While rejecting this argument, the majority still saw the setting of the TACC as an area in which the Minister has room to make policy choices.[110] Section 20(3) enables the Minister to set or vary the TACC at or to zero. Yet, as qualitative factors are excluded from the Minister's decision, it could easily be viewed as unreasonable to have a significant disparity between commercial and recreational take. This subsequently constrains the Minister's ability to make a decision substantially benefiting one group at the expense of the other.

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105 Ibid, at 14.

106 The *Kahawai* case, above n 2, at [61].

107 Ibid, at [60].

108 Voxy "Social, Cultural Well-being Eyed for Setting of Kahawai Quotas" (12 February 2009) <www.voxy.co.nz>.

109 The *Kahawai* case, above n 2, at [3] per Elias CJ dissenting.

110 Ibid, at [61].

The minority's approach avoids this difficulty by viewing s 21(1) as ascertaining cumulative non-commercial fishing mortality. This means the allocations to non-commercial fishing interests are decided elsewhere, an approach which enables the Minister to give effect to qualitative aspirations of those interests. It also clearly allows primacy to be given to Māori customary interests, without which many iwi would not have supported the fisheries settlement.[111] The minority approach also allows the Minister to reduce the TACC as a way of increasing biomass to provide for aspirations of bigger fish that are easier to catch.

The risk of dislocation between competing interests by using the minority's approach would be easy to overstate. It is obvious that the Minister would know that he or she is allocating a scarce resource when providing for various interests. The consultation required by s 21(2) enables competing interests to voice their aspirations. For example, commercial fishers who believe a TACC is too small (thus reducing the value of their quota property rights) can complain to the Minister that bag limits are set too high. While catch rates are likely to increase if the Minister does not fully allocate the TAC, this can be controlled through modifying recreational fishers' allowances in Part 16. The fact that s 21(2) requires consultation with various interests seems to recognise both the qualitative and quantitative interconnectedness of the decisions involved. Similar requirements for consultation exist where the Minister seeks to close specific areas to commercial fishing.[112]

V THE EFFECT OF THE CHANGES

While the decision of the minority may be preferable, it currently does not represent the law in New Zealand. It is important to analyse the deeper effects of the majority's decision. This part focuses on the impact of the majority's decision on two levels. First, it analyses the implications for those operating under the Act: recreational fishers and commercial fishers, and those with Māori customary interests or environmental interest. Second, it contextualises the effects of the majority's decision in light of fisheries management policy and the future of fisheries management.

A Effect on Interested Parties Under the Act

1 Effect on the environment

The effect of the *Kahawai* case is that had s 13(2A) not been passed, it would now be required. The Minister must have a way to limit catches where it appears that, despite a lack of evidence, the TAC is unsustainable. During Parliamentary debates, the Labour Party recognised that this was necessary if the Act was to give effect to the precautionary principle.[113] On a preferable interpretation of the Act this could be achieved by reducing the TACC. However, the new provision

111 Lock and Leslie, above n 8, at 43.

112 Fisheries Act 1996, s 311.

113 Hon Damien O'Connor MP (Labour) (23 September 2008) 650 NZPD 19017.

cuts both ways. It means that without any evidence as to sustainability, the Minister can increase the TAC. The wording in s 10 means that the Minister merely has to "take into account" this lack of information before setting the TAC under s 13(2A) at whatever level he or she believes will enable the fishery to move to MSY. This has obvious implications for both the efficacy of s 10 and the precautionary principle.

Section 13(2A) also creates undesirable incentives for research. Research functions are increasingly devolved to the industry.[114] Section 13(2A) means that commercial fishers do not have to demonstrate the sustainability of their fishing, thus creating an incentive to do the least research possible. Whereas before the Minister could reduce the TACC (thus increasing biomass) until he or she was satisfied the TAC was sustainable, that is no longer a possibility. It is absurd to require the Minister to set a TAC at or above a level that can produce MSY without any information. Yet this is the case for 50 per cent of stocks,[115] while only two to five per cent of stocks by number (though a bigger volume by value) are set on a literal interpretation of a biomass that will produce MSY.[116] This issue is ever more urgent when set against the backdrop of a 30 per cent cut to the Ministry's science programmes.[117]

The reduction in informational requirements may also lead to an increase in ascertaining stocks simply by reference to effort expended. The basic principle underlying this approach is that if effort remains constant, a declining fishery will produce reduced yields. The problem with this approach is that it is not always representative. This was recognised by the Ministry in a briefing note to the Primary Production Select Committee. The note states:[118]

> Because fishing is generally targeted at dense aggregations of fish, the normal indicators of stock depletion, such as gradually declining catch rates, are not reliable in these fisheries. Often, catch rates continue at high levels even though the stock biomass is being depleted.

A possible solution was put forward by the Green Party.[119] It proposed that, if the Minister wanted to rely on s 13(2A), he or she could maintain or reduce the TAC, but not increase it. In order to increase the TAC it would need to be demonstrated that the proposed increase moves the stock towards MSY. The advantage of this approach is similar to that of the previous one; if fishers want the TAC increased they have an incentive to do research to show that the increase is sustainable.

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114 Lock and Leslie, above n 8, at 52.

115 Ministry of Fisheries "Briefing Note: Process for Urgent Amendment of the Fisheries Act", above n 38, at 1.

116 *Antons Trawling Co Ltd v The Minister of Fisheries*, above n 1, at [48].

117 Chris Howe "Still Much to do Beneath the Waves" *The Dominion Post* (Wellington, 13 August 2009) at B5.

118 Ministry of Fisheries "Briefing for Primary Production Select Committee" 13 August 2008 (Obtained under Official Information Act 1982 Request to the Ministry of Fisheries) at [8].

119 Hon Sue Bradford (Green) (23 September 2008) 650 NZPD 19012-19013.

The Green party also pushed for inclusion of a provision to ensure the principles of the Act are taken into account when setting a TAC under s 13(2).[120]

This issue exists in the context of two broader problems. The first is that biomass is held out to be a sufficient indicator of ecosystem health when in reality, it is not. Overfishing and environmental degradation are far more closely linked to a failure to control when, where and how fishing occurs.[121] The current system does divide stocks up into quota management areas, but still incentivises getting the most fish for the smallest amount of effort. This creates a localised race to fish that undermines the aspiration of the Act to take an ecosystem approach to fishing. Removing top predators from an area fundamentally alters the ecosystem. An example is kina barrens, where, in the absence of predators such as snapper and crayfish, kina devour kelp forests, reducing the diversity and productivity of the area.[122] Thus, while the biomass of an overall quota management area may still be at a level that can produce MSY, specific habitats may be affected significantly.

The second problem involves a breakdown in fisheries management theory. The theory is that, as fishers have a property right in their individual transferable quota, it is in their interest to act in a manner that preserves the integrity of that property. This should operate on two levels: fishers should fish sustainably, and do so in a way that protects that habitat from whence their property comes. No doubt many fishers do. Yet these incentives only operate at a collective level. At an individual level, incentives favour acting in one's own interest to reap individual benefits, whilst sharing associated negative externalities across the group. This is known as the tragedy of the commons. While dealing with the tragedy of the commons is beyond the scope of this article, its effects are exacerbated by the reduction of informational requirements and modification of incentives to do research.

2 Effect on commercial fishers

Commercial fishers benefit the most from the majority's decision. It provides them with considerable certainty, an important aspect given the property right conferred by an individual transferable quota. It means their interests are viewed as equal to that of non-commercial fishers. The majority's decision also makes it likely that commercial fishers will continue to push for increases in the TAC. Because a TAC must be fully allocated, commercial fishers know that increases are likely to be allocated to them.

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120 Ibid.

121 Alison Reiser "Property Rights and Ecosystem Management in US Fisheries: Contracting out for the Commons?" (1997) 24 Ecology LQ 813 at 815-816.

122 This effect is known as a trophic cascade. See Vince Kerr and Roger Grace *Intertidal and Subtidal Habitats of Mimiwhangata Marine Park and Adjacent Shelf* (DOC Research & Development Series 201, Department of Conservation, 2005) at 31-32; NT Shears and RC Babcock "Continuing trophic cascade effects after 25 years of no-take marine reserve protection" (2003) 1 Marine Ecology Progress Series 246 at [1.16].

3 Effect on recreational fishers

The effect on recreational fishers is that their interests are deemed to be on the same level as commercial interests, even where they place a greater value in a stock. As a consequence, if the Minister wishes to prioritise recreational interests on qualitative grounds, he or she will have to take more drastic action. Section 311 allows the Minister to recommend regulations to close areas to commercial fishing to protect access for recreational fishers.[123] As pressure on fish stocks continues to increase, it seems likely that there will also be increasing pressure on the Minister to invoke s 311.

The majority's decision also means that recreational interests only have an opportunity to alter the biomass of a stock when the TAC is reviewed. This may happen less often than the setting of the TACC. While the Minister could allocate more to recreational interests when he or she sets the TACC, the Minister cannot allocate more than the recreational fishers are able to catch.[124] To do so would mean that some of the TAC would be unallocated, artificially inflating biomass and thus failing to give effect to s 13 as a utilisation provision.

4 Effect on Māori fishing interests

The effect on Māori customary non-commercial fishing interests largely depends on whether those interests retain priority. As was indicated, statutory interpretation indicates they are on the same level as recreational interests. However, the majority's footnote stating that "[i]t is unnecessary in this judgment to discuss the basis on which the allowance for Maori customary non-commercial fishing interests is to be determined" may preserve Māori customary priority.[125] This ought to be the outcome. As a matter of policy, the allowance to Māori customary non-commercial fishing interests should fully satisfy those interests, despite the inconsistencies in the majority's reasoning.[126]

B Fisheries Management Policy and the Future

The recently released *Fisheries 2030* represents the strategic direction of the Ministry.[127] At a high level, that direction is still one that maximises benefits from the use of fisheries within environmental limits.[128] However, a number of principles that *Fisheries 2030* aspires to are at odds with the change to s 13 and the *Kahawai* case.

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123 Fisheries Act 1996, s 311.

124 The *Kahawai* case, above n 2, at [56].

125 Ibid, at footnote 22.

126 Lock and Leslie, above n 8, at 37.

127 Ministry of Fisheries *Fisheries 2030* (2009) at 5.

128 Ibid.

The addition of s 13(2A) and its associated problems undermine the principles which aspire to an ecosystem based approach and a precautionary approach.[129] These principles suggest that the Greens' amendment is significantly closer to the 2030 aspiration than the status quo is. The localised race to fish risks compromising the principle of conserving diversity.[130] The effect of the majority's decision in the *Kahawai* case appears to be a direct challenge to the Ministry's principle of "dynamic efficiency".[131] This principle extrapolates that "[f]rameworks should be established to allow resources to be allocated to those who value them most".[132] This indicates that a qualitative approach with a biomass set above that producing MSY is to be preferred in the future.

More broadly, where a fishery is targeted at producing MSY, recreational and environmental interests are disadvantaged significantly. It is self evident that if the biomass of kahawai is 17 per cent, and thus the fishery is producing MSY,[133] recreational fishers have a far smaller chance of catching a fish than if the biomass is higher. Similarly, the impact of the environmental concerns outlined above is aggravated by a lower biomass. Yet an affidavit from a fisheries scientist in the *Kahawai* case indicated that 90 per cent of MSY can be achieved with a biomass anywhere between 16 and 40 per cent.[134] This indicates that with good information, the Minister can set the TAC at a level that comes very close to attaining MSY, while better reflecting recreational and environmental interests, than by setting the TAC at a level that produces MSY.

VI CONCLUSION

The Fisheries Act balances a number of competing and important rights. In 2007, the total value of seafood exports was $1.3 billion.[135] The industry provides direct employment to over 7000 full-time equivalent people, and indirectly employs another 15,000.[136] At the same time, recreational fishing is considered to be part of the fabric of New Zealand society, with many New Zealanders considering it to be their birthright.[137] In addition to cultural value, recreational fishing also has considerable economic value. The direct and indirect economic effects associated with recreational fishing are thought to be nearly $1 billion for the five major recreational species alone.[138] In

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129 Ibid, at 12.

130 Ibid.

131 Ibid.

132 Ibid.

133 The *Kahawai* case pleadings transcript, above n 19, at 65 per Mr Scott.

134 Ibid, at 65-66 per Mr Scott.

135 Ministry of Fisheries "NZ Fisheries at a Glance" (2007) <www.fish.govt.nz>.

136 Ibid; Lock and Leslie, above n 8, at 43.

137 Lock and Leslie, above n 8, at 43.

138 Ibid.

addition to fishing, the marine environment is increasingly used for mining, tourism and aquaculture.

Increasing sustainability pressures bring with them the need for a more comprehensive response to ecosystem management. The reduction of informational requirements under s 13(2A) represents a backwards step in this regard. The *Kahawai* case demonstrates the need for ministerial discretion to give effect to values held by different interests. Unfortunately, that case represents an unnecessary reduction of discretion, largely in favour of commercial interests. For fisheries management to achieve the aspirations of *Fisheries 2030*, more needs to be done to enable the Minister to make what are essentially political decisions regarding the sustainable use of New Zealand's marine environment.