

**BETWEEN**                      **NEW ZEALAND BIG GAME FISHING**  
First Appellant

**AND**                      **THE NEW ZEALAND RECREATIONAL  
FISHING COUNCIL INC**  
Second Appellant

**AND**                      **SANFORD LIMITED, SEALORD GROUP  
LIMITED AND PELAGIC & TUNA  
NEW ZEALAND LIMITED**  
First Respondents

**AND**                      **MINISTER OF FISHERIES**  
Second Respondent

**AND**                      **THE CHIEF EXECUTIVE OF THE  
MINISTRY OF FISHERIES**  
Third Respondent

Hearing:                      12 February 2009

Court:                      Elias CJ  
Blanchard J  
Tipping J  
McGrath J  
Wilson J

Appearances:                      A R Galbraith QC with S Ryan and B Gallagher for the  
Appellants  
B A Scott and G T Carter for the First Respondent  
Solicitor-General with P A McCarthy and A E L Ivory for  
the Second and Third Respondents

**MR GALBRAITH QC:**

Yes, if Your Honours please, I appear with Stuart Ryan and Bruce Gallagher for the appellants.

5 **ELIAS CJ:**

Thank you Mr Galbraith.

**MR SCOTT**

If Your Honours please, counsel's name is Scott I appear with my friend  
10 Mr Carter for the first respondents.

**ELIAS CJ:**

Thank you Mr Carter, Mr Scott.

15 **SOLICITOR-GENERAL:**

Mr Ivory and Mr McCarthy are with me for the second and third respondents,  
Your Honours.

**ELIAS CJ:**

20 Thank you Mr Solicitor. Mr Solicitor, are you happy with the seating  
arrangements?

**SOLICITOR-GENERAL:**

I'm perfectly content to keep my head down at the back this morning.

25

**ELIAS CJ:**

Yes, Mr Galbraith.

**MR GALBRAITH QC:**

30 Yes, thank you. Your Honour, there's a deal of paper in this and I'm  
unfortunately going to hand Your Honours some more paper but it's in the  
interests of economy to avoid having to take Your Honours to some of the  
other materials, so, in other words, we tried to encapsulate in a schedule  
material that I might otherwise be asking you to turn to. Perhaps just while

that's being done, if I could start by trying to put the appeal into some sort of context, because it comes to Your Honours after a lengthy hearing in the High Court and not such a lengthy hearing in the Court of Appeal, and now, on one issue only of course before this Court, although there were many more  
5 issues between the parties in the High Court.

Perhaps, just to say this, you will have seen in the commercial fishers' submissions quite a lot, and in my respectful submission, too much attempted to be made of the fact that there was some coincidence in one of the  
10 submissions filed by one of the appellant organisations in the 2004 year between the numbers which fell out of the Minister's decision, and the numbers that were enclosed, or included in that submission in relation to recreational interests allowance. What that submission obscures is the fact first that that was a very selective choice out of the submissions, as I said, it  
15 was one organisation's submission in one year in one small part of that submission, but it ignores the fact that not only did that submission contend for much lower numbers for the commercial fisher's interests, it also obscures the fact that there has been a serious disagreement between the recreational interests and the commercial interests over a considerable period of time now,  
20 as to how allowances should be made under section 21 and allocations of the TAC under section 21 in which the Ministry has been caught, I won't entirely say in the middle, because the recreational fishers' view has been that the Ministry hasn't always been in the middle, it's tended more towards the commercial fishers' end of the spectrum.

25

The Court will be aware, of course, because over the years when Your Honours have been on various benches you will have seen litigation commenced by the commercial sector against the Ministry in relation to various, very often quota decisions, and there's been a great deal of fisheries  
30 litigation. To the best of my knowledge, apart from some relatively peripheral involvement which the recreational sector had in *Snapper 1*, which is a decision you'll see that is relied on in all parties' submissions here back in, I think it was about 1996, '97, it was '97 in the Appeal Court, the recreational interests have taken, haven't been before the Courts in this role, this is the

first time, to my understanding, that the recreational interests have initiated proceedings to try and obtain resolution in relation to the proper approach to be taken under the Act to the various allowance and allocation decisions.

5 The reasons that's occurred in this case is partly because of the species that was involved, kahawai, which again, Your Honours haven't got all the evidence before you, but there's evidence that kahawai is often referred to as the "people's fish", it's a fish that is caught by kids and by serious people who go out fishing.

10

**TIPPING J:**

And elderly Judges.

**MR GALBRAITH QC:**

15 And, I'm pleased to hear that, yes, Your Honour, you're obviously more successful than I am. So that was part of the background to it. The second part of the background is that the recreational fishers' view is that over a period of 20 plus years now, since allowances and allocations have been made, there has become institutionalised a position where allocations or  
20 allowances are made on a catch history proportional basis, and in the *Snapper* case, it was correctly said by the Court of Appeal that a proportional basis for adjusting allowances or allocations is not required under the Act, the Act provides for the ability to make allowances and allocations on other bases, what we would describe as a qualitative basis of assessing the respective  
25 values which various interests place on the fishing resource, but it invariably, over the 20 plus year period, the approach which has been adopted is that which was adopted here, which is catch history proportionality and so –

**TIPPING J:**

30 You're not saying that that per se is unlawful, it's just, it's an available matter, but not a mandatory matter, is that what –

**MR GALBRAITH QC:**

Well it's an available answer, so yes, Your Honour's correct, in the sense it's an available method to be applied if you get there by the right process and I suppose what I'm saying is that the fact that out of 20 years they never got to  
5 any other answer, certainly as far as the recreational fishers are concerned raises a question about it becoming the institutionalised answer and that's, I think we all know, that's what can happen. And so in respect of the process which was adopted here, the recreational fishers' view was that the advice which had been given by the Ministry, which we'll have to come to in a bit  
10 more detail, was incorrect and Your Honours may have noted that the High Court, having agreed with the recreational fishers view on that, there in fact was a concession made by counsel for the Minister in the Court of Appeal that, so far as the advice was concerned, the High Court was correct in coming to that conclusion and the advice wasn't, well, correct in repeating that  
15 word, I'll just deal with – I'll have to come to that in slightly more detail in a moment, because I accept the position which is set out in the Crown submission as to what ultimately was said in the Court of Appeal but it was acknowledged that the advice given to the Minister wasn't the appropriate or correct advice.

20

So the recreational fishers necessarily see this proceeding as firstly, of course, in respect of particular advice which was given, to challenge that, and secondly, to seek from the Courts a proper and a principled determination of what approach the Minister should take in coming to the conclusion, which as  
25 His Honour Justice Tipping rightly put to me, could end up being the same conclusion but by an appropriate process, or appropriate consideration of the issues under the Act.

**McGRATH J:**

30 Was the Crown accepting, in essence, the Judge's finding which was that the Minister had proceeded on the basis that catch history was the only relevant consideration?

**MR GALBRAITH QC:**

Yes, Your Honour will see, perhaps it's worth dealing with now, in the Court of Appeal decision which is behind tab 4 – 5, sorry, in volume 1, it's referred to in two places, paragraph 72 of the decision, "All parties were agreed that M-Fish advised the Minister on qualitative factors and that he was therefore well informed of those factors." No quarrel about that, the advice to the Minister, more extensively in 2005, less extensively in 2004, did traverse because, to summarise, the submissions which had been made by the various parties did traverse qualitative factors. "The difference between the parties is as to whether M-Fish's advice led the Minister to believe that he was entitled to disregard those factors and rely on catch history only. That was strongly argued by Mr Galbraith. On behalf of the Crown, Mr Ivory accepted this criticism that the advice given by M-Fish to the Minister and accepted that the Minister had been led to believe he could and therefore did exclude qualitative factors and rely only on catch history." And you'll see it also at paragraph 81.

**TIPPING J:**

That's rather ambiguous, the idea that you could is technically correct, isn't it? You could come to the view that in this, after weighing everything up, this was the decisive thing, but maybe it clarifies, does it, as it goes on?

**MR GALBRAITH QC:**

Not much, in the Court of Appeal judgment, but I'll try and help Sir as I go. Paragraph 81, if Your Honours wouldn't mind just looking at that. "We are conscious that the Minister's counsel conceded error on the Minister's part. It was conceded that the Minister was advised by M-Fish that he could assess the recreational interests on the basis of a catch history approach and did so, thereby excluding from the decision the detailed information the Minister had about recreational interests."

Then they go on – and this is, I guess, the nub of their decision, "We consider that the decision to allocate on a catch history basis was made only after consideration of the qualitative factors which influenced his decision to reduce

the TAC in both years and on the basis of the allocation of reduced TAC and the catch history basis would in a broad brush basis provide for those qualitative factors.” And that’s why I said a moment ago, I accept that what is said in the Crown submissions, if I can just find it, paragraph 30, is correct and perhaps just puts this in perspective. The concession is as recorded in those two paragraphs I’ve taken you to is, in my respectful submission, the – a quite proper concession that was made by counsel for the Crown. By the time the Crown got to its feet, or my learned friend for the Crown got to his feet, Mr Scott had done an excellent job in persuading the Court of Appeal that all these qualitative factors had been put before the Minister and as I’ve said already, there’s no argument they had. The 2004 advice papers traversed all the submissions he’d agreed and made and of course the recreational fishers had made submissions on a qualitative basis, et cetera.

So what happened was that my learned friend Mr Ivory, when making his submissions was put under some pressure, shall we put it that way, by one or two of the Judges on the Court of Appeal about this concession. To Mr Ivory’s credit, he stuck to that concession and didn’t resile in any way from it, but what was said, and quite appropriately, is what’s recorded in paragraph 30 of the Crown’s submission, second part of paragraph 30, I’ll just read the whole of the paragraph, well perhaps go back to 29, that puts it in context, sorry.

**TIPPING J:**

Just pause, I just want to follow this, because this is obviously important.

25

**MR GALBRAITH QC:**

Perhaps go back to paragraph 29, it puts it in context. Paragraph 29, “The key issue in determining the formal result of the appeal is likely to be one of fact, namely whether the reasoning process leading to the Minister’s decisions included proper consideration of recreational interests. In the High Court, counsel for the second and third respondents submitted that the Minister was adequately informed and that his decisions included a correct consideration of recreational interests. The High Court rejected that submission, held that the Minister’s decisions reflected considerations of recreational catch history only

and placed to one side the more detailed information that was before him. The Minister at that time, then Minister Anderton, was content to accept that decision of the High Court and to move on, making future decisions with the benefit of the Court's findings about the importance of qualitative factors.

5 Accordingly, there was no Crown appeal and counsel for the Minister did not challenge the relevant factual findings of the High Court and the Court of Appeal, while submitting that if the Minister had taken into account all the material in the advice papers, he would have been properly informed about the relevant recreational interests.”

10

And perhaps just to read the next paragraph, “The Court of Appeal examined the material submitted to the Minister and held that the Minister’s decisions did in fact reflect an adequate consideration of recreational interests. The second and third respondents are content for the former result of this appeal to reflect this Court’s assessment as to whether the factual conclusions of the High Court or those of the Court of Appeal should prevail. Their primary interest is in the guidance of the decision of this Court should provide for future decisions.”

15

20 So what, in my memory at least, of the position it was achieving, and arrived at in the Court of Appeal was that my learned friend Mr Ivory again, in my submission, quite appropriately said that if the Court of Appeal comes to the conclusion that the Minister, despite the advice from the Ministry that he could adopt catch history and, in effect, ignore the qualitative considerations, had, in fact, taken into account qualitative considerations in coming to that conclusion, which is the point I was making to Your Honour Justice Tipping, then –

25

**TIPPING J:**

30 But was the advice to the effect that these other matters were irrelevant?

**MR GALBRAITH QC:**

No.



**TIPPING J:**

Well that's, it's very important to see exactly what the advice was.

5 **MR GALBRAITH QC:**

Yes, we've got – we need to come to that, sorry, I'm just trying to put that into context at the moment.

**BLANCHARD J:**

10 I'm a bit concerned that this is an argument, at least between your people and the Ministry, between persons who are not really in disagreement.

**MR GALBRAITH QC:**

Well yes, we weren't, at the Court of Appeal it was – the appeal was brought –  
15

**BLANCHARD J:**

But even the Court of Appeal seems to have been saying that there needed to be a consideration of qualitative factors.

20 **MR GALBRAITH QC:**

Yes.

**BLANCHARD J:**

And the fact that the particular consideration and the years in question may  
25 not have been adequate, is now almost irrelevant. The Minister's been told he needs to take these things into account so effectively, why are you here on this point?

**MR GALBRAITH QC:**

30 Right. The answer is yes and no, if I could answer that way Sir. Your Honour is quite correct that in relation to the particular decisions in 2004, 2005, as you'll see from the Crown submission, it's really only a formal matter now because the Minister is reconsidering those decisions and I think in October this year is planning on coming out with further decisions as a result of further

investigation and considerations. So there isn't an issue in a sense about the particular orders that were made, Sir. It's also quite correct, as Your Honour says, that there is some significant agreement between, certainly the Ministry and recreational fishers, if one reads the Ministry's or the Crown's present  
5 submissions as to the qualitative consideration that needs to be given to the recreational fishers interests. But there is a distinct difference between the High Court approach and a difference, not as distinct, but a difference between the Ministry's approach as set out in their submissions and the approach which we would – and the Court of Appeal's approach, so there's –  
10 the High Court approach is that in relation to the section 21 decision, the section 8(2) wellbeing considerations are objectives, you might say, or we do say, of the decision making. The Ministry says in its submissions that social, cultural and economic considerations are factors, not objectives but factors to be taken into account in assessing recreational interests under section 21,  
15 and the Court of Appeal said that the High Court Judge and we had overemphasised section 8(2) wellbeing and that it was simply part of a global purpose section and not in any sense mandatory to be taken into account under section 21. So there's three different tiers of emphasis, but it's emphasis which, in our submission, is substantive, substantively different.

20

**ELIAS CJ:**

Why aren't we starting with the statute, which is really the way the question on which leave was given is phrased?

25 

**MR GALBRAITH QC:**

Sorry, I was just –

**ELIAS CJ:**

30 

What outcome are you seeking, Mr Galbraith, beyond some indication of the sequence and the considerations to be followed?

**MR GALBRAITH QC:**

We're not seeking a formal order quashing any decision, so that's all we're seeking, Your Honour. In effect, what we're seeking is a reinstatement of the

position taken by the High Court or the view expressed by the High Court as against the, as to how the considerations –

**ELIAS CJ:**

5 You're seeking obiter statements of this Court?

**MR GALBRAITH QC:**

Well as the Court of Appeal records in its judgment, this is very much a test case, they put it to one side –

10

**ELIAS CJ:**

Yes I understand that.

**MR GALBRAITH QC:**

15 - as you understand, the commercial fishers submissions that, well, the numbers are pretty right so who cares, that wasn't the purpose of the litigation in the first place and so it's to, it's effectively to seek a, this Court's views on the interpretation of section 21 and section 8. It's not an otiose exercise because, as I've said, the Minister has undertaken the same exercise again at  
20 the moment and it's quite clear also from the Minister's submissions before this Court that there has been considerable movement by the Minister between the position the Minister had back in – well the Ministry had back in 2004, 2005 and the position that the Minister now has. In other words, the progress of the litigation and the views expressed by both Courts have  
25 undoubtedly had some influence already.

**ELIAS CJ:**

Well then, is it necessary to go into the facts except for illustrative purposes?

30 **MR GALBRAITH QC:**

I'd like to avoid the facts if I could, I'll do my best.

**ELIAS CJ:**

I thought you were taking us to them.

**MR GALBRAITH QC:**

Yes, yes, I know.

5 **TIPPING J:**

Is it really, and this isn't pejorative, an advisory opinion that you're seeking?

**MR GALBRAITH QC:**

Well, I'm scared to accept that because the Court may say, "We're not in that  
10 business", but –

**WILSON J:**

Well in effect, a Declaratory Judgment isn't it?

15 **MR GALBRAITH QC:**

Well that's right, and one of the prayers for relief in fact seeks exactly that.

**TIPPING J:**

And it's all centred around, really, whether the High Court's view of section  
20 8(2) or the Court of Appeal's view of 8(2), which is the preferable view?

**MR GALBRAITH QC:**

Yes, that's what it comes down to, Sir.

25 **TIPPING J:**

Where 8(2), both of itself and how it fits in?

**MR GALBRAITH QC:**

Yes.

30

**BLANCHARD J:**

So the concession really doesn't have much relevance?

**MR GALBRAITH QC:**

Well no, because the concession really went to the specific reason for the decision.

5 **BLANCHARD J:**

I was just puzzled as to why we were wasting time on the concession.

**MR GALBRAITH QC:**

I was just trying to explain to Your Honours –

10

**ELIAS CJ:**

Why the recreational fishers haven't been litigating in the past, all right.

**MR GALBRAITH QC:**

15 And it is a serious issue for recreational fishers.

**ELIAS CJ:**

Why then, are you not appealing the setting of the TAC?

20 **MR GALBRAITH QC:**

Because, well perhaps in retrospect we, well the setting of the TAC, the result of that was not inappropriate in the sustainability sense. Can I just leave the answer at that for the moment?

25 **ELIAS CJ:**

Yes.

**TIPPING J:**

Well you're not, you're not, it's focused on the TACC.

30

**MR GALBRAITH QC:**

We're not, yes. And there is a different emphasis, there is some difference in views as to what you can do under a TAC setting as against under a TACC setting.

**ELIAS CJ:**

But you're trying to put everything into the TACC decision making?

5 **MR GALBRAITH QC:**

Yes.

**ELIAS CJ:**

And I need to flag with you –

10

**MR GALBRAITH QC:**

Yes I understand.

**ELIAS CJ:**

15 - that I'm not sure there's that weight, where as I think your argument may be much more powerful in relation to the TAC.

**BLANCHARD J:**

But we don't want to hear that laterally –

20

**MR GALBRAITH QC:**

No, no.

**ELIAS CJ:**

25 Well except it's relevant to the interpretation of section 21 because the statute has to be read as a whole.

**MR GALBRAITH QC:**

30 And the submissions for the – the Crown submissions in fact do in part deal with that in relation to, they do in part deal with that. Taking the hint, can I just go to the statute then, and we've, in our submissions, pages 7 through 14, have discussed the statutory context, but probably, and perhaps it's just worth having that there, but –

**BLANCHARD J:**

Have we actually been given the relevant portions of the statute in the materials? We've been given practically everything else, but I couldn't find it so I'm working off a hard copy.

5

**ELIAS CJ:**

More accurate, anyway.

**MR GALBRAITH QC:**

10 No, unfortunately the Court hasn't, I'm working with a hard copy also. Do all Your Honours have the statute, or? Sorry. The, it's – as Your Honours know, it's a very long statute, but there's not that much of it that we need to dwell on. Perhaps just turn to part 2, there's a definition section before which has some definitions in which are relevant, there's definitions of sustainability measure  
15 for example, total allowable commercial catch, et cetera, stock rule defined in the definition section.

But turning to part 2 which is purpose and principles, section 8 which the Court's already discussed, is, in our submission, central to our argument. The  
20 purpose of the Act is to provide the utilisation of fisheries resources while ensuring sustainability. There's then a definition, well it then says, "In this Act, ensuring sustainability means..." and it describes that, "Maintaining potential fisheries resources, avoiding mitigating environment effects and utilisation means conserving using enhancing developing fishing resources to enable  
25 people to provide for their social, economic, and cultural wellbeing." It would be clear to Your Honours already that it's that explanation of utilisation or definition of utilisation with the objective of providing for wellbeings that recreational fishers place most emphasis upon.

30 Section 9, Environmental Principles. All persons exercising functions et cetera shall take into account environmental principles which are set out. Similarly with information principles, all persons exercising functions et cetera shall take into account the following information principles. A decision should be based on the best available information and a decision maker should

consider any uncertainty in the information available and should be cautious where information is uncertain, unreliable or inadequate. The absence of or uncertainty in any information shouldn't be used as a reason for failing to take and measure under the Act.

5

If one goes over the page to part 3 which is headed "Sustainability Measures", and Your Honours will see that it says in section 11 that the Minister may set or vary any sustainability measure and there are a number of sustainability measures which the Minister can adopt, including 11(a), fisheries plans.

10

Section 12 is a consultation provision and you'll see in section 12(1)(a) that the Minister is to consult with persons or organisations representative of a class of persons having interest in the stock or effects on the aquatic environment, including Māori, environmental commercial recreational interests et cetera, and there's a Tangata Whenua provision.

15

And then section 13, which is, in a sense, the functional section, total allowable catch, the TAC. "Subject to this section, the Minister shall, by notice, set in respect of the quota management area relating to each quota management stock", so this is only where you've got stock within a quota management system, "a total allowable catch for that stock, that total allowable catch shall continue to apply until varied. Subsection (2), the Minister shall set a TAC that maintains the stock at or above a level that can produce the maximum sustainable yield having regard to the interdependence of stocks."

20

And maximum sustainable yield is defined back in the definition section which is on page 38 of my copy here, as being "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." And I'm no scientist and my learned friend Mr Scott will much more accurately describe what that means, but it comes down in practical terms that when I was growing up, and there were lots of kahawai in the Hauraki Gulf and lots of them were quite big, that doesn't produce maximum sustainable yield, you get maximum

25

30



sustainable yield by killing off quite a chunk of the older, bigger fish and having more smaller, younger fish rapidly reproducing and being caught and that produces maximum sustainable yield. Now, that's an awful layman's interpretation of maximum sustainable yield, but as I say, my learned friend  
5 Mr Scott has yield curves and a scientist's affidavit which will explain it much more accurately than I have.

**TIPPING J:**

Is it fair to say that the TAC, under 13, is the primary sustainability measure?  
10

**MR GALBRAITH QC:**

Yes, yes, absolutely Sir.

**ELIAS CJ:**

15 In the quota management –

**MR GALBRAITH QC:**

In the quota management areas, yes, because there are things which –

20 **TIPPING J:**

All within that context, yes.

**MR GALBRAITH QC:**

Yes, yes, no there are things which aren't quota managed of course which fall  
25 outside that, but –

**ELIAS CJ:**

Mr Galbraith, the Courts below place huge amount of weight on maximum sustainable yield, but section 13 makes the decision of setting the TAC one  
30 which can set it at that level or above, and in relation to the concerns that your clients express, it's the failure to set above the maximum sustainable yield that really has the adverse impact from their perspective on the fishery.

**MR GALBRAITH QC:**

It's a combination, Your Honour. Yes, it's correct that if the maximum sustainable yield was set, sorry, if the TAC was set significantly above the, hang on it's the other way round, if the maximum sustainable yield is set  
5 below the, sorry, if the TAC is set below the maximum sustainable yield then you get more fish, because you're not taking –

**WILSON J:**

Add the words 'is to maintain the stock', I think makes more sense doesn't it?  
10

**MR GALBRAITH QC:**

Yes, yes. So it's the other way around, slightly perversely that you actually want it set, if you want to get more fish, you want it set lower which is why, it's why the Minister slashed 15 percent and then 10 percent off to reduce the  
15 TAC because of uncertainty about the sustainability and therefore you've got your margins, so – but just to go back to the point I was making about these two issues, one is, if the TAC is set at a level where it's below maximum sustainable yield and therefore hopefully there'll be an increase in the stock, is one part of the equation, but the other part of the equation, as far as  
20 recreational fishers is concerned, is that there is an inequality when it comes to utilisation between the ability of the recreational fishers to extract or catch their share of whatever the TAC might be, the allowance under the TAC as against what will be caught by the commercial fishers because of the different techniques which each can adopt and also that there are different values  
25 which the different, the two sectors attribute to –

**ELIAS CJ:**

Big fish.

**MR GALBRAITH QC:**

To the fish.

**TIPPING J:**

Does – in layman’s language, does “maintains the stock at or above a level” et cetera, mean that you’re having more stock than you need? More fish than you need –

5

**MR GALBRAITH QC:**

Yes.

**TIPPING J:**

10 - to maintain maximum? So but do your people want that?

**ELIAS CJ:**

Yes.

**MR GALBRAITH QC:**

15 We would like more big fish. More fish and bigger fish.

**ELIAS CJ:**

Easier to catch and bigger.

20

**TIPPING J:**

Do you mean easier to catch because there’s more of them?

**MR GALBRAITH QC:**

25 There’s more of them, yes. So more of them and bigger so it’s more fun when you catch them.

**ELIAS CJ:**

Because there’s no minimum size for kahawai?

30

**MR GALBRAITH QC:**

There may be – no there wasn’t. No there isn’t, no.

**McGRATH J:**

And no maximum number, is that right?

**MR GALBRAITH QC:**

5 Well there's a mixed bag –

**ELIAS CJ:**

Twenty for recreation.

10 **MR GALBRAITH QC:**

Yes 20, there's a mixed bag number of 20, but one of the issues – one of the issues in this case was that when the Minister reduced the TAC, he didn't impose a bag limit number on kahawai and commercial fishers challenged that and that was one of the, in the High Court, His Honour held that that  
15 made the decision invalid because, in effect, the declaration is to what the recreational fishers take was to be wouldn't be effective unless there was a reduction in, sorry, a specification of bag limits.

**ELIAS CJ:**

20 I should flag that I think the notion of – that there's a question as to whether the notion of the recreational fishers' share or a decision about the recreational fishers' share is an accurate way to characterise the provisions of the Act.

25 **MR GALBRAITH QC:**

I'm not quite understanding what – is Your Honour saying in terms of share or?

**ELIAS CJ:**

30 The TACC mechanism, the section 21 mechanism, I question whether it's accurate to characterise it as the Court seemed to be doing as requiring the Minister to set a right, if you like, which is equivalent to the property right that commercial fishers have.

**MR GALBRAITH QC:**

I would, with respect, agree with Your Honour on that, that's the recreational fishers' position, the allowance under section 21 is of quite different character to the allocation which is made in respect of the TACC because what happens, I'm leaping ahead now, but under the – once a TACC is set, there's then a whole mechanism in the Act which automatically then divides it up between whoever the quota holders are, so it's an allocation in relation to a property right which is then split up into the various proportions which each property right holder has.

10

**ELIAS CJ:**

Which takes me back to the question why it isn't 13 that is key for the recreational fishers?

15 **MR GALBRAITH QC:**

The problems under section 13, well, I'll –

**ELIAS CJ:**

I've sufficiently flagged it, I would like you to address that Mr Galbraith.

20

**MR GALBRAITH QC:**

No, I understand, no, I've got to address that. Just staying with section 13 though for a moment, you'll see under, going back to subsection (2), the first little (a) is "Maintains the stock at or above a level that can produce the maximum sustainable yield", little (b), "Enables the level of a stock whose current level is below the maximum sustainable yield to be altered in a way and at a rate that will result in the stock being restored", and obviously the reason for that is that, and this situation did arise in relation to some stocks in the past where it was found that they were well, I don't know whether they're described as south and north, but they were well down on maximum sustainable yield and so the question then is well over what period of time are you going to require the stock to be rebuilt? Because of course, if you require it all to be done in one year then if it's a stock which is fished commercially

30

that would be disastrous, well may be disastrous for commercial interest for example, and so it may be that it's phased in over a period of time.

5 The second consideration is biological characteristics, et cetera, it's not much good saying it's all going to happen within one year if the stock's very slow breeding, for example. Little (c) is similar.

10 Now, subsection (3) is of importance in our submission and I think all Courts have regarded as important. It says, "In considering the way in which and the rate at which a stock is moved towards or above a level that can produce maximum sustainable yield under (b) or (c), the Minister shall have regard to such social, cultural and economic factors as he or she considers relevant." And that's, and I want to say more about this, but that's a different, in our submission, provision for consideration for social, cultural, and economic  
15 factors, which are there only to be had regard to than what we would say section 8 requires when it talks about social, economic and –

**TIPPING J:**

20 And it only applies if you need to move it towards or above, in other words, presupposing it's now below?

**MR GALBRAITH QC:**

25 Yes, you're going to move it – no, it's one way or the other Sir, so that, so it only applies to the rate of movement and the period of time over which it moves.

**ELIAS CJ:**

30 But this is what your – this is what the recreational fishers are seeking, they are seeking to have the level of stock moved to above the rate at which it produces maximum sustainable yield. I would have thought this was a key provision for them.

**MR GALBRAITH QC:**

Well our view on it, recreational fishers' view on it is that in setting the maximum sustainable yield, that because it's defined across in the definition section, is, in fact, the result of a scientific, to the extent that the scientists are able to accurately measure what the volume is that will maintain that, and so that's a scientific question as to how you get to maximum sustainable yield. This provision, subsection (3) is of course, only applies in relation to the rate at which you're moving towards or above, it does say a level that can produce the maximum sustainable yield, it only applies to the rate, not to the setting. The rate or the period of time over which you're doing it. It doesn't apply to the setting –

**ELIAS CJ:**

Yes, the way in which.

**MR GALBRAITH QC:**

Yes, it's the way in which you get there, rather than the what you're getting to, if I can put it as –

**WILSON J:**

Mr Galbraith, doesn't that give emphasis to the Chief Justice's earlier point that both 13(2)(a) and 13(2A)(c)(ii) refer to setting the catch at or above the level producing maximum sustainable yield?

**MR GALBRAITH QC:**

Yes, it does. Sorry, certainly the first one does, I think I missed the second one.

**WILSON J:**

Well it's repeated again, the same point, in (2A)(c)(ii) as I read it, the reference to at or above the level.

**MR GALBRAITH QC:**

And the Ministry's submissions make that point.

**TIPPING J:**

I'm not sure which provision my brother's referring to.

5 **WILSON J:**

Subsection (2A) of section 13.

**MR GALBRAITH QC:**

Oh, sorry, it's an amendment that Your Honour's referring to, isn't it?

10

**WILSON J:**

Yes, an amendment, yes.

**MR GALBRAITH QC:**

15 Yes, that's why I was getting lost.

**ELIAS CJ:**

Oh, I don't have it, that's why, perhaps we shouldn't have the –

20 **MR GALBRAITH QC:**

Mr Scott usefully has some copies of that.

**ELIAS CJ:**

I wonder whether we could be provided with the text of the amended –

25

**TIPPING J:**

These are relevant to our – well certainly relevant looking forward, I would say.

30 **WILSON J:**

I was referring to subsection (2A) of section 13, paragraph (c), subparagraph (ii).



**MR SCOTT:**

Yes, the amendment in subsection (2) is not – it was a previous amendment, so the new amendments that occurred last year as a consequence of the High Court’s decision of the *Anton* case, which I also have a copy for Your Honours of, it’s subsection (2), the new (2A), just trying to deal with the situation where it’s too difficult to actually try and estimate BMSY where the scientific information isn’t available, it’s dealing with that in particular, (2A)(c)(ii), and then the consequential amendments in subparagraphs (3), (4), and (7).

10

**WILSON J:**

And (3) again refers to “towards or above a level producing maximum sustainable yield”, so there seems to be a theme running through the section that expressly contemplating fixing the TAC in that way.

15

**MR GALBRAITH QC:**

Yes.

20 **TIPPING J:**

Well that’s what’s been puzzling me, are there any criteria anywhere which say when or whether the Minister should be looking above as opposed to at? Because that seems to be becoming your crucial point.

25 **MR GALBRAITH QC:**

Well, I don’t know the reason why it says what it says, but despite the fact that there’s a nice definition of maximum sustainable yield and going back to what I said a moment ago about scientists trying to work out what it is, the chances of the scientists, because fish live in the sea and you can’t count them like you can count sheep et cetera, any scientific estimate of maximum sustainable yield is going to be out by a number.

30

**TIPPING J:**

But if you’re going to err on the –

**MR GALBRAITH QC:**

Exactly, on the upside. Because if you err on the downside and you've got it wrong, then you're in –

5

**TIPPING J:**

Are you saying he's not erring on the upside enough?

**MR GALBRAITH QC:**

10 Well we're not attacking the TAC –

**TIPPING J:**

But is that the essence of it? Even though you're not attacking it.

15 **MR GALBRAITH QC:**

Well no, the essence of what we say about section 13 is that it's a sustainability section and therefore the emphasis is on just a point I've just made that if one looks back at the definition of sustainability –

20 **TIPPING J:**

But once you've got a pot under 13, somehow or other you have to divide up the pot under 21 don't you?

**MR GALBRAITH QC:**

25 Yes, that's right. I mean, from our point of view, the bigger the pot the better the answer and no argument about that.

**ELIAS CJ:**

30 But again, I have to remind you that my concern is that it's not a dividing the pot under 21 –

**MR GALBRAITH QC:**

Yes, yes, I accept that.

**ELIAS CJ:**

In which case it is under section 13 that these – that this provision has to be made.

5 **MR GALBRAITH QC:**

Well Your Honour I need to make submissions on that obviously.

**ELIAS CJ:**

Yes.

10

**MR GALBRAITH QC:**

But perhaps just to say something about it now, what we say is that section 13 is sustainability, sustainability is – the only, if you like to say, definition of sustainability is that in section 8. Section 8 says, and section 8 of course is talking about ensuring sustainability and it says it means “Maintaining the potential fisheries resources to meet the reasonably future needs – foreseeable needs of future generations”, so it’s a making sure there’s enough fish there now for the future, sorry, yes it is, it’s making sure that there are enough fish there now that given what you’re going to take out, that there’s going to be enough there for the future, that’s what that’s saying. Whereas we would say that a utilisation decision is to make sure that whoever is allowed to take the fish out now, it’s – are the people who, that whoever, between the various interests who want to take the fish out now are allowed to take out whatever volumes of fish they’re allowed to take out, there’s best achieving the wellbeings which are set out under the utilisation provision.

25

**ELIAS CJ:**

But Mr Galbraith, section 8(1) –

30 **MR GALBRAITH QC:**

Sorry, which?

**ELIAS CJ:**

Section 8(1) makes it clear that the Act is an Act with the purpose of utilisation on the condition of sustainability, it's not directed at different ends, it's sustainable utilisation, so this division is a little bit forced, isn't it?

5

**MR GALBRAITH QC:**

Well no, not with respect, Your Honour, because you could be ensuring sustainability because you've set it at a level which means that you're not going to run out of fish 20 years down the track, but you could have the utilisation being by a sector of –

10

**ELIAS CJ:**

Well, no, it's foreseeable needs of future generations, it's not just about running out of fish, it's about all the aspirations tied up with the fishery.

15

**MR GALBRAITH QC:**

Sorry, it was a bit glib what I was saying. But that's looking forward to future generations but making sure that there are adequate resources available to meet those foreseeable needs or to satisfy those foreseeable needs and the –

20

**ELIAS CJ:**

And utilisation has a conserving element as well.

**MR GALBRAITH QC:**

25 Yes it does, which is also forward looking, I agree with that.

**TIPPING J:**

But 21 is not within the sustainability part.

30 **MR GALBRAITH QC:**

No.

**TIPPING J:**

The sustainability part is anchored in, I would have thought, 13.

**MR GALBRAITH QC:**

Yes.

5

**TIPPING J:**

But once you've got past 13, you're in a different exercise aren't you?

**MR GALBRAITH QC:**

10 Yes, you're not – well, except to the extent that it's correct to say that the overall purpose which is expressed in section 8(1) must obviously inform application of any part of the Act but yes, Your Honour's quite correct in a –

**TIPPING J:**

15 I don't see how, logically, once you've set the total, your intersustainability when you're working out how the total, pace the Chief Justice's point, is to be is to be worked out, if you like, as between, I'll try and be neutral, as between the competing interests.

20 **MR GALBRAITH QC:**

Well I agree, and that's exactly our point, but what we're saying is that that you're principally, not solely, but you're principally focused on sustainability and making a decision under section – well the Minister is to make a decision under section 13. But when it comes to section 21 and who is going to get the  
25 benefit shot, we say of the access to the fish which are going to be allowed to be caught under the TAC, total allowable catch, then you have a decision to make which reflects, well which should reflect, that it goes, that the ability to use that TAC goes to those sectors for which it has the greatest value, but the value being those expressed in the utilisation definition of social, economic  
30 and cultural wellbeing.

**TIPPING J:**

But that doesn't exclude the commercial?

**MR GALBRAITH QC:**

No, not for a moment, never have said that, we've never said that.

**TIPPING J:**

5 No, but to just get that on the table.

**MR GALBRAITH QC:**

Absolutely, absolutely, but it's a decision that's got to be made but it's never been the case that the commercial's –

10

**TIPPING J:**

You're not saying, I understand, that you have a prior anything like right to have all your people satisfied before you get to the commercial people?

15 **MR GALBRAITH QC:**

It could happen, let's take two extremes. It could happen that when one looks at, in our view, the objectives of social, economic, cultural wellbeing that in a particular case, the commercial's got by far the greatest bulk of whatever was available or vice versa. But the decision and the analysis has to be made in those terms, that the greater wellbeing is that the allowance for recreational fishers should be whatever, the allowance for customary rights should be whatever, and the allowance for commercial should be whatever.

20

**TIPPING J:**

25 I'm having difficulty grasping what's the difference between your approach and what the Act – I mean, the Act surely contemplates the unfortunate Minister having set the total then has to pace other views, proportion, if you like, the total amounts as he thinks all these factors justify. I mean, that's what we basically said in *Snapper 1* wasn't it?

30

**MR GALBRAITH QC:**

Yes, well –

**TIPPING J:**

I know the Chief Justice indicated –

**MR GALBRAITH QC:**

I'm on the Chief Justice's side on this part of it.

5

**TIPPING J:**

Well I just – what I want to understand clearly is what your argument is, is it that you have to look at the recreational people in a vacuum and satisfy them before you move on to the commercial people, or do you acknowledge that it's a composite exercise where you try and balance everybody's interests?

10

**MR GALBRAITH QC:**

Well what we say is this, that you've got to – in making the decisions under section 21, because there's first the decision to allow for non-commercial, including customary, that's the first thing you've got to do.

15

**ELIAS CJ:**

And death.

20

**MR GALBRAITH QC:**

And death, and mortality.

**ELIAS CJ:**

That's quite significant because it's an indication that you're leaving out of what is available for quotaing what's gone, including to recreational fishers.

25

**MR GALBRAITH QC:**

Yes.

30

**ELIAS CJ:**

There's no indication there of making, in section 21, of making a decision as to what take recreational fishers should have.

**WILSON J:**

Well, what does the phrase “allow for” mean in practical terms?

**MR GALBRAITH QC:**

It means – well, to allow for, you’ve got to allow for, to put it that way and  
5 you’re and you can’t allow for by not allowing for, it’s like the old thing about  
licensing a parade, you can’t prohibit, you’ve got to license. So “allow for” is a  
positive obligation.

**TIPPING J:**

10 You’ve got to give them something.

**MR GALBRAITH QC:**

You’ve got to give them something, in our submission, with these objectives  
here, if I say, in view. Put it this way, it’s no good setting off down a road if  
15 you haven’t got the faintest idea where you’re going to and, with great respect,  
that’s really what the commercial fishers submission comes down to. The  
objective is to enable people to provide for their social, economic and cultural  
wellbeing when you come down to utilisation. Now that’s an objective about a  
state of affairs both present and future that one has to take into account. So,  
20 when you come to allow for recreational fishers and customary fishers and the  
Ministry and the Minister in relation to their allowances for customary fishers  
have, in our submission, done it entirely appropriately. The commercial  
fisher’s quarrel that the allowance for customary fishing has been too large,  
they talk about it being a phantom allowance because in fact the evidence is  
25 that Māori in general take under the recreational fisher’s hat rather than under  
their customary hat and so the customary allowance which is made appears  
on the evidence to be significantly larger than what in fact is taken under  
customary allowance. We would say the reason for that is because the  
Minister is recognising that in that way he is enabling Māori when they elect to  
30 use that to provide for their social, economic and cultural wellbeing by not  
putting a cap on them keeping them rigid to whatever their take was last year,  
that it provides for the opportunity for them to recognise and reflect their  
relationship which they have with fish as a resource, as a food resource.

**ELIAS CJ:**



Isn't it an estimate of what is taken just as he has to estimate what dies from natural causes or in the other paragraph?

**MR GALBRAITH QC:**

5 Well no Your Honour. The difficulty about using catch for example –

**TIPPING J:**

Which paragraph?

10 **ELIAS CJ:**

B or C, mortality.

**TIPPING J:**

15 Mortality caused by fishing, that's when you have to throw back the undersized one –

**ELIAS CJ:**

Yes, sorry, modern, natural causes, by fishing, other fishing. Is that by-catch and things like that?

20

**TIPPING J:**

Yes and throwing back undersized ones because they die, I would have thought.

25 **McGRATH J:**

Mr Galbraith, this idea of there being a greater wellbeing in the Act. This is the ultimate question of how the two wellbeings are going to be aligned, a policy question, or in other words what I'm suggesting to you that the Act doesn't actually have a concept of greater wellbeing against which the

30 Minister's decision can be assessed for lawfulness?

**MR GALBRAITH QC:**

Section 21 doesn't, no Sir. In section 21 at the moment and we've used the term which we borrowed, at least crediting it to Justice Fogarty's paper about a conceptual abyss. I mean, there's nothing in section 21 which tells you anything other than that an allowance has to be made for non-commercial including customary and for mortality and then a TACC is to be set.

**McGRATH J:**

Do I understand you to accept that the mere fact that the commercial interests are allowed for first doesn't give them any greater quality than the commercial interests?

**MR GALBRAITH QC:**

The non-commercial interests?

**McGRATH J:**

Mmm.

**MR GALBRAITH QC:**

That the non-commercial interests allowed for first, yes.

**McGRATH J:**

I am sorry, that the recreational are allowed for first, aren't they, well non-commercial because customary as well.

**MR GALBRAITH QC:**

Yes, customary as well.

**McGRATH J:**

You agree, that doesn't give them any greater place?

**MR GALBRAITH QC:**

It doesn't of itself give them any greater place other than they've got to be allowed for, so can't be nought because that is not an allowance, whereas for TACC can be set at zero and the Act specifically provides for that, so you've

got to make an allowance so to that extent yes, they do have a greater entitlement.

**McGRATH J:**

5 It is all a question of how you do the sum though, isn't it, in the end. If you go for TAC minus non-commercial interests to get commercial interests that's not suggesting that non-commercial interests have any greater value or priority, is it?

10 **MR GALBRAITH QC:**

Not of itself it doesn't but in considering the allowance to be made for non-commercial including customary, you've got to do that in a sense first –

**McGRATH J:**

15 In time you have to do it first –

**MR GALBRAITH QC:**

– you've got to actually do it first and in doing that first and in our submission properly considering the wellbeing issues under the utilisation definition, and  
20 take customary as an example of this, you may get and the Minister has got to the conclusion over the years that the customary allowance should be larger than what was taken under customary last year. In other words, catch history for customary isn't the appropriate allowance to make because of the wellbeings which are identified, or have been identified in respect of  
25 customary. Now you may come to that same conclusion in relation to non-customary recreational if I put it that way. You may not, well I don't say you may not, but the Minister may or may not but he's got to consider it in that qualitative context and you can't shortcut it by simply going to a numbers game of saying well that's what you got last year, I'm not going to be bothered  
30 about whether that's meeting your wellbeings or the – or would better meet your wellbeings. I'm simply going to slice and dice across the board based on the numbers. You can't jump to that. You could get to that conclusion.

**McGRATH J:**

But all that's' really saying is he's got to have all relevant factors aboard before he can legitimately prefer any particular factors?

**MR GALBRAITH QC:**

5 Yes I think that's got to be fair Your Honour.

**TIPPING J:**

It's a failure to take into account a relevant factor you're really saying isn't it?

10 **MR GALBRAITH QC:**

Yes.

**TIPPING J:**

When you boil it all down?

15

**MR GALBRAITH QC:**

Yes.

**TIPPING J:**

20 That they – it's too far fettered his discretion, if you like. He's said well I'm not going to worry about these other things.

**MR GALBRAITH QC:**

25 There's a number of things we'd say about it in terms of what actually happened but what we would say is –

**TIPPING J:**

But no one can argue, and it isn't now argued is it, that he can look at the numbers in isolation of all other factors, no one is arguing that surely?

30

**MR GALBRAITH QC:**

No, nobody is now arguing that Sir but the difference as I said beforehand for example, the party that's closest to our position is of course now the Crown and the Ministry, but what the Ministry says about the consideration of the

non-commercial interests under section 21 is that in identifying what those interests are, that one takes into account the social, economic and cultural factors so that you identify the fact that for example going fishing is part of the New Zealand cultural way of life for a lot of people and you identify that as a factor in essence to be taken into account.

**TIPPING J:**

Could you put it this way? You've got to decide how much utilisation should be available to the recreations?

10

**MR GALBRAITH QC:**

You've got –

**TIPPING J:**

15 What does utilisation mean?

**MR GALBRAITH QC:**

Yes.

20 **TIPPING J:**

See the definition?

**MR GALBRAITH QC:**

Yes.

25

**TIPPING J:**

Is that effectively your point?

**MR GALBRAITH QC:**

30 That's what we're saying Sir and – but the definition then leads you to not just considering these matters as factors but aiming to achieve the objective of enabling people to abide to their social economic and cultural wellbeing. It may be that because of the competing wellbeings, because as I said before there's no issue that commercial interests or employees or the general public

buying fish through the fish shops having been caught by the commercial interests, their wellbeings are not to be considered. It may be that because after a proper analysis of the various wellbeings, you can't achieve everybody's wellbeing. Everybody would like more, it's like Oliver Twist, everybody wants more but there isn't more so a decision has got to be made and you could end up, and that's what I said earlier on, you could end up deciding that the balance is struck and having made this assessment in such a way that the end result is that you do use catch history and you do use a – simply a proportional because there's no better answer but you've got to go through the process of trying to – of identifying the various wellbeings, weighting them and then deciding well can we properly accommodate if I can put it that way, those wellbeings by a decision which makes a greater allowance for customary or a lesser allowance for customary or a greater allowance for recreational or a lesser allocation of TAC for commercial. What you can't do is throw the baby out with the bathwater and simply hop to catch history and slice and dice on that basis without having got there through appropriate process.

**McGRATH J:**

But in the end, at some stage during the point of which the Minister is looking how to accommodate the various conflicting wellbeings, do you agree the decision becomes a policy one? I mean if the Minister were to decide, "I'd like to give recreational fishers more so that's how I'll come into it", he can't be assessed on whether, unless it's an irrational decision, he can't be assessed on whether he's correctly accommodated wellbeings?

**MR GALBRAITH QC:**

Well it would be difficult to assess him on that Sir. One would have to, because of the nature of the considerations. I mean, I agree with you – I'm sorry that's not a very – I should give you a straight answer.

**McGRATH J:**

I'm not interested if it's difficult or not. I just want a conceptual answer.

**MR GALBRAITH QC:**

There must be significant policy elements in the decision which he makes. No argument about that Sir, which it why it's appropriate for the Minister to make it.

5 **TIPPING J:**

But one of the things the poor Minister has got to wrestle with is that the definition of utilisation includes conserving?

**MR GALBRAITH QC:**

10 Yes.

**TIPPING J:**

In fact that's the very first word used.

15 **MR GALBRAITH QC:**

Yes and –

**TIPPING J:**

I don't know how he wrestles with that. So there's a sort of echo, or more  
20 than an echo, a loud reminder of sustainability at the very first step of the utilisation?

**MR GALBRAITH QC:**

Yes and conservation and conserving are defined also Sir as conservation  
25 means the maintenance or restoration of fisheries resources for their future use and conserving has a corresponding meaning.

**TIPPING J:**

So there's a sort of, there's an inevitable intra-link.

30

**MR GALBRAITH QC:**

Absolutely. No argument about that at all and that's one of the – of course that's one of the contentions, policy contentions I suppose, I might, so, of the recreational fishers that, that allowance to recreational fishing is much more of

a conserving – has a much more conserving consequence than allowance to commercial fishing for the reasons I expressed before. People going out in little tin boats trying to catch fish are a heck of a lot less efficient than large trawlers with spotter planes etc and so inevitably –

5

**McGRATH J:**

Well the Kahawai has got a chance of getting off the line because of the way it fights, yes.

10 

**MR GALBRAITH QC:**

It's got a chance of getting away yes. That's what it boils down too. But certainly in my experience any species has a chance of getting away.

**ELIAS CJ:**

15 

Mr Galbraith, just looking at the language of section 21(1). You're really suggesting that recreational interests includes utilisation which brings in section 8(2) and that it's not simply the take that recreational fishers are taking, that has to be estimated, it's their aspirations as well?

20 

**MR GALBRAITH QC:**

Yes it's a value. It's not just a number it's a value. I've put some –

**ELIAS CJ:**

25 

I understand that. Why – then how do you explain the paragraph b, "Or other mortality to that stock caused by fishing"? Because that's suggestive of these other two interests really in this section requiring an estimate of what is taken?

**MR GALBRAITH QC:**

30 

Well it – for mortality – if the allowance is made for non-commercial fishing interests, let's just say that for the moment, the allowance will be a numerical number. It'll be so many tonnes. It's then assumed that there'll be a mortality to the stock caused by fishing. What I'm just hesitating – can I just ask Mr Ryan for help in this?

**ELIAS CJ:**



Yes.

**MR GALBRAITH QC:**

I say this with just a little bit of caution, but I think I'm right in saying this. That  
5 what happens is the Ministry estimates mortality based on the overall TAC so  
it's not mortality just in relation to what non-commercials take, it's mortality on  
the whole volume of the TAC and I think I have in my memory somewhere  
5 percent is sort of a –

10 **TIPPING J:**

Mortality doesn't mean what the commercial people take, does it? It's some  
independent means of debt if you like.

**MR GALBRAITH QC:**

15 Sorry, it's not – if I catch a fish and take it home and cook it, that's not  
included in the mortality. The mortality is what happens as a result of fishing  
but doesn't become – doesn't end up in my pan or the commercial fisher's  
freezers.

20 **TIPPING J:**

Yes.

**MR GALBRAITH QC:**

So it's if you allow fishing of 2000 tonnes there'll be a certain percentage of  
25 fish which nobody will ever get, that will die.

**ELIAS CJ:**

I understand that. It's the equivalence between paragraphs A and B I'm  
asking you about.

30

**MR GALBRAITH QC:**

Yes well the B doesn't come from the A. The B comes from the total amount  
of the fishing.

**ELIAS CJ:**

I understand that.

**MR GALBRAITH QC:**

I'm sorry.

5

**ELIAS CJ:**

No I understand that. What I'm looking at is in terms of the legislative equivalence because your packing a lot into section 21(1) which on one view may better come into section 13 and I simply point out to you that paragraph B is concerned with other mortality caused by fishing which on one view could suggest that what is in issue in section 21(1)(a) is mortality caused by Maori customary non-commercial fishing and recreational interests which would have to come off before you can set the quota. And it ties back into my question of what decision the Minister is taking here because this part of the Act is about the quota management system and these allowances have to be made because otherwise the TAC would be exceeded.

10  
15

**MR GALBRAITH QC:**

Yes.

20

**ELIAS CJ:**

But it seems to me that section 21 really is about identifying what quota can be issued.

25 **MR GALBRAITH QC:**

You mean what's left?

**ELIAS CJ:**

What's left.

30

**MR GALBRAITH QC:**

I think the problem about that is that there's nowhere else where those interests are provided for.

**ELIAS CJ:**

Section 13?

**MR GALBRAITH QC:**

But section 13 doesn't provide – it just provides for the total allowable catch.

5

**ELIAS CJ:**

The total allowable catch requires the Minister to make a judgement about whether the stock is to be preserved at the maximum sustainable yield or above it?

10

**MR GALBRAITH QC:**

Yes. Yes but – but that's done, Your Honour, in relation to – if what Your Honour is suggesting is that the Minister in deciding that has to take, just think about what – how much is Maori customary going to take and how much is Māori – sorry, is non-commercial recreational going to take. That's reading an awful lot into maximum sustainable yield or above because that's the only room you would have. Maximum sustainable yield is simply a defined scientifically calculated with error as I say, plus or minus, but it doesn't contemplate that you get into a question about how much should Maori customary take –

20

**TIPPING J:**

Who's going to do the catching –

25

**MR GALBRAITH QC:**

Who's going to have it?

**TIPPING J:**

- of the take?

30

**MR GALBRAITH QC:**

No.

**TIPPING J:**

You just say this is the amount that we can have caught?

**MR GALBRAITH QC:**

Yes.

5

**TIPPING J:**

No, who is going to do the catching is a, I would have thought with respect, was a quite separate point.

10 **MR GALBRAITH QC:**

Yes and that's a utilisation point not a sustainability point.

**ELIAS CJ:**

It's not a quota management point?

15

**MR GALBRAITH QC:**

No it's not a quota management – well it is and it isn't because if somebody else has caught it then the quota management can't catch it. It's really – that's – which is the point in the sense Your Honour is making to me that if it's gone already then they can't have it, the quota management can't have it. So that decision's got to be made somewhere and in my respectful submission 21 is the, I think I'm right in saying, is the only place where it is contemplated it be made.

25 **TIPPING J:**

Because other than on a global basis, sorry, other than on an individual basis as to how much each recreational person can catch per day for example, there is no means of limiting recreational or other like fishers in the way you can limit the commercial catch.

30

**ELIAS CJ:**

How does section 21 limit what recreational fishers take?

**TIPPING J:**

It doesn't.

**ELIAS CJ:**

It's a phantom provision in that sense.

5

**TIPPING J:**

It doesn't directly and I agree with the Chief Justice that it is an estimate, it's an estimate.

10 **MR GALBRAITH QC:**

It doesn't directly because you can't – in this sense if you pick a number, it doesn't matter what the number is, pick a number and say recreational are only going to be allowed to take "x". The only way that you can effectively enforce that is by either closing fisheries or bag limits, really bag limits is the only way. The reality of –

15

**ELIAS CJ:**

Or the regulations, just saying you can't fish and so on.

20 **MR GALBRAITH QC:**

Yes, I agree, I mean you can do that sort of thing. In a practical sense of course that may or may not precisely achieve the – because you can't supervise what every recreational fisher actually catches, so it's not as precise as it is with the commercials where there are returns et cetera and that's one of the issues that you can only estimate and I think that was the word Your Honour correctly said before and the estimates, the big estimates, that's how much do non-commercial fishers take, come from survey evidence because there is effectively no other way of doing it. When I say survey I don't just mean people filling in a form and writing back but also having people employed to go to landing spots and identify what people are bringing on shore et cetera and interviewing people. With Māori customary it's a bit different of course because I think under the customary regulations there has to be a return made, so that's more easily identified.

25

30

**TIPPING J:**

Would the word “recognise” be less problematical than “allow for”? Because that’s really what you’re doing, you’re recognising what is likely to happen under these three heads before you can be definitive as to the TACC. I’m not  
5 trying to be semantic Mr Galbraith.

**MR GALBRAITH QC:**

No, no, I understand. The difficulty about that Your Honour is that if you use the term recognise it tends to imply and I think this was the point the  
10 Chief Justice was making to me, that that would be a recognition of what you think actually happens in a sense –

**TIPPING J:**

Not necessarily, no, no. It’s recognising recreational interests. To my mind,  
15 that word “interest” is quite an important word. It’s got nothing to do with what has actually happened, it’s to do with what their interest in the fishery is.

**MR GALBRAITH QC:**

The Crown submission accepts that because it says that you can reach a  
20 conclusion that recreational fishers’ values are such that you should make an allowance that allows them, even though they’re not catching at the moment, to grow into whatever number might –

**TIPPING J:**

25 Personally, I think they would probably have said “have regard to” if they hadn’t used that phrase immediately previously in the sentence.

**MR GALBRAITH QC:**

They started off when they were doing the Bill I think, using that phrase “shall  
30 have regard to” and changed it to “shall allow for”.

**TIPPING J:**

Well all right but maybe there was some great grammarian or literary person on the select committee, I don't know but perhaps that's a long shot Mr Galbraith.

5 **MR GALBRAITH QC:**

Yes Sir, I'm not sure of that.

**MCGRATH J:**

It was a result of lobbying, wasn't it?

10

**MR GALBRAITH QC:**

Well it was because the recreationals were lobbying for, were concerned about the fact that –

15 **MCGRATH J:**

Your real point is that "allow" has a judgmental connotation which goes straight to the wellbeing factors.

**MR GALBRAITH QC:**

20 Yes and the judgment has got to be made with something in mind, otherwise it's pointless.

**TIPPING J:**

25 Yes, regard to, recognise, allow, your more than zero point is I think crucial there.

**WILSON J:**

"Allow for" must be more than "have regard to."

30 **TIPPING J:**

Yes, indeed, indeed.

**MR GALBRAITH QC:**

Yes, it must, you've got to do – so you've got to have an object in mind, an objective in mind.

**TIPPING J:**

5 I accept that, that must be right.

**ELIAS CJ:**

“Must provide for”, would probably be –

10 **MR GALBRAITH QC:**

“Must provide for”, yes. I'm repeating myself now but that's the essence I think of the difference between the three views which are represented before Your Honours, is whether one interprets section 8(2) in the utilisation objective, as being an objective which should be taken into account when  
15 you're allowing for under 21(1) or whether they are simply, as the Ministry submission suggests, simply factors to be taken into account and our submission quite obviously is that well that's inconsistent with the wording both in section 21(1) which says “allow for” and it's also inconsistent with the wellbeing definition of utilisation in section 8(2) or the commercial fisher's  
20 position which I'm not entirely clear on but which seems to be that this is an issue which should be taken and was taken into account under section 13 and you can't then take into account also under section 21 and therefore I think therefore, once the TAC has been set, it's simply – there should simply be a catch history slice and dice under 21 if there has been any consideration  
25 that's placed the TAC above maximum sustainable yield. Now I may be not accurately representing the commercial fisher's submissions in that but I think there are those sort of three – it probably reflects in a sense the commercial fishers' approach to it.

30 **TIPPING J:**

The crucial point I think you make, you've made this dichotomy a little – quite a lot earlier. You see them not as factors but as objectives?

**MR GALBRAITH QC:**



Yes. That's the crucial point.

**TIPPING J:**

That's the crucial –

5

**MR GALBRAITH QC:**

That is the absolute crucial point. That's the difference of emphasis between Court of Appeal and High Court.

10 **TIPPING J:**

That's really the debate.

**MR GALBRAITH QC:**

Yes, that's the debate.

15

**ELIAS CJ:**

That's the application of section 8?

**TIPPING J:**

20 Yes.

**MR GALBRAITH QC:**

Yes. Are you aiming at something or are you simply juggling something.

25 **TIPPING J:**

Of course there are such diverse things that you're aiming at in utilisation that it becomes although interesting, intellectual issue in practical terms, I wouldn't have thought it would make much difference but it's important that the mind is correctly attuned.

30

**MR GALBRAITH QC:**

Yes because if you go through the right process, and as Your Honour in my respectful submission rightly says, that the mind is correctly attuned, I mean you will get to a different point. Well, sorry.

5 **TIPPING J:**

You may get to a –

**MR GALBRAITH QC:**

10 You may get to a different point than if you simply set out on a road with lots of things in your pocket and it's sort of an accident which comes out, and that is the essence of the dispute between the parties.

**BLANCHARD J:**

15 The problem is that there are similar objectives in relation to the commercial fishers?

**MR GALBRAITH QC:**

Yes. It becomes, ultimately it becomes evaluated.

20 **BLANCHARD J:**

Just wondering where we go with all this?

**MR GALBRAITH QC:**

25 Well it's something which the Ministry is grappling with and as I said before Sir certainly has moved on over this period.

**BLANCHARD J:**

They've moved so far that I'm a bit surprised that you're still persisting.

30 **MR GALBRAITH QC:**

Well it's the difference Sir between factors taking account of and objective.

**BLANCHARD J:**

But there are objectives on the other side as well.

**MR GALBRAITH QC:**

Well I wouldn't regard it as being on the other side Sir, I would say that there  
5 are objectives and one has to evaluate them.

**BLANCHARD J:**

But section 8(2) applies equally –

10 **MR GALBRAITH QC:**

Yes.

**BLANCHARD J:**

- to the commercial fishers?

15

**MR GALBRAITH QC:**

Yes and beyond. Beyond the commercial fishers. But you could end up –  
well just take a simple example Sir and it may or may not be helpful. It may  
be that, I'm not saying it's the facts at all, it may be that the commercial fishers  
20 for example are losing money out of some particular species or that it's all  
getting exported to feed moggies in Australia as against there are people in  
New Zealand who can't afford to buy snapper anymore and they need to buy,  
you know, Maori are going fishing because economic times are hard and they  
need to provide for themselves. Now if those are, I'm not saying they are the  
25 facts, but it that's what your evaluative approach leads you to conclude are  
the facts, then a Minister would have a very justifiable basis for making an –  
sorry, for making an allowance for non-commercial one way as against  
another way, and vice versa.

30 **TIPPING J:**

But in utilisation, as my brother points out, you've got the diversity of social  
and cultural as against economic.

**MR GALBRAITH QC:**

Yes. And one of the – because we have been living in a more economic age, if I can put it that way maybe to our pain at the present moment, there are always attempts of course to bring these evaluations down to some common basis and for example there was an attempt made to evaluate the different value which recreational fishers put on this fish stock as against commercial fishers and the South Australian Economic Institute did the analysis and came up with the answer that recreational fishers placed a value 11 times higher than commercial fishers.

10 **ELIAS CJ:**

How much would you pay for the opportunity to go fishing? That was what it was based on.

**MR GALBRAITH QC:**

15 Yes, that's what it boils down to, yes.

**TIPPING J:**

I would have thought they'd have been much better off simply having 8(1), and not tried to give these difficult and rather window dressing sort of definitions.

**MR GALBRAITH QC:**

Ah well politicians Your Honour.

25 **ELIAS CJ:**

Well it's a – it's just a recognition that there are a number of claims on these issues.

**TIPPING J:**

30 Yes.

**ELIAS CJ:**

That does have a social dimension as well as an economic dimension.

**TIPPING J:**

My point is that it seems to have spawned, if I may use that expression, very sort of fine points being taken.

**MR GALBRAITH QC:**

5 Well the difficulty is if you don't have, as I said before, an objective or something to aim at, then it's an accident where you end up. Unless of course what you do with say catch history proportionality is you simply preserve the status quo. I mean you might move the status quo up and down, it's 10 percent up or 10 percent down but you're just – you're locked into history  
10 and that is not a good way, and it's not an appropriate way, in my respectful submission, for section 8 to be applied because it is forward looking.

**TIPPING J:**

Is your client's primary purpose reflected by this thought, and forgive me if I'm  
15 just repeating what you've said, that you're trying to get out of the catch history bind?

**MR GALBRAITH QC:**

Yes. We want to look forward.  
20

**BLANCHARD J:**

But isn't the Minister really acknowledging that already? Acknowledging he has to take into account qualitative factors, he's simply saying, as I understand it, that there isn't sufficient precision in that, the means of  
25 measurement are not there, but I think he's saying if they prove to be there I'll certainly take it into account?

**MR GALBRAITH QC:**

I'm not sure if he's – I think he's saying part of what Your Honour said –  
30

**BLANCHARD J:**

Bear in mind also, and this is one of my concerns about this case, that we can't just focus on kahawai, this has got to apply across the board.

**MR GALBRAITH QC:**

Yes.

**BLANCHARD J:**

With a lot of different species and a lot of different fishing areas.

5

**MR GALBRAITH QC:**

It won't –

**BLANCHARD J:**

10 We can't come down with some nice formulation which effectively ties the  
Minister up in knots.

**MR GALBRAITH QC:**

I accept that entirely Your Honour. I think our submission identified what  
15 sometimes are called shared fisheries Sir. There are only a relatively small  
number of fisheries where there is any significant recreational interests versus  
commercial interests because of course most of the fish stocks which are  
subject to the quota management system are out in the deep blue waters so  
there really isn't any contest. But there are fish stocks, obviously important  
20 ones, snapper obviously is one, kahawai and there's a handful of others Sir  
where there is the squeaky meeting of the two interests. We're not wanting at  
all to tie the Minister up in knots. What our concern, the recreational fishers'  
concern, is the Minister has in the past tied himself, or institutionalised himself  
into a position which is, as I said, historical and not forward looking whereas  
25 section 8, as you would expect, is in fact intended to be forward looking and  
so what we're seeking from the Court, if the Court agrees with that position, is  
that there needs to be an application of section 8 by the Minister which has  
the objectives of section 8 in view rather than just, as I said before and I'm  
repeating myself now, just as factors to be taken into account. You've got to  
30 be trying to get somewhere I suppose to put it colloquially and the trying to get  
somewhere is not where you've just come from. You want to go somewhere  
else. And if one thinks about it just again very simplistic terms, in the 20 plus  
odd years since we've had nothing but proportionality, the population for

example has increased by goodness knows what percentage and that's got to be a factor that should be taken into account. That's not hard to estimate.

**ELIAS CJ:**

5 If it's suitable we'll take the adjournment now. You might like to consider what you want to –

**MR GALBRAITH QC:**

What else I need to say.

10

**ELIAS CJ:**

That hasn't been covered. I certainly would be assisted by hearing something more about the proportionate reduction dimension and what you say about that.

15 **COURT ADJOURNS: 11.30 AM**

**COURT RESUMES: 11.49 AM**

**MR GALBRAITH QC:**

I'll be very brief. Just in relation to that proportionality issue and just going  
20 back to section 13 for a moment, and if the Court would excuse me, just talking for a moment about the facts of this particular case really is illustrative, not in terms of asking Your Honours to make any decision on it. What happened in relation to the tax setting here was that there was a great deal of uncertainty as to, if I could put it this way, what maximum sustainable yield  
25 was in relation to this fishery, because the stock assessments which had been made were old and incomplete and had question marks about them, so at the end of the day, what the Minister did, was he, rather than using the old stock estimates, though he had some regard to them, he adopted the best estimates that there were of what actual take had been by all sectors as being  
30 the estimate of – assessment of the stock. So that's where he started from. Then he was worried because that was itself uncertain and of course it wasn't a true stock, it wasn't a scientific stock assessment at all, it was just looking at

what – the best estimates of what have been coming out, and so he decided in section 10, Your Honours may recall, which is the best information, the information principle section, says that you’ve got to make a decision even if the information’s uncertain, but you’ve got to use the best available  
5 information, you’ve got to consider any uncertainty and you’ve got to be cautious where the information’s uncertain. So he, the Minister, one can say quite properly, was cautious about taking that estimate as being the figure that should be plugged in to calculate the maximum sustainable yield and therefore cut by 15 percent and then 10 percent on a precautionary basis,  
10 concerned about sustainability because of the uncertainty. So that’s why, in my respectful submissions, I said earlier, that’s why section 13 allows for at maximum sustainable yield or above because you can do the fanciest calculation in the world, but if your information sources are uncertain, as they certainly were here, then there’s a fair chance you’re going to be wrong,  
15 you’re not sure which way you’re going to be wrong, but section 10 says you should be wrong on the – sorry, that you should make sure you’re right on the cautious side –

**ELIAS CJ:**

20 Section 10 deals directly with that, the need to make your best stab, section 13 though, in speaking of “above the level”, would apply also if you had perfect information, so it is about –

**MR GALBRAITH QC:**

25 True. That’s –

**ELIAS CJ:**

It’s not a margin of error provision.

30 **MR GALBRAITH QC:**

Well I think, with respect, given what I said before about assessing fish stocks is more difficult than assessing sheep or that, that’s going to be the more frequent application of the above opportunity or power, power I suppose it is rather than opportunity, because you’re generally going to be uncertain, you’re



never going to be – there's no chance of you being precise, put it that way, that's the one certainty, you're never going to be precise because you can't be. So that, in my respectful submission, is – at least indicates what the primary purpose in section 13 is and what the primary purpose of the ability to set an MSY above is, and that's, in our submission, what happened here.

When you come to 21, not in to being risk averse or anything like that, that's not a consideration under 21, 21 is identifying allowances, mortality and TACC across the stock and that's where, of course, we say that wellbeing has come into play. So where you've got, as the Minister did here, a proportionate reduction, total 25 percent over two years, that, as Her Honour the Chief Justice rightly put to me, in a general sense is good from the recreational point of view because it means that the Minister, if he's erred, is erring on the conservative side and which means that the maximum sustainable yield, or the fish stock should go up. So in that sense, it's good, but it's one of those curate's eggs things, it's good on the one side and bad on the other side, because of course what was then done proportionately because that was the approach that was taken, catch history and proportionality, was that, in effect, non-commercial interests received a 25 percent lower allowance, as did the commercial, so it was across the board, so TAC was one thing and the allowances then made were the other thing. We would say, with respect, the error there was, at the end of the day, in assuming that there was equal impact on wellbeings arising across the board without seeking sufficiently to identify whether the impact of those reductions, which, as I say, in the broad sense were of advantage to recreational fishers, were in the immediate sense detrimental to them and potentially lessened their wellbeing more than it lessened the wellbeing of the commercial fishers and the wellbeings being shared or lessening being shared on a proportionality basis.

30

Now, I accept entirely what Justice Blanchard said, those are different issues to grapple with, but in our submission, they had to be grappled with and instead what happened in a particular case, we would say is the Minister was given a way out on the basis that he could prefer and there was a policy

preference for catch history and proportionality and he was told, among other things, that if he did anything different from proportionality then the commercial fishers would sue him and if they sued him, they'd be claiming compensation because they claim they had a property right for which they could be compensated and one can only but imagine the "Yes Minister" conversation that would have gone on, had the Minister thought he might buck that advice.

**TIPPING J:**

10 Mr Galbraith, a point that's just struck me on looking at section 20, subsection (5B) seems to be a pretty obvious point, but presumably it was put in for some purpose, that you can't have a TACC that's greater than the TAC.

**MR GALBRAITH QC:**

15 I'm going to ask Mr Scott the answer to this one.

**TIPPING J:**

Why was it necessary to say what seems on its face to be a blindingly obvious

–

20

**MR GALBRAITH QC:**

It does seem blindingly obvious and I was just suggesting to Mr Scott that it was because of some threat he made at some stage, but he says no, it wasn't him.

25

**TIPPING J:**

Well he has a great reputation in this field but even he, I suspect, would have had –

30 **MR GALBRAITH QC:**

Yes, he disavowed that immediately Sir, he said, but apparently somebody at some stage raised it as a theoretical possibility but it seems, I agree with Mr Scott –

**TIPPING J:**

It seems to imply that it can be up to the TAC.

**MR GALBRAITH QC:**

5 Yes it can be, yes it can be.

**TIPPING J:**

Which means you'd squeeze out everybody else.

10 **MR GALBRAITH QC:**

Yes.

**TIPPING J:**

Doesn't that have a bearing on the meaning of "allow for"?

15

**MR GALBRAITH QC:**

No Sir, because what you've got to do is identify the interests, and if you take, for example, I'll get myself wrong with my fish, but –

20 **ELIAS CJ:**

Orange roughy.

**MR GALBRAITH QC:**

I was going to say orange roughy, I think orange roughy –

25

**ELIAS CJ:**

Well it's been fished out, it's a very bad example.

**MR GALBRAITH QC:**

30 Yes, but they live very deep and a long way out and so recreational interests don't have any interests, or measurable interests, in any case.

**TIPPING J:**

Oh I see, you mean it's one where the recreational people couldn't logically have an interest?

5 **MR GALBRAITH QC:**

Yes Sir.

**TIPPING J:**

I see, yeah.

10

**MR GALBRAITH QC:**

Unless Your Honours have any other questions, I'm just going to leave my friends to deal with these difficulties.

15 **ELIAS CJ:**

Thank you. Yes, Mr Scott, sorry, take your time.

**MR SCOTT:**

I apprehend a number of matters I was going to deal with I no longer need to  
20 deal with them, so I think I can probably truncate it. I was going to essentially  
develop three broad propositions. The first was really this whole question –  
the first proposition really is that the rec fishers case, in my submission, both  
the legal and factual components is premised on an erroneous assumption.  
That being that the TAC –

25

**ELIAS CJ:**

Sorry, which case?

**MR SCOTT:**

30 The rec fishers case.

**ELIAS CJ:**

Oh yes, rec fishers, sorry.

**TIPPING J:**

What fishers?

**MR SCOTT:**

5 The recreational fishers –

**TIPPING J:**

Oh, recreational fishers.

10 **MR SCOTT:**

- case, the appellant's case.

**BLANCHARD J:**

I thought these were some fishers who had –

15

**TIPPING J:**

I thought they were reckless fishers.

**ELIAS CJ:**

20 I thought it was some decision of the Court of Appeal that my brothers sat on that I didn't know about.

**MR SCOTT:**

25 The appellant's case is premised on an erroneous assumption that TAC decisions are not utilisation decisions and fundamentally, in my submission, that is wrong, and their submissions state expressly that this is – that proposition said to be central to their argument but as I think the Court has apprehended both TAC and TACC decisions have important utilisation and sustainability components to them, particularly in shared fisheries such as  
30 kahawai and while the TAC decision is obviously a key sustainability measure in terms of limiting the total level of mortality, critically the TAC also determines – the TAC determines, not the TACC, the TAC determines the level of utilisation that is to be permitted by all users and critically determines biomass size. TAC is the determinative biomass and biomass feeds directly

through to these questions of the recreational fishers aspirations for a quality of fishery which is greater than they say they currently have one where they have faster catch rates, larger fish, inextricably connected with biomass. So in my submission, the recreational fishers' submissions fail to recognise that it was the TAC decision rather than the TACC decision that was primarily relevant to those qualitative aspirations and of course there's been no appeal in respect of that issue.

Now my friend Mr Galbraith did refer to yield curves and the like. What I would like to do, in some sense it's elementary but in some sense a diagram does help to really get into one's mind how particularly this concept of MSY and the TAC operate, in particular how movements in the biomass impact on yield. So perhaps I can just emphasise first from section 13, perhaps just that – if Your Honour's have section 13 and subsection 2 where it emphasised, "The Minister shall set the TAC that, and then it's maintains the – we've got A, B and C, maintains the stock at or above a level that produces maximum sustainable yield. B, sets a TAC that enables the level of the stock, so that's the biomass, so we can see there quite expressly that the role of the – well one of the functions of the TAC is the recognition that it is going to and will move biomass size. Now, and obviously critically also, section 13 is focusing then on moving biomass size in relation to its ability to produce maximum sustainable yield and managing a fishery so it's at or above that level.

Now if I can then just ask Your Honours to take volume 2 and about three quarters of the – near the back, the affidavit of Dr Starr and page 303 of the bundle, at least starting at page 302 of the bundle, Dr Starr describes the concept of maximum sustainable yield and how it operates and BMSY, as it's known, the biomass that produces maximum sustainable yield, and on page 7 of his affidavit, page 303 of the bundle, he's got that yield curve. There now when I see a yield curve my, not being an economist, my eyes glaze but if I could just sort of walk you through this curve and –

**TIPPING J:**

Sorry, what page are you on?

**MR SCOTT:**

Page 303 of the bundle.

**MCGRATH J:**

5 Of your bundle?

**MR SCOTT:**

Of my bundle.

10 **TIPPING J:**

The page with the curve on it?

**ELIAS CJ:**

Volume 2.

15

**MR SCOTT:**

The case on appeal, volume 2. Sorry. So that affidavit of fishery scientist, Dr Starr, and he gives some explanation there in paragraphs – 303 is the actual page with the graph on it, Sir.

20

**TIPPING J:**

Is it necessary to obtain a sort of intricate and detailed understanding of this Mr Scott because at first blush it's fairly formidable?

25 **MR SCOTT:**

No it's not Sir but it's certainly – at a high level it is quite important and hopefully quite useful. So the bottom access Sir is – represents the biomass so we've got – it had 100 percent where unfished fishery so B0 is where – bottom access is the biomass size so at 100 percent the fishery – essentially  
30 it's in its natural state, unfished. The other access, the left hand access is dealing with yield and as a percentage of the maximal yield. Now yield is the new fish recruiting to the fishery each year. It's a function of the new fish recruiting the weight being produced by new fish. The growth of existing fish less natural mortality, gives you the additional weight that the – production

that the fishery is producing each year. Now what then you immediately see is that in its natural state and unfished – when the fishery is in its virgin state without any commercial fishing at 100 percent, there is no yield. It's not producing any yield because every year the natural mortality is equal to the new fish – the weight of the new fish that are recruiting to the fishery and the growth that's there. So the fishery is essentially an equilibrium and it's not – and if you think of it in terms of a farm because I struggle with fish sometimes, if you think in terms of a farm, you have a thousand acre paddock, you lock it up for a hundred years, putting aside variations caused through nature and climate and the like, essentially you'll reach carrying capacity and there won't be any – essentially there'll be no yield available on that farm because each year the mortality equating to the –

**TIPPING J:**

15 You mean your death rate equals your birth rate, putting it extremely simply?

**MR SCOTT:**

Yes and the growth of what's there. So – and that's because largely you've got a lot of older, mature sheep that are no longer producing offspring and you've got a whole lot of older animals that aren't actually growing. They've reached maturity and they're not growing. So what happens is, when you fish, and it's called the fishing down phase, and with respect Your Honour, Chief Justice, the orange roughy fishery hasn't collapsed in the way sort of intimated and I'll avoid the temptation to get into a debate over it, but what we see in something like orange roughy is what's classically known as the fishing down phase and that's where the fishery is brought down to the level that theoretically will produce the maximal yield and you'll see there that to get to maximal yield , and you'll see there that to get to maximal yield to the point where you're maximising the yield from the fishery, you essentially need to take out about 75 percent of the population. It varies from fishery to fishery but BMSY is usually something about 25 percent of the fishery. So you need to remove about 75 percent of the population to get it down to the point where it's maximising annually the yield that is being produced. So you've got lots of younger, healthy fish having lots, spawning, producing lots of new fish and



critically you've got lots of fish that are growing rapidly in the fishery each year rather than lots of large fish which aren't putting on weight.

5 So in those circumstances the commercial fishers tend to want, not always, but tend to want a fishery which maximises yield, the amount of fish that is available to be harvested each year where recreational fishers, not always, but tend to want a fishery managed above BMSY so that you've got, on average, if it's a bigger population in the water, you'll have larger fish on average and you'll have a faster catch rate because there's more of them in  
10 the water and they're quicker to catch. But the corollary is you have a lower yield.

Just some points to note as Dr Starr points out in paragraph 40 in point 2, you can sustainably manage the fishery, assuming you've got good information, at  
15 really any point on the biomass spectrum. So sustainable management is not, doesn't equal at BMSY. You could sustainably manage at 40 percent of its original biomass or 60 percent. So when we say the fishery can't be sustainably managed at its current level of take, we're not saying necessarily the fishery is in crisis or anything like that. We're simply saying if you want to  
20 hold the biomass at its current size, we have to reduce the amount of take. But we're not saying necessarily that the fishery is in crisis or anything like that if it's simply not sustainable at that level.

Now in relation to kahawai, in 1996, and I'll give you the reference for this in a  
25 minute, that's at paragraph 40 actually of Dr Starr's affidavit, the fishery was, when the last stock assessment was done before this matter was considered, the fishery was about 50 percent of the BMSY, so it was about three times above BMSY, which was thought in that case to be about 17 percent.

30 So it was, back in 1996, well above BMSY, and I'll come to the more current position in a minute. Just a couple of other points to note, you do get the same yield on both sides of the yield curve, so you can actually manage a fishery, if you look at the way the yield curve and point Dr Starr makes, he's got those 90 percent bounds. You can essentially get 90 percent of the

maximal yield at anywhere between about 16 percent and 40 percent of BMSY, so the yield curve is typically very flat at the top and you've got all sorts of natural fluctuations in the environment.

5 What recreational fishers often don't appreciate in the way this yield curve works, is also that if you want to try and have an above BMSY policy where you have got faster catch rates in particular and a lower yield, in order to hold the fishery at that higher level, you have to actually reduce the total level of take, there is less yield, there is less fish available to be taken each year, so if  
10 you want faster catch rates and bigger fish, everyone has to be prepared to actually take less numerically and from a practical perspective for recreational fishers, that means they have to have lower bag limits and potentially you get into the whole question –

15 **ELIAS CJ:**

Unless the Minister decided not to impose bag limits.

**MR SCOTT:**

The problem there ma'am – correct, correct, but the problem there ma'am is if  
20 he, the Minister decides not to impose bag limits, then you won't get stock rebuild. If the Minister's trying to –

**ELIAS CJ:**

No but it could all come out of the quota.

25

**MR SCOTT:**

You could only do that then by progressively reducing the commercial allowance to allow for recreational rebuild.

30 **ELIAS CJ:**

Yes.

**MR SCOTT:**

Now, if I could just then deal with this proportionality issue that you were discussing with my friend. First, two points really I suppose, first of all, it's not correct to say that all reductions were proportional here, the Minister made a  
5 decision in 2004 not to proportionately reduce the customary allowance, so it wasn't a blanket policy of everything's got to be done proportionately and I can give you the reference for that.

**ELIAS CJ:**

10 How big is the customary allowance, it's quite small is it?

**MR SCOTT:**

Well no, the – it should have been quite small because the evidence is, what the Ministry was doing and what the Ministry recognised was that most Māori  
15 were in fact taking under the recreational allowance and they didn't actually use the customary permitting regime and they didn't need to use the customary permitting regime, in circumstances where you had a bag limit of 20 anyway. There's evidence in the bundle that shows that in the South Island where the customary regulations had been operating for  
20 10 years, only 67 kilograms of kahawai was taken under customary permits, as distinct from kina and oysters and paua where there were many tonnes were being taken. So recreational fishers for some of these fin fish species don't use the customary regime. The Ministry simply didn't look at that material when they – and they said there wasn't any and that was part of the  
25 challenge in the High Court.

**TIPPING J:**

Are we coming quite soon to the question of what's meant in section 21 by "shall allow" or something like that?  
30

**MR SCOTT:**

We are.

**ELIAS CJ:**

My fault, Mr Scott.

**MR SCOTT:**

5 If I could just deal with the proportionality point.

**TIPPING J:**

No, no, I want you to deal with that because it's an important point, but it has to be dealt with at a more conceptual level than just –

10

**MR SCOTT:**

So the first point is that there wasn't a blanket policy of proportional reductions, customary Māori did not, did not have a proportional reduction in 2004. The second point is that, and it's a more of a policy issue, but it's  
15 critical to remember that the quota management system uses an – is an economic instrument designed to achieve fisheries management objectives, and if you start playing with those, with the incentive, the economic incentives that are inherent in the quota management system, then you do run the real risk that you actually undermine the quota management system, the core  
20 sustainability objectives of the QMS. One of the key issues when you talk about non-proportional reductions, is what message do you send to the commercial – to the holders of the quota, the people who are supposed to have property rights and perpetuity and there was evidence actually in these proceedings about this from Dr Yeablsley haven't included in the material  
25 because it's irrelevant to the issues we're dealing with but if you – there is a real issue about distorting the incentives, if the industry believes they are going to simply lose over time their property right, not because of a sustainability issue, but because it's simply going to be reallocated to another sector, they lose all incentives to invest in the fishery, to research, to properly  
30 nurture and protect it as you would any other property right, so it is a critical question that non-proportionally, we accept obviously the Court of Appeal's decision in the *Snapper* case that it is open to the Minister to make proportional reductions, non-proportional reductions, but in my submission, rightly, the Minister has been, based on the advice from the Ministry, has been

very concerned about doing that as a matter of course because of what message it would send.

**ELIAS CJ:**

5 Unless he imposes the bag limits, it doesn't work.

**MR SCOTT:**

Correct, but – and that really takes, coming to the section 21 point, because this really is one of the key issues. The bag limits are obviously within the  
10 Minister's hands, so when we talk about the allowance for recreational fishers and as was said by the Court of Appeal in the *Snapper* case, and you can see it, it's quoted, the relevant paragraph is quoted in the Court of Appeal's decision in these proceedings at page 91 of volume 1, paragraph 63 of the judgment. And it's the – it's really the terms of Your Honour Justice Tipping's  
15 judgment in that case, it's really the last part of the first sentence that's key, "To take recreational fishers as an example, the allowance is simply the Minister's best estimate of what they will take during the year", agree with that entirely, but the key is the next sentence, the next part of the sentence, "They, being subject to the controls which the Minister decides to impose on them,  
20 e.g. bag limits, minimum size, or other restrictions, closures and the like", so the key is, yes it's an estimate, but it's an estimate which the Minister, looking forward, is able to control –

**ELIAS CJ:**

25 Which comes first, does he have to establish the limits first and then he has a better basis for making the estimate under section 21 or does he have to come – do a balancing as, I think, in the *Snapper* case was suggested under section 21?

30 **MR SCOTT:**

I think what it's requiring the Minister to do is to look forward, so it's an estimate looking forward as well as back and obviously the Minister's informed by information that is available, and frankly there isn't much, about what recreational catch levels actually are, you'd certainly need a real time sense,

but the Minister then has to look forward and say “What do I believe, based on the advice I’m receiving, they will take if I put these management controls in place?” and these issues are obviously all done together, these sustainability decisions are all wrapped up so the Minister looks at the TAC, the TACC and what other management controls need to be put in place, all in part and parcel.

**TIPPING J:**

Of course, the problem that emerged that is not before us is he didn't follow through.

**MR SCOTT:**

Correct.

**TIPPING J:**

So that was clearly – it’s a composite hole, it’s a management hole.

**MR SCOTT:**

It’s very much a composite hole and logically you’d expect that to be the case and that Parliament would contemplate that, and in my submission, this statement in the *Snapper* case is entirely consistent with what Parliament did expect, and we can see that in the select committee report. If I can invite you to take volume 2 of my friend’s authorities, and we have the report of the select committee at tab 5, and this is the select committee reporting back on what becomes the Fisheries Act 1996. If I could ask you to turn through about halfway through the page, roman numeral 15, bottom of 14, and there’s a discussion about the total allowable commercial catch in clause 20. So clause 20 provides for the Minister to set, vary TAC for each stock that is subject to QMS. The Minister is required to consult before setting a varying TACC clause, 21 specifies the matters the Minister has regard to, to allow for – before setting, varying the TACC, and the bill has introduced, this is the point my friend Mr Galbraith was referring to, the Minister is required to have regard to customary recreational interests in stock before setting the TAC. Various submissions thought a clear priority should be given to Māori, customary

fishing recreational or both. They consider the requirements for the Minister to have regard to the interests of non-commercial as nebulous and should be replaced with the requirement for the Minister to allow for those interests as provided for in the existing legislation.” In tab 1, I’ll come to it in a minute, in  
5 tab 1 I’ve given you the legislative history of the provisions, the wording over time. So it was previously and still is “allow for”.

So it carries on, “The Minister would be able to give consideration to these matters to the extent to which he or she considered appropriate on a case by  
10 case basis. We agree with the point and recommend that the Minister allow for non-commercial interest, non-commercial allowance and then importantly, will be quantified and enforced through bag limits and other controls, customary fishing regulations.” So clearly they are contemplating as an allowance, so, trying to work out what they mean by “allow for”. I mean, it’s  
15 quite clear I think, they did see it as an allowance coming out of the TAC, the total allowable catch and for that to have any integrity it must, I’m not suggesting that the recreation allowance has the same precision or the same, obviously the same sort of management controls or regulations around it as the TACC does but clearly the contemplation is that all the powers available to  
20 the Minister within the Act are going to be used to ensure that the TAC, the limit on mortality, is not exceeded and the allowance that’s made then for recreational fishers is to be both quantified and enforced through bag limits and other controls.

25 So, in my submission, that’s quite insightful and telling us, confirming for us that it is intended to be a true allowance, “allow for” is supposed to be an allowance. Looking forward, Parliament were contemplating that in this wrapped up process, all these things happening together and I agree it is somewhat strange that you’ve got this sort of key mechanism that relates to  
30 the recreational fishers sort of buried in a provision that’s dealing with the TACC but in a sense it has to be because this is where it’s sort of happening, this is where the apportionment of the TAC is actually needing to occur.

**TIPPING J:**

The Court used the concept of apportionment in *Snapper 1*, you would support that view would you?

5 **MR SCOTT:**

I would support that Sir and I'd say that is supported by the select committee, what the select committee were envisaging was going to occur in their report back.

10 **WILSON J:**

Mr Scott, this concept of allowance flows through TAC, TACC and then allowance for the non-commercial interests?

**MR SCOTT:**

15 Yes, for the non-commercial interests.

**ELIAS CJ:**

What is the provision under which those –

20 **MR SCOTT:**

The allowance is given effect to?

**ELIAS CJ:**

Yes, the bag limit, what section?

25

**MR SCOTT:**

Potentially through two mechanisms, through sections, essentially the regulation making powers which are found in sections 297 and 298 of the Act. Section 297 is the general regulation making power and has very broad, as  
30 you'd expect, regulatory powers. The relevant one relating to recreational fishers, paragraph 1(a) but there are, when you refer to our submissions, there are specific provisions though that allow, for example report potentially requiring recreational fishers to report their catch. So it's not only commercial fishers that are potentially subject to a reporting regime. That hasn't in fact



been used by the government, there are no regulations requiring recreational fishers to report, there are for customary fishers. So these regulations have been used to create under the customary regime and I have available, if it would be helpful, a copy of the customary fishing regulations. They have  
5 created, using this section, an authorisation regime where kaumatua provide an authorisation to customary fishers who want to take for customary purposes and then the customary fishers have to then provide information back to the kaumatua who then has to report that information to the Ministry of Fisheries.

10

**ELIAS CJ:**

Do these regulations apply to quota, to people who have quota?

**MR SCOTT:**

15 Customary fishing regulations relate only to –

**ELIAS CJ:**

No, no, sorry, I wasn't talking about customary ones. I mean this regulation making power?

20

**MR SCOTT:**

25 This is a generic provision that can be used both for commercial and recreational fishers, that's correct. Then there's a more specific provision, 298, to make regulations relating to sustainability measures which then reverts back to section 11 which is just a very broad regulating making power, so there's that composite all there.

30 Reverting back to what we were talking about, section 21 and "allow for". It's schedule 1 of my submissions, my written submissions. I've put a schedule in showing the history of the equivalent provisions through from 1983 legislation through various amendments to the current version and the words "allow for" have been used throughout at that time. I just note that even though the 1996 Act came into force in 1996 the relevant provisions didn't come into force until 2001 because of reasons I don't need to go into which means that

the provisions we see on the first page of that schedule were operational through to 2001. Each of those have the concept of “allow for” and what I really just wanted to point out was that through until 2001, for the period of 1990 –

5

**ELIAS CJ:**

Sorry, what page is this at?

**MR SCOTT:**

10 There should be a tab reference, see schedule 1.

**TIPPING J:**

Is the point of this that the concept of “allowing for” is one that’s of longstanding if you like in this legislation and they obviously decided to go back to it in the face of the earlier draft of “have regard to”?

15

**MR SCOTT:**

Yes but the particular point I was wanting to make here is that in the legislation that existed in the first amendment there, we see in the amendment that was made in 1990, the second and third provisions on that page, the last of the subparagraphs (2) in each case refers to an amount determined under section 12 of the Territorial Sea and Exclusive Economic Zone Act as an allowable catch for foreign fishing craft. Now, the relevance of that and you’ll see that appears in both the version between 1990 and 1992 and then as amended after the Treaty settlement and replied from 1992 to 2001. What is happening there is that under the Law of the Sea, New Zealand was required to make any surplus catch available to foreign nations. We had a separate Act at the time which enabled that to be determined through a separate TAC, a separate TAC that was applicable to foreign fishing craft. Now, in both those provisions you’ll see that the “allow for” is first of all essentially for the non-commercial interests and then also “allowing for” those foreign fishing craft to the extent there is a TAC. So in my submission that’s just another indication that this is really, it is truly sort of an allowance, it’s not, it’s to be taken off, really to ensure the integrity of the TAC and that the TAC is not

20

25

30

exceeded which is now expressly confirmed in the 1996 Act that the TAC can't be exceeded by the TACC. So obviously of a very different character the rights of foreign states to come and fish in New Zealand waters but it has still be dealt with under the legislation using the same formulation of "allow for".

**WILSON J:**

Is allowing something synonymous with allowing for it?

10 **MR SCOTT:**

Not necessarily.

**WILSON J:**

No, arguably there could be a distinction, couldn't there?

15

**MR SCOTT:**

Yes, yes and I have included my submissions, a definition of and the Crown have also got similar definitions in their submissions but – and the recreational – the appellants in their submissions try to use a definition of "allow", so this is at, in my submissions themselves, the bottom of page 12, paragraph 45. By looking at the ordinary meaning of "allow" and "allow for" the appellants pick up a definition of simply the word "allow" and, this is my paragraph 44, and they say the definition of "allow" means to provide some benefit or advantage but of course what we have here is not "allow," we have the intransitive verb "allow for," and that is defined differently. That is defined as simply "make due allowance" or "take into consideration." So once again that broader concept –

20  
25

**TIPPING J:**

It's allowing for defined interests?

30

**MR SCOTT:**

Allowing for defined interests. And then we pick up the second point from the *Snapper* judgment that in allowing for the defined interests, it is still – it is ultimately for the Minister. While it's an estimate, it's an estimate that has to

take into account the fact the Minister is determinative of management controls which will effect the amount recreational fishers are able to take. Therefore, it's not simply an estimate in some sense that whatever they take, they take and the rest is left over for commercial fishers. That's not the  
5 scheme at all. There is a TAC that has to have integrity. The TAC shouldn't be exceeded, recognising there's different management controls and we can't be anywhere near as precise for recreational, that contemplation isn't the same precision for recreational customary fishers. Nevertheless, there must be a genuine attempt to try and estimate and to impose management controls  
10 which will try and ensure that the TACC is not – the TAC is not exceeded as a consequence of those management measures.

**TIPPING J:**

Well if you didn't allow for them you would run a grave risk of achieving TAC.  
15

**MR SCOTT:**

Absolutely. So the key sustainability measure would lose its integrity. So there has to be an allowance and it has to be, as I said, not just a best stab. It has to be a proper – and the Ministry of Fisheries do obtain advice regularly  
20 from NIWA as to what the impact of bag limit controls or other measures will be and we saw that in both the *Snapper* litigation and in these proceedings estimates were being provided to the Ministry and the Minister. If you put minimum bag limits – sorry, if you changed the bag limits, what will that do if you put in minimum legal size, what would that do, all those have impacts and  
25 will constrain the recreational catch over time.

If I could just deal with one other point related to that and that's whether they have to be allowed – whether it means, my friend Mr Galbraith said that he did continue with the argument that “allow for” must mean allow something. In  
30 contrast he said to commercial fishers which where there's a contemplation that the TAC could be zero and once again it's always hard dealing with these things, these issues sort of in the hypothetical abstract but in my submission there could well be situations even in a shared fishery where theoretically anyway, the Minister may in fact a particular fishery make no allowance even

though there's a commercial allowance. If I can just give you a possible example. At the moment we have in the Marlborough Sounds a complete closure, there's no fishing for blue cod by commercial fishers for some time. Recently this year we saw a regulatory control put in to essentially prevent  
5 any, that's for the next five years I think, any take by recreational fishers from the Marlborough Sounds. Now the Marlborough Sounds fall within a quota management area which is much wider than the Marlborough Sounds. So just assume, it's not in fact the case, but just assume that recreational fishers for some reason couldn't fish out in the Cook Strait or the likes, so that in  
10 practice the advice to the Minister was that if you've prevented them by regulation from fishing at all in the Marlborough Sounds, they won't in fact be able to catch anything because they can't practically fish out in the Cook Strait. So the Minister might then say well in that case the allowance, even though there will be a TACC for commercial fishers because they are  
15 fishing out in the Cook Strait, there may in those particular circumstances be no allowance for recreational fishers because the management controls the Minister has put in place on recreational fishers are such that in those particular unusual circumstances there is no expectation that they will catch any fish. He has closed, essentially, their fishery. Now I'm not saying that's  
20 ever going to happen in practice but I'm just saying in theory it certainly can be the case.

**ELIAS CJ:**

But that's specifically provided for, isn't it?

25

**MR SCOTT:**

It is specifically provided for.

**ELIAS CJ:**

30 In section 21(5).

**MR SCOTT:**

Subsection (5). So they could be zero, probably very unlikely in practice in any true shared fishery.

**WILSON J:**

Just one other point on section 21. Is section 21(1)(b) principally directed at by-catch?

5 **MR SCOTT:**

No Sir. I think it's certainly, no – by and large by-catch, for any quota management species all by catch has to be landed, if it's a quota management species. So what it's targeted primarily at is unlawful discards but more so things like poaching. So the classic is the paua fishery where, I'm  
10 guessing, but I think it's something like 25 percent of the total mortalities is actually from poachers. So obviously you need to allow for that, particularly very significant chunk of catch when you – after you set the total allowable catch you need to recognise that, notwithstanding the compliance efforts that are going on, that is disappearing and we need to set the TACC and the  
15 allowances in a way which recognises that. So it's poaching and it would be any, if there was an unlawful discarding believed to be going on within the commercial industry or in the recreational fishery if, for example there were fishing going on in closed areas. So for example there are quite extensive, not relevant to kahawai, but there had been very extensive set net closures  
20 put in place recently applying to both commercial and recreational so if you thought that recreational fishers were carrying on fishing notwithstanding some of those you'd have to allow for that as well.

**WILSON J:**

25 How is by-catch from quota fishing taken into account?

**MR SCOTT:**

The by – well that's a different – because it's a by-catch it's a different species but if it's a by-catch it has to be landed and therefore it has to be counted, so it  
30 would be explicitly taken into account.

**WILSON J:**

Taken into account in the seating of – the quota for that particular species?

**MR SCOTT:**

It would, yes. So whether it's taken, and obviously for some people target – if someone's targeted someone else's by-catch and whatever it is it has to be landed, has to be reported and therefore is part of the TACC.

5

**ELIAS CJ:**

Is there any assistance in the legislative history as to the meaning of interests, fishing interests?

10 **MR SCOTT:**

No, not that I have seen. I do accept though that – the question that interests includes obviously all the – both the quantitative and all the qualitative. There's never been any issue from the commercial sector that that full gamut of issues need to be taken into account and considered under section 21. But  
15 the real point, I think the point the Chief Justice was making is that the importance in relation to, of this, the linkage back to section 13 is critical because the commercial fisher's position is not that when you look at section 21 and you see recreational interests you exclude all their wider aspirational desires in that automatically, but it's just that in practice many of those, as in  
20 kahawai, they fall to be determined or they fall to be – the delivery, the sort of giving effect to them, can only occur through section 13 because if your desire is for a higher biomass to give larger fish and faster catch rates, you can only really achieve that, can potentially only achieve that, through – no you can only achieve that, through the TAC decision because you've got to lift the  
25 biomass size. So the commercial fisher's position is simply that when the Minister comes to section 21 – when he came to section 21 in this case in relation to kahawai, the issue was really already determined and because of the TAC decision and the Ministry's advice expressly acknowledged that, and you can actually see that in the final advice paper.

30

If I could ask Your Honours to take volume 4, that is the voluminous advice papers. When you get to the conclusion at section – it starts at page 601 of the bundle, bottom right hand corner, 601, about a third of the way in, we're in the 2004 final advice paper and the conclusion section starting there. The

point I was going to make is at paragraph 325 on page 605 where they're summing it all up and I'm just going to go back to a couple of the other paragraphs in a minute but they're summing it all up and they provide this table in table 12 of the proposed TAC allowances and TACCs, putting it all together. Then they say, "On balance, M-Fish considers the allocations in table 12 appropriately reflect competing demand, current use in the fishery, socio-economic effects of current use versus reduced use. To a large extent the options for determining allowances and TACs will be driven by the TAC option you consider reasonable." Really, that is just the recognition of what I've been saying, that it's the TAC that drives so many of these issues that the recreational fishers were concerned about. They were asking in very strong terms for a reduction in the TAC because they wanted a stock rebuild. And the Minister delivered that to them through first of all a 15 percent reduction then a 10 percent reduction in the subsequent year. So the advice to the Minister recognised that it really fell back in the context of the TAC that the – where the recreational interests were primarily effected.

If I could just go back while I'm here just to a couple of other paragraphs. The conclusion – in the Court of Appeal I had the luxury of spending about half a day going through these advice papers and I'm not going to do that now but if I could just highlight a couple of very important paragraphs. Just back on the previous page they're talking about these – the advice that had been presented and the options that were being put forward and note in 3.20 that M-Fish notes TAC option based on production of current utilisation has socio-economic impacts on commercial fishers but then it goes on in 3.21, the IPP and FAP contain discussion of the use of alternative options when considering how to allow for non-commercial use. The claims based, which is catch history, and the utility approaches. The policy discussion on utility and claims based approaches is not intended to fetter your discretion but rather provides policy guidance in order to provide a more robust framework when considering allowances. So all the Ministry were trying to do in this advice was saying well when you've got something as nebulous as who values it more and that's obviously a utility concept, they were trying to help the Minister by – in the use of the SACES Model that my friend Mr Galbraith



referred to, sort of put it into numbers so you could compare apples with apples, so they looked to try and value the non-commercial interests using valuation techniques but immediately recognised that that was inherently problematic and all sorts of issues arose about it, but pointing out here that they're not trying to fetter his discretion, they're just trying to help him with a decision making framework which makes it, makes his decision more robust, and, in my submission, that's perfectly appropriate.

The next paragraph is important too, the utility model strongly opposed by industry and the Te Ohu Kaimoana, the former Treaty of Waitangi Fisheries Commission, on the basis that this approach has the potential to undermine the QMS, the integrity of the QMS and in the case of TOK in the 1992 Deed of Settlement, the basis of much non-commercial opposition to commercial fishing for Kahawai, purse seining in particular is based on a perception that the value of the fishery is more highly – the value of the fishery more highly than commercial fishers. And then they go on to talk about the subjectivity in both methods they're trying to determine the allowances in the 324, "There are competing demands for kahawai in excess of the proposed allowance from the TAC, you are not required to fully satisfy the demands of any sector, in determining allocations you must consider competing demands for the resource and socio-economic impacts of the allocations proposed." In my submission, perfectly appropriate advice to be providing which does look to capture the full gamut of interests, which are available.

**25 TIPPING J:**

The second sentence in 324 neatly encapsulates the Chief Justice's point, I suspect, that where the advice is, "You are not required to fully satisfy the demands of any sector group."

**30 MR SCOTT:**

Yes.

**TIPPING J:**

That of course is a contentious statement on one view of it, isn't it?

**MR SCOTT:**

Well only, I'm not really sure it is, I don't think, I don't understand the recreational – the appellant's position to be that they are entitled to have their interests fully satisfied first, that a proposition that whatever we need, we get first and then whatever's left over is only available for the commercial fishers, I don't think even my friend Mr Galbraith's gone that far. He is accepting that it is a balance, Justice McGrath's proposition that it's a, ultimately it's a policy issue, a balancing exercise for the Minister. That's quite a nice proposition from Justice McGechan in the *Snapper* litigation at first instance, which I quote at page 14 of my submissions, my written submissions, at the top there and he was looking at the question of whether, when you're talking about "allow for", can that, does that mean you have to allow fully for? Or is that "allow for" in whole or in part, i.e. the part the Minister determines and I won't read it to Your Honours there, but he really looked at and had quite a lot of evidence in front of him about the history of the provision and what was going on when those provisions were being enacted and concludes there that it's likely that Parliament intended to leave a discretion to the Minister to adjust any resource shortage between the competing sectors as the Minister saw fit at the time and allow for is to be construed as meaning allow for in whole or in part."

That certainly, in my submission, must follow, it seems to me, there isn't any sort of level ground. You either accept – well you either start a proposition that it is simply the recreational fishers whatever they want, whatever they're actually catching is what they get or you say no, that the Minister does have the ability to control that catch and it'd be remarkable if Parliament didn't contemplate that the recreational share of the catch was going to be controlled, particularly bearing in mind a fishery such as this where the non-commercial interests are allocated 60 percent of the fishery. So you – as soon as you say and acknowledge that there is an ability to control the recreational total take through with management measures, you immediately retreat to the proposition well it's then a matter for the Minister to determine in the exercise of his or her discretion what allowance he or she will make for

their interests given whatever management controls he or she is prepared to impose in that fishery. And that's obviously going to depend entirely on the circumstances of each fishery and it will undoubtedly change over time as some societal demands –

5

**TIPPING J:**

What do you say on the proposition that the section 8 matters are more than factors to be regarded, they are objectives to be pursued?

10 **MR SCOTT:**

In my submission it's pure semantics. There is nothing in section 8, subsection (2) that is not already embodied in the discretion which exists in what the Minister's required to do under section 21. The Minister has to look in terms of looking at those interests, what recreation interests are. The  
 15 Minister must look to, not with some hindsight only, but must be looking forward and looking to what their aspirations – I mean it's inherent in the concept of aspirations of course that it's a forward looking concept and the Minister – when the Minister is determining all those – that whole suite of matters that go into section 21, inevitably the Minister is looking at well such  
 20 factors such as wellbeing, the extent to which the allowance the Minister makes or doesn't make, how that will impact on the ability of –

**TIPPING J:**

So what you're really saying is that the, if you want to reduce it or focus on  
 25 purpose, it's achieve purpose to the extent consistent with all other purposes that must be achieved or attempted to be achieved?

**MR SCOTT:**

Yes, and critically, it applies to both sectors, so it just takes you – as soon as  
 30 you accept, as the appellants do, I can't stop saying rec fishers, as soon as you accept that the appellant, as the appellants do that section 8(2) applies equally to the commercial sector, and all other sectors, you immediately come back to, what's it adding? What does it add that isn't already in section 21 itself? In my submission, it doesn't add anything, it's simply co-extensive and

in that sense, it does no more than, as the Court of Appeal said, it guides rather than governs section 21. All discretions as per the decision of this Court in *Unison* I think it is, all decisions, simple *Padfield* analysis, must be, all discretion must be exercised in a manner which looks to give effect to the purpose of the Act. When you're exercising a discretion under section 21, the Minister is guided by, but not governed by, the purpose provision in section 8, at section 8(1), let alone a definition of, within the, within section 8. So I simply adopt the Court of Appeal's analysis there that, and the reference to, of Justice Keith in the *Westhaven* decision that decisions must conform with the purpose of the Act, but in that sense you're always back, and decision makers should be looking back to the purpose of the Act in that general sense for a broad statement of policy of what it is you're doing. But that doesn't help us here in terms of the exercise the Minister's got to do of actually balancing those competing demands. It applies equally to both, it adds nothing in any practical sense to what is inherently –

**TIPPING J:**

Well that assumes that the purpose is to balance the competing demands, which is central to your thesis, as I –

**MR SCOTT:**

Yes, and in my submission, that is, I think you do see that in section 8 itself, in two respects, you see that in section 8 in just that concept of subsection (1) of providing for utilisation while ensuring sustainability. There's always going to be a continuum of options available to the Minister that provide for more or less utilisation or a more or less sustainable, focus on sustainability, and where the Minister chooses to sit on that continuum is very much a decision for the Minister, and equally when you're looking to apply, or have in mind the definitions which, as Your Honours have rightly noted, both the definitions of utilisation, sustainability have both got utilisation and sustainability components to them, so you have to say to some extent, do they really add much, but I think they are, just recognising you've got to continue to look to balance in any decision that you're making. The rights of all sectors in relation to a particular fishery, whether it's utilisation or sustainability.

**TIPPING J:**

Interests rather than rights.

**MR SCOTT:**

5 Sorry, interests.

**WILSON J:**

Mr Scott, on your argument, could the Minister lawfully allocate to the customary interests an amount which was insufficient to satisfy those interests  
10 in full?

**MR SCOTT:**

There is no – the legislation, in my submission, deliberately does not distinguish between recreational and customary, there is no basis on the face  
15 of the legislation for believing that Parliament intended any differentiation between those two in the sense of – in terms of the allowance process, recognising, though, there is a very different management framework behind recreation, on the one hand, and customary on the other.

**WILSON J:**

I understand that, but do I correctly understand your position to be that the Minister could lawfully, to repeat my question, my proposition, allocate to the customary interests an amount which was insufficient to satisfy those interests  
25 in full?

**MR SCOTT:**

Yes, yes absolutely. And there are, you know, from the commercial perspective I suppose that's – you see in these proceedings, the  
30 *Snapper* proceedings, the Treaty of Waitangi Fisheries Commission, Te Ohu Kaimoana, on behalf of the commercial Māori interests looking to say, well, hang on, we've just allocated this as property right, now these management decisions you're making are effectively taking away what was

the settlement of a Treaty claim, how can that be? You know, and that has been dealt with in the previous legislations.

**WILSON J:**

5 And I think the Ministry made that point in the advice to which you refer.

**MR SCOTT:**

Yes, they did, they did. So yes, and in my submission, it is a completely unremarkable proposition to say that in society today, no one gets absolute  
10 priority over anyone else when you're dealing with resource allocation, those decisions are inherently matters which are typically expected to be left to Ministers to determine, the elected representatives to balance all those competing demands. So, as an outcome, in my submission, completely unsurprising and unremarkable that that's what the legislation would have  
15 provided for, and in my submission, I think we can see quite clearly in that short extract I referred to in the select committee report, that's exactly what Parliament contemplated.

I just want to make one other comment particularly about, perhaps I've just got  
20 time to do it before the luncheon adjournment, about catch history and essentially the attack on catch history as a basis for allocation, and really make some –

**ELIAS CJ:**

25 Sorry, before you – just following up on your reference to the regulation making par and I see that section 21(5) is only, only relates to regulations made under section 311, and section 311 talks about the ability of recreational fishers to take their allowance, is the word allowance used in respect of – is it  
30 used in another provision in this Act in terms of the bag amounts, or something of that –

**MR SCOTT:**

Perhaps I could check on that, I could do a search on that over the adjournment, I don't believe it is –

**ELIAS CJ:**

Yes, I'm sorry, it's such a huge Act.

5

**MR SCOTT:**

I don't believe it is, but I hadn't noticed that in 311 that actually does that, it's interesting. If I – I'll have that checked over the luncheon, and see if there is any other reference.

10

**ELIAS CJ:**

Yes, thank you. Sorry, carry on.

**MR SCOTT:**

15 Perhaps, if it is a convenient moment.

**ELIAS CJ:**

All right, yes, we'll take the lunch adjournment now and resume at 2.15, thank you.

20 **COURT ADJOURNS: 12.57 PM**

**COURT RESUMES: 2.16 PM**

**MR SCOTT:**

25 Your Honour, I had my friend check the Act, there was no other reference to allowance throughout the Act but I'm grateful for you referring that, obviously that does assist –

**ELIAS CJ:**

Yes.

30

**MR SCOTT:**

- I think in the argument that it clearly effectively recognising what the select committee itself was saying in its report, that it does contemplate that true allowance being made. I also think it may be helpful just to reflect that there has been a gradual shift in the legislation over time to more explicit allocations which is still really an ongoing process and part of the legislative debate that's going on at the moment about whether there should be truly defined shares in a more explicit way.

But if you look at the Act as it was first enacted in 1996 remember that when the quota management system was first introduced there wasn't a concept of a TACC at all, there was simply a TAC. In 1990 when proportional quotas were introduced they changed that to a TACC. There was still no – there was a definition of TAC in the Act but the TACC – there was no separate TAC setting mechanism in the Act as we see now in section 13 so it was initially TAC, became TACC, then the 1996 Act we've got the dual concepts of section 13 and section 21 developing a formally set TAC and a TACC as a sub-part of that. And part of the legislative debate that's going at the moment in the shared fisheries proposal was one of the issues is whether there should be even more sort of explicit and defined share of the fishery form of non-commercial interests and then whether there should be explicit rules about proportionality or not but those are matters that politicians in Parliament are grappling with.

But I think we can see in the Act, the point I was simply making is that over time we do see in the legislation a gradual move towards the more explicit recognition of this total allowable catch on the one hand and a commercial component on the other and we're seeing them in the '96 Act, this creation of what was always been allowing for being seen then as a true allowance.

I'm wondering if I might hand something up. In terms of - I don't know if I answered Your Honour's question particularly well, Chief Justice, about the nature of the structure of the recreational rights in the Act. I just got my friend over lunch to prepare a quick table of any reference or how any references to recreational interests, there's no other reference as I said to allowance but



there is no single part, obviously, of the Fisheries Act that deals with recreational fishers. What there is, is scattered through the Act and predominantly the reference to the recreational fishers comes up in consultation. So there's a myriad of consultation obligations through the Act then there is the specific division you saw in section 21(5) which then cross-references out to section 311 and then in section 297(1) the general regulation making power 1W there's an explicit power to regulate, to give effect to the closures that are provided for in 311.

10 There are numerous other references to non-commercial interests in the Act where their rights are being defined as well but really the reality is that for the most part, with the exception of consultation, the recreational management framework appears in the regulation made under –

15 **ELIAS CJ:**  
In regulations?

**MR SCOTT:**  
In regulations.

20 **ELIAS CJ:**  
Are they described as allowances, what is available under those?

**MR SCOTT:**  
25 Well they drop down – yes they are in some cases but they're just – they're really dealing with predominantly bag limits and then they are sort of an individual allowance and they are variously referred to in the regulations as a bag limit or sometimes they're called a daily allowance but that really is talking then about the subset, the actual – what the individual can take rather than  
30 the collective.

**ELIAS CJ:**  
Yes.

**MR SCOTT:**

So it is a regulatory framework. I've set out in my submissions that there are some 300 odd individual regulations that govern recreational fisheries in New Zealand and there's a range of mechanisms or powers in the Act some  
5 which aren't currently used. So for example section 89 – sorry, section 189H provides for recreational fishers to be able – require for recreational fishers to report their catch or file returns – regulations to be made. There's no current regulations that give effect to that but there is – I suppose I'm really simply saying through that regulatory framework in section 297, 298 a very wide  
10 power to regulate amateur fishing.

The other section which is quite relevant though which is referred to in some of the submissions, section 89(1) and subsection (1) and subsection (2), this feeds into the question of – it's dealt with in the submissions of the customary  
15 common law right to fish. Section 89 essentially starts off as a complete prohibition on anyone taking fish unless they do so under the authority of a current fishing permit but then subsection 2(1)(a) and (b) become relevant. Subsection (1) doesn't apply, i.e. you don't need a commercial fishing permit if you are a natural person taking otherwise than for the purpose of sale and  
20 then critically and in accordance with any amateur fishing regulations made under any other requirements of this Act. So if you like that's where the base regulatory control comes on. Everyone has to have a fishing permit unless you're an individual fishing for otherwise for the purpose of sale but it's a regulated right and you have to fish in accordance with any regulations made.

25

That's when, in our submissions, we respond to the proposition that there is a – the common law right has some relevance here. While it's interesting academically that right is sort of going back to magna carta if not before. We certainly say in submissions that it's really got no relevance here.  
30 The reality is in the first instance that right didn't apply only to recreational or non-commercial use applied equally to commercial but the key point is that it is now a regulated right.

It's very clear on the authorities that that common law right is simply a public right and can be abrogated simply by legislation or regulation and - as occurred here. So in my submission that attempt to essentially create some or drive some priority for recreational fishers into section 21 by harking back to the common law right to fish doesn't assist. I don't anticipate I need to develop that.

**ELIAS CJ:**

No, thank you.

10

**MR SCOTT:**

Really just two final points. First I want to deal with catch history and of course the essential part of the appellant's case is a criticism of the use of catch history and that this morning a more general criticism that catch history has become a tool which has become sort of institutionalised in the, at least in the Ministry and in the allocation process. Well my submission that criticism is inappropriate coming from the recreational fishing interests in this or any other case. They make the submission in their written submissions –

15

**ELIAS CJ:**

Sorry, I'm sorry. You took us to some of these provisions in the Act and I was just following them through.

20

**MR SCOTT:**

25 Yes.

**ELIAS CJ:**

Part 6 is access to fisheries and I was just checking to see that all fishing is to be authorised by a fishing permit unless there's one of the exceptions which applies to recreational fishing. But quota holders do have permits, don't they?

30

**MR SCOTT:**

That's correct.

**ELIAS CJ:**

So the provision that governs whether you have access to the fisheries, that's part 6 is it?

**MR SCOTT:**

5 That's exactly correct and quota does not give a right of access -

**ELIAS CJ:**

No.

10 **MR SCOTT:**

- by itself so you have to have a fishing permit.

**ELIAS CJ:**

Yes.

15

**MR SCOTT:**

You can have as much quota as you want but you can't go fishing unless you've also got a commercial fishing permit to utilise that quota.

20 **ELIAS CJ:**

Yes, thank you.

**MR SCOTT:**

25 So one of the submissions made by the recreational fisheries and the appellants in their submissions is that it would be simply – it would be blind chance if the catch history equated to what they believed their interests in that fishery actually were. Well in my submission it's by no means blind chance and that's simply because they asked for, in this case, their allocation to be made on the basis of catch history and that's what the Minister did. So it's  
30 completely, my submission I say with respect, disingenuous for them to come to the Court criticising the use of catch history as a basis for allocation when they themselves asked for the allowance, their allocation, to be made on the basis of catch history.

Now my friend started, and I can understand why he sought to distance himself from the submissions that were made by recreational fishers, but it was the main submission made by the recreational fishers that asked for their allowance to be set based on their own catch history. If I could just take you  
5 to that document. It's in volume –

**TIPPING J:**

Does this matter?

10 **MR SCOTT:**

Well it really is a – I acknowledge I am trying to sneak into the facts.

**TIPPING J:**

I mean it's a good sort of jury point.

15

**MR SCOTT:**

Well I was concerned that my friend did make a sort of generic point this morning, of a criticism of the use of catch history and how, I think the exact word was institutionalised –

20

**TIPPING J:**

Well it's not going to help us to sort of lay down the principles is it?

**MR SCOTT:**

25 No.

**TIPPING J:**

It's more to this particular – the years in question.

30 **MR SCOTT:**

Yes Sir. My point really I suppose is that, and any group I suppose is inclined to do it, is that when catch history suits them they rely on their catch history and when they think they can get more through some other method they may be inclined to do that. But in this case the recreational fishers, the main

submission, including on behalf of one of the appellants in this case, the New Zealand Big Game Fishing Council was a signatory to that submission, was for their allocation to be made on the basis of catch history yet they're coming still complaining to the Court about the use of catch history and in my  
5 submission that's simply not tenable. But I'm digressing into the facts. My final point –

**McGRATH J:**

Just before you leave catch history it would help me to understand, I'd do  
10 better if I knew just how important you thought catch history was. I mean is it the starting point, is it the prima facie indication of recreational interests or is it something more than that?

**MR SCOTT:**

15 I think the answer to that as with most of these questions, it's entirely face specific so in this case it was and the reason that it was the appropriate and sensible starting point and that's because this fishery was quite different to –

**McGRATH J:**

20 I'm really asking the question not so much to get you back into the facts but to try and see what the term recreational interests means?

**MR SCOTT:**

Generically in my submission the catch history, what the different interests  
25 they're currently using and taking is a logical, orthodox, sensible starting point but I certainly make no submission greater than it's a sensible starting point by no means the be all and end all. But in this particular case without using the fact – the reality was there was 15 years of history where management decisions, because this particular fishery had been held outside the quota  
30 management system for a quirk of fate relating to the Maori Fisheries litigation and then problems with legislation getting the fishery into the QMS, it had been held out for essentially 10 or 15 years from the QMS but in the interim there had been a regulatory regime in place which had effectively been doing a similar – going through a similar allocating process between the sectors and

that had, from the commercial fishers perspective, shut them out or in a number of fisheries severely cut them back in a range of other ones so their catch history base from their submission had been severely limited by the past management regime so it was a perfectly appropriate place to start in the process but by no means did it require or suggest that you should look at other factors. The final point really just to reach this question of -

**ELIAS CJ:**

Just following on from that because I was thinking that you were almost indicating that the QMS has been very effective at confining the recreational fishers.

**MR SCOTT:**

No.

**ELIAS CJ:**

All right. But is there anything you want to say in response to Mr Galbraith's point or how do you suggest that the Minister deals with Mr Galbraith's point about the increase in population and the impact of that. Is that a TAC consideration or is it something that permits adjustment within the section 21 allocation if that's what it is?

**MR SCOTT:**

I think my answer in part as I said before it's so fact specific that it's going to depend entirely on the circumstances of each fishery but taking this example, if – there's a trade off going on continuously here so for example if the demands are increasing there's going to be a trade off between how much yield you want to achieve and the demand. So for example, if you decide you want an above BMSY policy and in the 2005 decision paper there was an express proposal by the Labour government to introduce an above BMSY policy but they decided it was too hard. And part of the reason it's too hard is – as you increase, as I said before, as you increase the biomass you've got less yield. There's less fish that can actually be taken annually so there's a trade-off there to be made. You've got to decide well okay if we want – if

there is an increasing – the Auckland population is increasing, there's a greater demand for a greater volume of fish because a greater number of people are fishing. You can't sort of have it both ways because if you increase the biomass you've got less fish that can be taken but you're - at the

5 same time you're increasing the desirability of the fishery because people are catching bigger fish and catching them faster, but you've got more people wanting to take them and you've got less yield available because you've increased the biomass so you might then have to do a trade-off and say okay well we will run the fishery at a more – nearer BMSY because it will actually

10 increase the yield available to be taken each year, even though it will mean that people have to fish a little bit longer to catch the fish. The catch rates won't be as high. And the fish might not be as big, at least they get to catch a fish. Whereas if we have them above BMSY policy maybe there'll have to be a bag limit of very low levels in order to keep the fishes at high level. So to

15 answer your question more specifically it is both a TAC and a TACC issue. Both issues will need to be dealt with in parallel and it will ultimately fall to the Minister to determine whether he or she believes it is appropriate how that allocation is to go. So if the commercial sector is content with the obviously the finding in the *Snapper* case that it is the prerogative of the government to

20 adjust proportions over time. For example, if the Auckland population is increasing it will argue at a policy level that it should not occur for the reasons I referred to earlier, about the impact on if you start making non-proportional adjustments without compensation then you're going to destroy the economics and centres that underpin the QMS.

25

So my last point is trying to round out this question of priority and I have focused quite a bit of my submissions on really four arguments, most of which we've covered. But where the recreational fishers submissions, in my submission, do attempt to try and create a priority and I'm not boxing at

30 shadows here. There is a – for example Mr Ingram's affidavit, one of the deponents on behalf of the appellants, I won't take you to it but I'll give you the reference, volume 2, para 68, page 145 of the bundle Mr Ingram says expressly one of the objectives of these proceedings was to try and establish a priority for recreational fishers and the allocated process. And I've been



concerned in my submissions to try and identify places where there is an attempt to try and create a priority interest for recreational fishers under section 21 and trying to dispel each of those arguments. We have really dealt with each of them as we have been going on but I'm just concerned that the significance of that issue doesn't get lost. They do believe they have a priority in my submission plainly on the legislation they do not. It falls to the Minister to determine in the way we've described to decide what allocations are appropriate having regard to all those competing demands.

10 Unless there's any submissions I can assist you with those are the submissions for the first respondent.

**ELIAS CJ:**

No, thank you Mr Scott.

15

**SOLICITOR-GENERAL:**

As Your Honours please. These proceedings very graphically illustrate the invidious position which the Minister is in when he attempts to allocate respective entitlements under section 21. In making his decision it is actually a matter of course that the Minister must faithfully apply the legislation and he must make decisions which are reasonable and comply of course with all administrative law requirements. In doing so the Minister is often required to rely upon sub-optimal information and must ensure that he's not unreasonably lured in the competing directions which the recreational fishers and the commercial fishers wish to pull him.

The Crown's position is that it agrees with almost all of the reasoning of the Court of Appeal as to how sections 8, 13 and 21 inter-relate and are applied. And to the very limited extent that the Crown may have raised any issues with the Court of Appeal's reasoning then those differences are truly minor and may actually only reflect a difference in the way in which concepts have been expressed rather than any differences of substance.

30

I wish to just make five points in my oral submissions. The first is that the purpose of the Act is not sub-divisible. The Crown fully agrees with the Court of Appeal when held that the Act has one purpose which involves a recognition of both sustainability and utilisation. The Fisheries Act provides very sound guidance that the approach taken by the Court of Appeal on this point was correct. If I can very briefly traverse it but section 8(1) identifies a single purpose, not multiple purposes. Decisions under section 13 clearly involve more than just questions of sustainability. The TAC decision determines the total catch which may be utilised. Utilisation factors may be used to justify a lower TAC for example to satisfy future utilisation interests in larger and more abundant stock. Section 13(3) itself incorporates into the TAC decision making process elements of the definition of utilisation namely social, cultural and economic factors. Conversely section 21 is concerned with more than just utilisation. When setting the TACC the Minister will give consideration to sustainability factors such as need to prevent people exceeding their allocation and the need for the Minister to consider mortality in stock when making an allocation under section 21 imports a sustainability consideration into that section 21 decision making process.

So in summary on that first point which I wish to stress it's submitted that the Fisheries Act has one purpose that embodies both sustainability and utilisation and that it's not appropriate to characterise section 13 as only being about sustainability and section 21 as only being about utilisation.

The second point which I wish to emphasise is that allocations under section 21 may be based on recent catch histories. However, while the ultimate decision under section 21 may reflect recent catch histories, that criterion alone can't be the sole determiner of allocations under section 21. In making an allocation under section 21, the Minister must consider all of the known interests of recreational fishers and non-commercial customary Māori fishers and after considering all of those factors, the Minister may ultimately decide that recent catch history provides the most reasonable and rational method of providing the allocation under section 21. However, the Minister can only reach that decision after factoring in to the equation all of the other identified

interests relevant to recreational and non-commercial Māori customary interests.

5 The third point I wish to emphasise is that the assessment of recreational interests under section 21 is not made by simply analysing the wellbeing factors found in the definition of utilisation in section 8(2). The range of factors relevant to the assessment of recreational interests under section 21 is broadly co-extensive with the social, cultural and the economic wellbeing factors found in that definition of utilisation in section 8(2). If we take the case  
10 of kahawai, the interest of recreational fishers raised during the consultation included the sporting qualities associated with fishing for kahawai, having a greater quantity of kahawai, the value of kahawai as a food source for some and the pleasure of fishing for that particular type of fish. These are all qualitative factors which are probably encompassed by the section 8(2) social,  
15 cultural and wellbeing factors. However, there are other factors that may also be taken into account when assessing recreational interests, such as the impact on recreational interests of historic management decisions and historic fishing activity, neither of which would fall in to the definition of utilisation or the wellbeing factors found in the definition of utilisation. So, when the  
20 Minister makes an assessment of recreational interests, he doesn't simply apply the social, cultural and economic wellbeing factors found in section 8(2), instead he makes a decision under section 21 bearing in mind the objective of the Act when assessing what are the recreational interests. So the primary provision governing the Minister's TACC decision in section 21, the wellbeing  
25 factors are relevant to that decision insofar as they fall within the scope of recreational interests which the Minister must consider under section 21. Any decision which the Minister makes must of course conform with the overall purpose of the Fisheries Act but that purpose is not sub-divisible, so it's not appropriate to take one part of the purpose of section 8(2) and make this the  
30 driver of the outcome of the decision made under section 21.

The fourth point I wish to make concerns the question as to whether or not the interest which recreational fishers have in larger and more abundant fish. Is that achieved through section 13 or is it achieved through section 21 and the

Crown submission is that the interest which recreational fishers have in larger and more abundant fish stock is best achieved through managing the TAC under section 13. Once the TAC is set, the Minister's duty under section 21 is to determine the interest of the recreational fishers and non-commercial customary Māori interests and then set the TACC. It would seem inconsistent with the purpose and structure of sections 13 and 21 to make a section 21 allocation of fish that will allow the development of larger and more abundant fish. This is because any change in the size of the fish stock is more appropriately achieved through reducing the TAC under section 13. To this end, the Crown would disagree with the recreational fisher's submission that we are making a decision under section 21, the Minister can deliberately provide for an allocation for non-recreational fishers which will not be caught so as to assist in the development and conservation of stock. Sorry, provide for an allocation for recreational fishers which will not be caught, so as to assist in the development and conservation of stock. However, the Minister might allocate more to recreational fishers under section 21 than it had anticipated fishers will actually catch in the short term in order to recognise their interest to grow in to an ability to be able to fish more and catch more under a particular allocation. It is a different issue to making a decision that's designed to enhance the quality and the amount of the fish that is found in a particular stock.

The fifth point I wish to make concerns the meaning of –

25 **ELIAS CJ:**

Sorry, can you just explain that a little bit more, might allocate more to let them grow into?

**SOLICITOR-GENERAL:**

30 I'm sorry. The word grow into was fraught to mislead and I apologise for doing so. What I was meaning to say Your Honour, is that the Minister might make a decision under section 21 to allocate more to recreational fishers and that allocation may be, in the short term, more than is anticipated that the

fishers will catch and the expectation that the recreational fishing industry will expand or develop or grow in that sense.

5 **ELIAS CJ:**

They can anticipate growth?

**SOLICITOR-GENERAL:**

They can anticipate a future interest that should be able to be catered for. I'm  
10 not too sure if that satisfactorily addresses the question that Your Honour  
had?

**ELIAS CJ:**

No, I just wondered what you meant by it.

15

**McGRATH J:**

Is that in your written submissions?

**SOLICITOR-GENERAL:**

20 Yes, it is, it is. It was a point which my friend Mr Galbraith seized upon as  
being something which he thought was a –

**TIPPING J:**

It presumably is linked with the idea that you are not ruthlessly bound by catch  
25 history?

**SOLICITOR-GENERAL:**

Precisely, yes, precisely.

30 **TIPPING J:**

It's a highly relevant factor no doubt, it's not a determining –

**SOLICITOR-GENERAL:**

Precisely, Your Honour, yes.

**TIPPING J:**

You can go above it?

5 **SOLICITOR-GENERAL:**

Yes.

**TIPPING J:**

The extent is seen appropriate?

10

**SOLICITOR-GENERAL:**

Yes.

**TIPPING J:**

15 Or below?

**SOLICITOR-GENERAL:**

Or below it. The Minister must take into account all known interests that are associated with the recreational or non-commercial customary Māori interests and then ultimately, as transpired in this case, may come back to catch history as being the only reasonable and sensible basis for making a decision but he can only get to that point after taking into account all of the other interests that are known about the interest –

20

25 **TIPPING J:**

You agree with Mr Galbraith essentially on –

**SOLICITOR-GENERAL:**

I think we're all in agreement on this very point.

30

**TIPPING J:**

Yes, yes.

**ELIAS CJ:**

What about where, as I understand to be the case from reading the documents here, catch history is wildly inaccurate?

5 **SOLICITOR-GENERAL:**

This comes back to the point that I was making right at the beginning, that the Minister is often obliged to make a decision using some optimal information and where the information is not adequate, the Minister must take a very cautious approach, the legislation imposes that obligation on him. Even wildly  
10 erratic information about catch history might be better than purely anecdotal comments that have come from another source about the value of a particular resource to a particular interest group.

**ELIAS CJ:**

15 Yes, I'm just wondering if there's an intermediate point between being shackled by catch history which on any view may well be inadequate, making a best assessment on the best information available and providing for future growth. It doesn't seem to me that rejecting catch history as the be all and end all necessarily takes you to sufficient flexibility on the scheme of the Act to  
20 develop an interest.

**SOLICITOR-GENERAL:**

Well Your Honour, within the statutory framework which exists at the moment, all the Minister can do is make a reasonable, conscientious decision –

25

**ELIAS CJ:**

Yes, I understand that, yes.

**SOLICITOR-GENERAL:**

30 Based on the best information that is available.

**ELIAS CJ:**

Yes.

**SOLICITOR-GENERAL:**

The submission which the Crown makes is that the Minister does not start off from the position that catch history is going to provide the answer. The Minister must understand what the interests of the recreational fishers are, take those into account and then make a decision. Now it may ultimately be that after taking all of those factors into account he or she comes back to catch history. But it's not the determiner and it is not the starting point.

**ELIAS CJ:**

I'm just wondering about recreational interests.

**SOLICITOR-GENERAL:**

Yes, I was just going to come onto that very point.

**ELIAS CJ:**

Slipping into that but it's really fishing interests.

**SOLICITOR-GENERAL:**

That is correct, yes.

**ELIAS CJ:**

Non-commercial fishing interests.

**SOLICITOR-GENERAL:**

That is correct Your Honour.

**ELIAS CJ:**

And again this ties into my query about other mortality that this provision does seem to be directed at the take, the fishing?

**SOLICITOR-GENERAL:**

At one level I can understand Your Honour's reasoning. The submission which I would urge upon the Court however is that the word interest, recreational or non-commercial Māori customary interest, isn't necessarily



going to result in a assessment of what the take is for that particular interest group. Now this is a point which I note Justice Wilson and Justice Tipping in particular have questioned Mr Galbraith about and on this point I would respectfully adopt the submission of Mr Scott that the words “taking account of” interests does – is almost invariably going to result in something being allocated to those who have an interest but it is conceivable and I will urge the Court not to reach a position where it says something to the contrary, that it is conceivable, that after taking into account the interests of a particular group –

10 **WILSON J:**

It’s allowing for rather than taking into account though, isn’t it?

**SOLICITOR-GENERAL:**

Sorry. Allowing for that – that particular group would still end up with nothing and I say that for two reasons. One, the dictionary definition of what constitutes “allow for” and we’ve provided that to the Court, but also just looking at the legislative history, and in particular the report of the Primary Production Committee, which explained the difference in terminology between the bill and the legislation as it emerged, clearly envisaged, in my respectful submission, that the Minister would look on a case by case basis, take into account the interests of that particular group and then make a determination as to what, if any, allowance there ought to be.

**TIPPING J:**

25 I think an important feature Mr Solicitor is that one mustn’t disconnect “allow for” from its contextual reference of that to any second the Minister shall allow for. It’s a kind of arithmetical concept in a way because normally you’ve got 10,000 tonnes of TAC and you obviously have to know what you should notionally if you like count for these other things before you can fix sensibly your TACC otherwise you risk exceeding the TAC. There is an element of just simple – this is becoming vastly over complicated but all they’re saying is you’ve got to remember when you set a TACC that there are these other people who have got a likely drain on the TAC.

**SOLICITOR-GENERAL:**

And the only point I was going to make Sir, and again I acknowledge that it's very difficult to conceive of a situation where this would occur, but it is conceivable that there could be an interest that doesn't get recognised in the form of an allocation. That's the only point.

**TIPPING J:**

Well that is theoretically possible. I would have thought on the –

**10 SOLICITOR-GENERAL:**

That's the only point that I was trying to make and I'll not go any further than that.

**ELIAS CJ:**

15 But which might preclude quota – it might result in a measurable diminution of the quota available. Is that what you mean?

**SOLICITOR-GENERAL:**

It means that a particular group would end up with nothing.

20

**ELIAS CJ:**

Oh.

**TIPPING J:**

25 You don't have to take anything off the TAC to reflect the interests of that group because you've decided for whatever reason, unlikely as it may be, that the zero goes well inside that group.

**SOLICITOR-GENERAL:**

30 That's the only point that I was trying to make and I again emphasise it's going to be – it's difficult to conceive of a situation where that's likely to happen but that option –

**ELIAS CJ:**

If there are any interests, how can that be so?

**SOLICITOR-GENERAL:**

5 Well because the interest isn't necessarily going to be reflected in an allocation.

**ELIAS CJ:**

On what basis?

10

**SOLICITOR-GENERAL:**

It might be it's established that yes there is a desire, an aspiration, on the part of a certain group to be able to acquire certain types of fish.

15 **ELIAS CJ:**

I don't think this is about aspirations. I find it very difficult to read this section as being about aspirations. Particularly when it's contrasted with the other mortality to the stock. It reads like an assessment of, as Justice Tipping puts it, the drain on the TAC which must be subtracted before you can set the

20 TACC?

**SOLICITOR-GENERAL:**

We may be really getting down to some very, very fine nit picking here and that's my fault for even having raised the point but I did want to emphasise  
25 that the Crown would support Mr Scott's submission that it is theoretically possible that in considering the interests - when making an allowance for the interests of a particular group, it is theoretically possible that that allowance would end up being zero.

30 **TIPPING J:**

It's not an allowance. That's the problem. You can't equate, in my respect, at least the present thinking, allow for as an allowance. It is recognise or –

**ELIAS CJ:**

Subtract.

**TIPPING J:**

5 Subtract if you like, if you want to do the arithmetical line which I think does have a bearing on it. It's how much you must take off so as you don't exceed TAC by what you fix as TACC.

**SOLICITOR-GENERAL:**

10 Well I think I'm clearly in Your Honour's camp on that point.

**ELIAS CJ:**

Because if it's – I'm not sure why the Minister would really seek to argue for a very wide discretion under section 21 because there –

15

**BLANCHARD J:**

311? It isn't allowed.

**ELIAS CJ:**

20 Well yes I think that's right. But it's where that takes you.

**TIPPING J:**

Well it may be able to be called an allowance if you recognise something but I don't think it precludes your saying in the very unlikely event that there's  
25 actually going to be a nil allowance if you like to use the word allowance.

**SOLICITOR-GENERAL:**

That's the only point I was trying to make.

30 **TIPPING J:**

It's a very fine point and I think it's fair to make it but –

**SOLICITOR-GENERAL:**

And I certainly didn't want to take up the Court's –

**TIPPING J:**

- it's theoretical more than real I would have thought.

**SOLICITOR-GENERAL:**

5 I agree.

**ELIAS CJ:**

The point that why would the Minister argue for a wide discretion in the scheme of this Act under section 21 is – he's inevitably going to have to  
10 arbitrate between two irreconcilable forces whereas the TAC mechanism, if it's the principal mechanism, is a statutory – it doesn't have that quality about it.

**SOLICITOR-GENERAL:**

15 Yes. I'm not certain that Your Honour and I are actually in disagreement.

**ELIAS CJ:**

All right.

20 **SOLICITOR-GENERAL:**

Those are the five points that –

**ELIAS CJ:**

But because so much has been said about potential lawsuits, compensation,  
25 it's the case, isn't it, that if the TAC is lowered and that pain flows through to quota, that there's no comeback, is that right?

**SOLICITOR-GENERAL:**

Yes.

30

**ELIAS CJ:**

Is that not the case if it's done under section 21 adjustments or is all this interorum?

**SOLICITOR-GENERAL:**

Yes. I won't say yes and I won't say no.

**BLANCHARD J:**

5 What would this be, some sort of public law damages?

**SOLICITOR-GENERAL:**

We'll have to wait and see.

**10 ELIAS CJ:**

Yes I'm sorry. It was sort of vulgar curiosity on my part.

**TIPPING J:**

Mr Solicitor, can I just ask you one thing that's just been, you may be able to  
15 set me right if I'm wrong. I've always thought that although there is an  
inter-relationship that you rightly point out between sections 13 and 21 and  
20 and 21, really they are sort of aiming at different targets ultimately, in that  
the section 13 target is what the whole drain ought to be on this fishery and 21  
is how you work out what is left if you like for the commercial people after  
20 you've made appropriate recognition of the other people. So obviously there's  
an inter-relationship but I imagine that it's not uncommon for the Minister to do  
everything at the one time, so that he can see it all as a whole. Is it correct to  
think that the target, if you like, of each section is rather different?

**25 SOLICITOR-GENERAL:**

The target as you have expressed it is different but that doesn't mean that we  
buy in to this argument that the purposes of the Act can be divided in the  
way –

**30 TIPPING J:**

Well no, I wasn't that at all. I'm just saying, there is a material difference in  
the exercise on which you are engaged in 13, as against 21?

**SOLICITOR-GENERAL:**

Indeed, yes.

**TIPPING J:**

5 It's not a great point because it's self-evident but there seems to have been some sort of attempt to sort of fuse the two in some way.

**SOLICITOR-GENERAL:**

Probably because the ultimate decision making occurs in very close proximity.

10

**ELIAS CJ:**

Do the facts or whatever those –

**SOLICITOR-GENERAL:**

15 Final advice papers.

**ELIAS CJ:**

Yes. Do they address all elements?

20 **SOLICITOR-GENERAL:**

Yes, indeed.

**ELIAS CJ:**

Including regulation and permit questions?

25

**SOLICITOR-GENERAL:**

Can I just pause?

**ELIAS CJ:**

30 Yes.

**SOLICITOR-GENERAL:**

Regulations but not necessarily permits.

**ELIAS CJ:**

I see.

**TIPPING J:**

5 But TAC, TACC and putting some brake on the recreational people, are all part of one package in the end, aren't they?

**SOLICITOR-GENERAL:**

Indeed, yes.

10

**ELIAS CJ:**

Why was there no increase or decrease in the bag limits?

**SOLICITOR-GENERAL:**

15 The Minister didn't think it was necessary.

**ELIAS CJ:**

How was the 10 percent reduction to be achieved?

20 **SOLICITOR-GENERAL:**

In the expectation that people would comply with their obligations and in the expectation that that reduction would achieve what the Minister was trying to achieve.

25 **McGRATH J:**

What obligations would recreational fishers have?

**SOLICITOR-GENERAL:**

30 Only to comply with their bag limits obviously. There's nothing else. There was one administrative point which I just wanted to make. Your Honours will appreciate that the Minister proposes to review the way in which these decisions are made under sections 13 and 21 in relation to the allocation of kahawai under section 21. The timing of that decision, can I just alert the Court to that. If the decision were to be made before the commencement



of the next fishing year on the 1<sup>st</sup> of October, that process would need to be commenced in May of this year in order to comply with consultation obligations. So what I'm rather subtly suggesting to the Court is –

**ELIAS CJ:**

5 A judgment before.

**SOLICITOR-GENERAL:**

If the Court can't get a judgment out before the 1<sup>st</sup> of May, then it would be –

10 **ELIAS CJ:**

There will be something wrong.

**SOLICITOR-GENERAL:**

– then it would be after the 1<sup>st</sup> of October.

15

**TIPPING J:**

Five pm on the 1<sup>st</sup> of May.

**SOLICITOR-GENERAL:**

20 Either the 1<sup>st</sup> of May or the 1<sup>st</sup> of October, it would be very nice but in between time would cause a lot of difficulty.

**ELIAS CJ:**

25 I'm not sure that that's not an entirely improper suggestion. It's a matter of judicial independence.

**McGRATH J:**

Judicial payback.

30 **SOLICITOR-GENERAL:**

I know you'll take it in the spirit in which it's intended.

**ELIAS CJ:**

Thank you Mr Solicitor. Yes, Mr Galbraith.

**MR GALBRAITH QC:**

5 A few things. Just very quickly on *Snapper 1* which has been referred to.  
That was a decision, the Court of Appeal decision back in 1997, section 8 only  
came into effect in 1996. While it's true that the Court of Appeal did take into  
account the 1996 amendments although they weren't, I think, generally in  
force at that stage, I don't think there was any discussion of the role in  
10 section 8 in *Snapper 1*, I stand to be corrected by His Honour Justice Tipping  
gave the judgment but I think that's right.

If I can just talk for one moment about sustainability and utilisation and  
section 8 and 13 and 21. We are not saying for moment that section 13 is and  
15 we never have said, is solely sustainability or that section 21 is solely  
utilisation. We accept the fact, recreational fishers accept the fact that the  
purposes in section 8 are complimentary purposes, so you provide for  
utilisation while ensuring sustainability. So we're not saying you subdivide this  
but what we are saying is really, with respect, a point I hope was what  
20 Justice Tipping making, is that when you look at section 13 it is predominantly  
a sustainability section because that is what it's all about, MSY et cetera and  
under it's part 3 heading says sustainability. It doesn't cut up the cake  
between the various parties. When you look at section 21 it does cut up the  
cake, it's predominantly a utilisation section. Now, I accept entirely that when  
25 deciding utilisation you've still got to take into account ensuring sustainability  
because that's what section 8 says and when you're doing sustainability  
you've got to be considering the fact of utilisation because that's also what  
section 8 says.

30 With great respect, the mistake which is made by the Court of Appeal is in  
rejecting what they saw as an attempt to subdivide section 8, they have as I  
said before, really thrown the baby out with the bath water. It doesn't mean  
you then ignore section 8 or the fact that it says what utilisation is. If you've  
got a predominant utilisation section then you apply section 8, the two

elements of section 8 complimentary but of course if you're on predominantly a utilisation section then you're predominantly going to be focussing on the utilisation purpose under section 8 and vice versa, if you're on sustainability you're predominantly going to be focussing on sustainability, while still  
5 keeping an eye on utilisation. So that's all we're saying, that section 13 is predominantly sustainability and section 8 is predominantly utilisation. We're not trying to subdivide and the Court of Appeal unfortunately in running it all together which is what they tended to do, was collapse the whole issue, is in our respectful submission incorrect.

10

If I can just talk about section 13 for a moment and just take up a point that my learned friend Mr Scott addressed you on. Mr Scott is entirely correct that setting the TAC is the most direct route to altering biomass, no quarrel about that. Her Honour the Chief Justice asked me earlier why recreational fishers  
15 hadn't challenged the decision on the TAC. Well, the reason was as I think I answered, was because the decision to reduce the TAC was in favour of the recreational fisher's position because it meant that the biomass would increase over whatever else it might have been had it been a higher TAC. Now, not saying that the Minister got it right or the Minister got it wrong, but it  
20 was a decision in the right direction but it doesn't answer the question about who then gets to utilise the reduced TAC in the meantime until the fish have time to grow because reducing the TAC doesn't mean overnight, you've suddenly got 10 percent or 15 percent or 25 percent more fish, it doesn't happen like that.

25

If you take, I hope this sort of states the point that I'm labouring to make, that if you get a fishing stock say that's not doing too well for whatever reason and then you have an oil spill in the area and the fishing stock gets devastated by a natural calamity, so I'm not blaming anybody, it's not the commercial fishers  
30 over fishing, it's not anybody else doing wrong, you've got that situation. The Minister quite rightly reduces the TAC to allow the fishing stock to re-establish, to rebuild which it does under section 13 et cetera, but then when he comes to a decision as to who gets to use the very substantially reduced fishing stock he's got to, in our respectful submission, make a determination as we've said

before, emphasising or focusing predominantly, because of the utilisation decision, on the wellbeing situation.

5 Among the wellbeing situation he's got to recognise the fact that if the stock is reduced substantially the chances of the recreational and even less the chance of the customary fishers being able to catch whatever he allows to them is going to be an uphill battle, whereas the chance of the commercial fishers because of all the technological advances they've got catching whatever the allowance for them is going to be a jolly sight easier and if then 10 the next year he applies catch history again, if that's the base he's going to proceed on, you're probably going to get a death spiral for the recreational and customaries because they won't have made their – whatever was allowed to them and commercials will have so next year down goes their allowance and up goes the commercial's allowance and they're back on their argument 15 that they get the full amount of whatever's left under the TAC.

In my respectful submission that can't be right. He has to make a separate decision as to allocation, applying section 8 because it's a utilisation decision, taking particular account of the objectives under – what we describe as an 20 objective under section 8, and his answer may be as my learned friend Mr Solicitor said, if he's gone through the whole appropriate process of analysing all the issues which are relevant to deciding interests, his answer may be no TACC because otherwise this stock isn't going to rebuild quickly enough and the recreational, whose wellbeing or customary fishers whose 25 wellbeings is of vital importance are going to be squeezed out or it may be catch history and too bad. If he goes through the right process he can get to either answer but he's got to go through the process and I think with respect Mr Solicitor on behalf of the Crown accepts that, that you can't just choose one result which is what we say happened actually here in fact. You've got to 30 go through the process and if you get to that result by the right process well so be it. But in getting to that process you've got – there's an evaluator issue and – so there are two issues that arise. One under section 13, which may be a biomass issue, but there's still a significant issue that arises under section 21.

**ELIAS CJ:**

5 In adjusting the TAC under section 13, the Minister has to take into account the economic impact of moving the matters.

**MR GALBRAITH QC:**

Yes.

10

**ELIAS CJ:**

Why do you not argue that the whole reduction comes off the quota?

**MR GALBRAITH QC:**

15 Well that's what –

**ELIAS CJ:**

Why do we need the complication of yet another assessment of economic, social and whatever aspects?

20

**MR GALBRAITH QC:**

Well that's in fact what the recreations were asking for under section 21. Not the whole reduction but in effect they were – well not in effect, in fact they were saying that the TACC should be reduced below the previous catch history because they would say that the low catch rates which the recreationalists were facing in for example the Hauraki Gulf where a consequence of years of over fishing by the commercials. Now there's two sides to that argument, I appreciate that, but that was the position being taken by the recreational fishers.

30

**ELIAS CJ:**

But why is there this blame or – why is there the contest at the section 21 stage?

**MR GALBRAITH QC:**

Because once you've got the TAC set it's a question of who gets to benefit from that.

**ELIAS CJ:**

- 5 But if you take the view that the Minister is obliged to allow for the recreational take, why doesn't that mean that you continue to provide for the recreational take?

**MR GALBRAITH QC:**

- 10 Sorry, that was the next question I was just going to come to. What's emerged in this court is rather different, appears to have emerged in this court, is perhaps a rather different approach to what allowance means or "allow for" under section 21.

15 **ELIAS CJ:**

Well that's what we're probing.

**MR GALBRAITH QC:**

- 20 Yes, yes, no I understand that. As I understand ma'am and I'm subject to correction, what the Minister does at the moment is he actually puts a number on commercial, customary and TACC so there's a TAC number and then there's a volumetric tonnage number on each of the other three. That's regarded as being a limit which the Minister is allowing for each of them so it's not in my understanding regarded as being whatever it is that they take which  
25 he's then got to make an estimate of and simply take off and whatever's left over is the TACC.

**ELIAS CJ:**

So it's a discretion not a judgement?

30

**MR GALBRAITH QC:**

Yes.

**ELIAS CJ:**

And you're content with that?

**MR GALBRAITH QC:**

5 And that's the position, as I understand, the solicitor. If I could just read to you  
from, it's on case volume 4. You'll recall that I explained to Your Honours  
before that the customary allowance which has been made is considerably,  
and my learned friend Mr Scott confirms, considerable in excess of what  
10 customary fishers actually take under the regulations. And if I could just read  
to you from volume 4, page 522, it's only an example, just from the 2004 final  
advice paper, page 522, paragraph 70. What it says is, "The consistent  
overfishing of the TACC and allowance which results in a reduction of the  
TAC is a general principal to be attributed to the stakeholder group  
responsible for the overfishing." So it's only if one group goes out there and –  
15 I mean they've actually set a TACC or you set an allowance for recreation, it  
doesn't mean that people are necessarily going to stick by that so what the  
Ministry are saying here, if one party goes and abuses that then next time  
round if you've got to reduce the TAC because of that, then you should take  
account of that in setting the section 21 utilisation. So again it's the same  
20 point but section 13 in reducing the TAC isn't the end of the issue.

Equally stakeholders may elect to exercise their fishing rights in a manner  
which results in their allocation of the fishery being under caught. In other  
words it's up to the stakeholders themselves. They may decide well look we  
25 want to have this fish stock re-established even more quickly. We won't go  
and plunder paua resource somewhere for a period of time. We'll let it rebuild  
and why should they then lose out next time round when the stock's adjusted?

30 "Voluntary closures and temporary shelving of allocation may be undertaken  
as a means of improving the abundance of the species and availability of  
certain sized fish. Current catch by customary Māori may not reflect the  
extent of customary interests in the species. Decisions maybe made not to  
fish a species due to non-availability. The allocation process should  
endeavour to take account of customary needs and not simply reflect the

current level of catch which may have been constrained by a lack of abundance.” So –

**TIPPING J:**

5 All by voluntary –

**MR GALBRAITH QC:**

All by voluntary whatever the word is, I can't remember the right word.

10 **ELIAS CJ:**

Abstinence.

**MR GALBRAITH QC:**

Abstinence, yes. And perhaps actually just on the next page it's just  
15 interesting because from 523, paragraph 73 it says, it's talking about  
recreational allowances, “Where appropriate bag numbers may need to be set  
for the stocks introduced as QMS. The purpose of a bag number is to ensure  
that the recreational allowance is not exceeded. The bag limit may also act as  
a means by which the sustainability of the fishery is ensured. For a number of  
20 stocks introduced under this process there is no current bag limit. The need  
to set a bag limit may be averted in the short term with the recreational  
allowances based on current catch but takes into future recreational interests  
in the resort. In the immediate term it may be unlikely that the recreational  
allowance for some stocks will be exceeded even in the absence of a bag  
25 limit.” And with respect I think that was the Minister's position here though the  
High Court has said that was improper.

Now the other – perhaps just the other, on the same theme, can I just direct –  
well, so there's an interesting argument about what “allow for” means, put it  
30 that way. Is it an allowance in the way which I think generally it's been  
implied, that it's something which is identified and determined and there's a  
consideration where you need a bag limit to enforce it or don't need a bag limit  
to enforce it or is it the other alternative which Your Honours have spoken of,  
is it simply making an estimate of what is going to be taken in a sense by



those other interests and then making sure that the TACC doesn't allow the TAC to –

**TIPPING J:**

5 Whatever you caught, surely it's the amount you put alongside it that's the critical question?

**MR GALBRAITH QC:**

Yes.

10

**TIPPING J:**

And how you get to that amount.

**MR GALBRAITH QC:**

15 Yes. Though just taking up that issue about whether you could recognise an interest and not making an allowance for it. The problem about that is that if the interest exists and takes and you don't make an allowance for it, then it seems to me you're in trouble.

20 **ELIAS CJ:**

Then you've got poaching so you –

**MR GALBRAITH QC:**

25 And you've got poaching as well, yes, that's right. but I would have thought you could not, not make an allowance – hang on, I've got that wrong. You could only not make an allowance where there's a recognised interest, if you used one of the regulatory powers to prevent that interest being exercised.

**TIPPING J:**

30 Precisely.

**MR GALBRAITH QC:**

I don't see how you could do it under section 21.

**TIPPING J:**

I agree Mr Galbraith, but that doesn't mean you've got to always have a plus number alongside it, inevitably.

**MR GALBRAITH QC:**

5 No, well, you've got to recognise it, well that was to use Your Honour's earlier term.

**TIPPING J:**

You've got to think about it –

10

**MR GALBRAITH QC:**

I think you've got to do more than that Sir, I think, if it exists I think you've got to allow for it and the question is whether you might allow something more for it, and taking –

15

**TIPPING J:**

If it doesn't exist, because you've put in a block, it would only be in – I agree, if it exists, you must recognise it.

20

**MR GALBRAITH QC:**

No I accept what Your Honour says.

**ELIAS CJ:**

25 Do you allow it as a matter of grace to the interest that it's attributed to, or is that all covered by the permit provisions of the Act and it's simply necessary for you to deduct that stock if you're not to exceed the TAC? And that's what that exercise is all about, but that isn't an argument you're putting to us?

**MR GALBRAITH QC:**

30 No, and we see it as a, put it this way, a positive allowance which, in our submission, should positively reflect what section 8 says, whichever emphasis you'd like to put on that.

**TIPPING J:**

But you do see it as an allocated mechanism, because you used that expression yourself?

**MR GALBRAITH QC:**

5 Yes, so –

**TIPPING J:**

Section 21 is an allocation decision.

10 **MR GALBRAITH QC:**

It is in that sense, at the end of the day what the TACC is falls out of that process and then that's, as we know, subdivided between quota holders. I think this, Your Honours have been taken to this already, but I'll just give Your Honours the reference again, the select committee report at little roman 15,  
15 which I think my learned friend Mr Scott took, in fact he did take you to. It talked about the submissions that were made before the select committee, concerns about priority, et cetera. The context of those submissions and talking about priority really, in my respectful submission, is talking about an allowance in the terms of something which is positive, rather than just a  
20 recognition of what exists, because otherwise you couldn't be talking about a priority, and if it just exists, it exists and that's all there is to it. Just, previous page, not previous page sorry, a couple of pages earlier on, little roman 11, sorry, the select committee material is behind our tab 5 in volume 2, little roman 11.

25

**ELIAS CJ:**

Volume, which?

**MR GALBRAITH QC:**

30 Our volume 2 of authorities, tab 5. This is the select committee report back in 1996, little roman 11, second paragraph, talks about the bill being consistent with New Zealand's international obligations, we've got some written submissions on that. There had been a suggestion if national benefit was a consideration and they rejected that, but you'll see in the third sentence there,

they say “We strongly believe that sustainability concern should be the key factor used to determine the TAC. We recommend subclause 13(3) which requires the Minister to have regard to such social, cultural, and economic factors as are considered relevant when considering the way in and the rate at which a stock has moved towards a sustainable level. Consistent with the UN – UNCLOS, doesn’t detract from the philosophy setting a TAC should be primarily based on sustainability concerns and recognises recent management practice.” So again, it’s just a recognition that section 13 is principally sustainability and 13(3) was engrafted and recognised as an international treaty obligation New Zealand had, and it was so that going up or going down, you weren’t hurting people, you were taking account of the good and the bad in relation to the effect of that.

I don’t want to get into the facts of the present case, but what was wrong here, in our respectful submission, was that the Ministry advice certainly wasn’t as clear and as correct as the submission which Mr Solicitor has very appropriately made to the Court today, which is that you can get to a catch history result, but only if you go through the right analysis. What you can’t do is set qualitative considerations to one side and prefer catch history because, for whatever reason, but you can get there. The odds are, in my respectful submission, is that you won’t get there in any situation where the wheel is really squeaking, because if you apply a qualitative analysis, somebody’s interest is going to be advanced or wellbeing is going to be advanced better than somebody else’s by making a decision in their favour or the other favour, and instead we’ve had the status quo for 20 odd years, and you’ll only get a priority if you deserve it under the wellbeing analysis, as the objective, I mean, otherwise, if you don’t jump that hurdle, no priority. If you do jump that hurdle, you should get a priority, and that’s the nub of the recreational fishers’ case, they’re not saying that they’re entitled to a priority or that every time they get a priority and sometimes they wouldn’t get it, but that’s what the Minister should be considering.

Unless there are any questions?

**ELIAS CJ:**

No, thank you.

**MR GALBRAITH QC:**

5 Thank you.

**ELIAS CJ:**

Thank you very much counsel for your assistance, we will reserve our decision in this matter.

10 **COURT ADJOURNS: 3.26 PM**

15