

NZRFC Delegates Report
To
The NZ trailer Boat Federation
August 2009

Kahawai Legal Challenge

The KLC brought by the New Zealand Recreational Fishing Council and the New Zealand Big Game Fishing Council, has been biggest thing ever in recent non-commercial fishing history. My reports since 2006 have included references to it. It was long arduous and costly. But what has been the result?

In March 2007 recreational and amateur fishers Kahawai Legal Challenge was won in the Auckland High Court. Justice Rhys Harrison made declarations that the Minister of Fisheries decisions on entry of the kahawai species to the quota management system in 2004 and 2005 were unlawful as the Minister of Fisheries had:

- Set total allowable commercial catch for kahawai without having proper regard to the social, economic and cultural wellbeing of the people – a mandatory consideration in the Fisheries Act 1996; and
- Failed to take into account the special considerations applying to the Hauraki Gulf, due to the Hauraki Gulf Marine Park Act 2000, when fixing the total allowable catch within area 1 (covering North Cape to East Cape, and including the Hauraki Gulf).

The High Court has directed the Minister to reconsider or review his 2005 decisions to take account of the Court's decision. This will require fresh decision-making before the start of the new fishing year in October 2007.

The Ministry of Fisheries accepted the Courts ruling, but commercial fishing interests took the case to the Court of Appeal.

The Appeal Court's decision was something of a mixed bag but represented a win for the commercials as regards the key issue of interpretation of sections 8 and 21. However aspects of the Court's reasoning in arriving at this result could be said to be potentially helpful to recreational interests.

The decision needs to be read as a whole, but essentially the Court of Appeal overturned the decision of Justice Harrison, and upheld the Commercials appeal that the social, economic and cultural wellbeing factors were not a mandatory consideration when making decisions under section 21. The Court of Appeal determined that the decision which the Minister makes under section 21(1) "*must conform with the purpose of the Fisheries Act as expressed in s.8(1) but the governing provision is s.21(1), not s.8(1)*" [para 69]. The Court found there is no express reference in the statute to the social, economic and cultural factors in s.21, in contrast to s.13 [para 65].

The NZBGFC and the NZRFC then took the case to the Supreme Court and that decision was delivered on 28 May 2009. A majority decision of four of the Supreme Court's five judges dismissed the appeal from the Court of Appeal.