

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2023-485-

UNDER THE Judicial Review Procedure Act 2016

IN THE MATTER OF An application for judicial review of decisions of the Minister for Oceans and Fisheries under s 13 of the Fisheries Act 1996

BETWEEN THE ENVIRONMENTAL LAW INITIATIVE, a charitable trust having its registered office at 75 Taranaki St, Wellington.

First Applicant

AND DALLAS WILLIAMS on behalf of Ngāti Hau & Ngāti Kaharau Hapū ki Hokianga

Second Applicant

AND MINISTER FOR OCEANS AND FISHERIES, a Minister of the Crown who is responsible for the administration of the Fisheries Act 1996.

Respondent

STATEMENT OF CLAIM: APPLICATION FOR JUDICIAL REVIEW
31 AUGUST 2023

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THE APPLICANT BY ITS SOLICITOR SAYS:

Introduction

1. The first applicant, Environmental Law Initiative (**ELI**), is a registered charitable trust whose charitable purposes include to:
 - (a) preserve, conserve, protect and enhance natural and cultural resources, and to protect them against harm, misuse, depletion, unsustainable use and destructions; and
 - (b) promote and encourage environmental laws and policies for the conservation, protection and enhancement of the natural or cultural environment.
2. The second applicant, Dallas Williams (King) brings this claim on behalf of her hapū, Ngāti Hau and Ngāti Kaharau, the two hapū in Omanaia, Hokianga. Ngāti Hau and Ngāti Kaharau have authority over the rohe which reaches out from ngā Pukehaua Maunga and ngā Pukehuia Maunga to, and including, the marine and coastal environments of the Hokianga Harbour.
3. The respondent, the Minister for Oceans and Fisheries (**Minister**), is the Minister for the time being responsible for the administration of the Fisheries Act 1996 (**Act**), the purpose of which is to provide for the utilisation of fisheries resources while ensuring sustainability. Ensuring sustainability means:
 - (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
 - (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment.

“Utilisation” is defined in the Act as meaning conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

The quota management system

The Act

4. Schedule 1 of the Act divides New Zealand fisheries waters into a number of different fishery management areas. The Act provides for the management of stock, being any fish, aquatic life, or seaweed, within each of the fisheries management areas.
5. Under Part 4 of the Act, the Minister can, by declaration, make a stock subject to a quota management system within a quota management area (for example by reference to the areas in Schedule 1).
6. Once a stock is subject to a quota management system, the Minister must set a total allowable catch (**TAC**) for that stock in respect of its quota management area. The TAC applies in each fishing year for that stock until varied.

7. Section 13(2) relevantly requires the Minister to 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.

Particulars

- (a) Maximum sustainable yield is defined in s 2 as “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”.
- (b) The *Harvest Strategy Standard for New Zealand Fisheries (HSS)* refers to the stock level associated with taking MSY as B_{MSY} . B_{MSY} is defined as “the average stock biomass that results from taking an average catch of MSY under various types of harvest strategies.
8. The Minister must make the TAC decision *inter alia*:
- (a) in a manner consistent with New Zealand’s international obligations relating to fishing, pursuant to s 5;
- (b) in a manner consistent with the purpose of the Act, as set out in s 8;
- (c) taking into account the environmental principles set out in s 9;
- (d) taking into account the information principles set out in s 10;
- (e) taking into account any effects of fishing on any stock and the aquatic environment in accordance with s 11; and
- (f) having regard to the interdependence of stocks in accordance with s 13(2).

Ecosystem approach

9. Section 5 requires that the Minister’s powers must be exercised in a manner consistent with New Zealand’s international obligations relating to fishing, which include, *inter alia*:
- (a) the United Nations Convention on the Law of the Sea of 10 December 1982 (**UNCLOS**); and
- (b) the voluntary Food and Agriculture Organisation of the United Nations’ Code of Conduct for Responsible Fisheries 1995 (**Code of Conduct**).

Particulars

Article 61(4) of UNCLOS provides:

In taking [conservation and management] measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

Articles 6.1 and 6.2 of the Code of Conduct provide:

States and users of living aquatic resources should conserve aquatic ecosystems. The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living resources.

Fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development. Management measures should not only ensure the conservation of target species but also of species belonging to the same ecosystem or associated with or dependent upon the target species.

10. Section 9 of the Act requires the Minister, when making his TAC decisions, to take into account environmental principles set out in that section.

Particulars

The environmental principles are:

- (a) associated or dependent species should be maintained above a level that ensures their long-term viability;
 - (b) biological diversity of the aquatic environment should be maintained; and
 - (c) habitats of particular significance for fisheries management should be protected.
11. Section 11 of the Act requires the Minister, when making his TAC decisions, to first take into account, *inter alia*, any effects of fishing on any stock and the aquatic environment.
12. Section 13(2) of the Act requires the Minister to have regard to the interdependence of stocks when making decisions as to a TAC.

Precautionary approach

13. Section 5 requires that the Minister's powers must be exercised in a manner consistent with New Zealand's international obligations relating to fishing, which include, *inter alia*:
- (a) the Code of Conduct;
 - (b) the Rio Declaration on Environment and Development 1992 (**Rio Declaration**); and
 - (c) customary international law in relation to fishing.

Particulars

Article 6.5 of the Code of Conduct provides:

States and subregional and regional fisheries management organizations should apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources in order to protect them and preserve the aquatic environment, taking account of the best scientific evidence available. The absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment.

Article 15 of the Rio Declaration provides:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

14. Section 10 of the Act requires the Minister, when making his TAC decisions, to take into account the information principles set out in that section.

Particulars

The information principles are:

- (a) decisions should be based on the best available information;
- (b) decision makers should consider any uncertainty in the information available in any case;
- (c) decision makers should be cautious when information is uncertain, unreliable, or inadequate; and
- (d) the absence of, or any uncertainty in, any information should not be used as a reason for postponing or failing to take any measure to achieve the purpose of this Act.

Rock lobster fishing

Management under the Act

- 15. On 1 April 1990, the rock lobster fisheries (comprising red rock lobster and packhorse lobster) became subject to quota fishing in all quota management areas for a period of 25 years. That classification, brought into force pursuant to s 28BA of the Fisheries Act 1983, remains in force under s 17(3) of the current Act.
- 16. Red rock lobster stocks are located in nine quota management areas (**QMAs**). Relevantly to this claim the CRA1 QMA extends from the Kaipara Harbour on the west coast of the North Island around North Cape and then south to Te Arai Point.
- 17. Ngāti Hau and Ngāti Kaharau's rohe moana is squarely within the CRA1 management area.

Stock assessments

18. The Ministry for Primary Industries (**MPI**), through its business unit Fisheries New Zealand (**FNZ**) procures third-party providers to undertake fisheries stock assessments.

Particulars

The *Review of sustainability measures for spiny rock lobster (CRA 1) for 2023/24 (Decision Paper)* provides that stock assessments estimate, *inter alia*, the:

- (a) total stock biomass;
 - (b) vulnerable biomass – meaning the portion of a stock’s biomass that is legally harvestable; and
 - (c) spawning stock biomass – meaning the total weight of the sexually mature female fish in the stock.
19. The stock assessments are said to provide a scientific basis for TAC decisions, including because they estimate size of a stock relative to the maximum sustainable yield reference levels for that stock, and accordingly provide the basis for “sustainable” TAC options.
20. The most recent “full” stock assessment for the CRA1 stock took place in 2019. The B_{MSY} reference level was estimated to be 14.1 per cent of the unfished level.
21. In the 2019 stock assessment, the vulnerable biomass of the CRA1 stock was estimated to be at 15.5 per cent of the unfished level. The spawning stock biomass was estimated to be at 37 per cent of the unfished level.
22. “Rapid updates” to the CRA1 stock assessment were undertaken in 2021 and 2022. The results of the 2021 rapid update were that vulnerable biomass had declined to 14.6 per cent of the unfished level. The spawning stock biomass was estimated to be at 36.3 per cent of the unfished level.
23. The results of the 2022 rapid update show that vulnerable biomass had declined further to 14.4 per cent of the unfished level. The spawning stock biomass was estimated to be at 36.8 per cent of the unfished level.

Effect of rock lobster fishing on aquatic environment

24. Fishing of rock lobsters has created trophic cascades in CRA1, which affect associated species sea urchins (**kina**), kelp and other seaweed (referred to in this Statement of Claim as **seaweed**).
25. Rock lobsters feed on kina and are a key kina predator in CRA1.
26. In areas where rock lobster populations decrease due to fishing, the density of kina populations increases.
27. Kina feed on seaweed. In areas where their populations increase, seaweed coverage diminishes, with excessive kina numbers causing areas of the seabed to be denuded of seaweed (**kina barrens**). This process is described as a “trophic cascade”.

28. Seaweed supports a diversity of other marine life and the overall productivity that would otherwise naturally occur, undermining the viability of associated and dependent species, biological diversity of the aquatic environment, and habitats of particular significance within CRA1.
29. Seaweed also has large economic value, including carbon sequestration, nutrient remediation, coastal protection, enhanced fisheries and tourism, and provision of harvestable food and materials.
30. It can take decades to reverse a kina barren once the cause of that kina barren's creation is corrected.
31. Within the CRA1 QMA, red rock lobster have declined to the point of functional extinction, meaning their populations are so low they no longer perform their ecological function.

Previous CRA1 TAC decisions

32. On 1 April 2020, the then-Minister decreased the CRA1 TAC from 273.962 tonnes to 203 tonnes on the basis that the 2019 CRA1 stock assessment estimated that stock biomass would decline with then-current catch levels (**2020 TAC decision**).
33. On 16 March 2021, the then-Minister made a further decision retaining the TAC of 203 tonnes (**2021/22 TAC Decision**) on the basis that the 2020 rapid assessment update indicated that the 2020 TAC decision had successfully halted the predicted decline in biomass.
34. On 25 November 2021, the then-Minister announced his intention to revisit the 2021/22 TAC decision in the April 2022 sustainability round.
35. A statutory consultation process followed, with a decision made on 29 March 2022 to further decrease the TAC by 5 per cent to 193 tonnes (**2022/23 TAC Decision**) on the basis of the results of the 2021 rapid assessment update, and to provide an increased likelihood and rate of biomass increase relative to the status quo.

High Court judgment

36. On or about 17 November 2021, ELI brought proceedings for judicial review of the 2021/22 TAC Decision. These proceedings were later amended to also challenge the legality of the 2022/23 TAC Decision.
37. In a judgment dated 11 November 2022, High Court concluded that both the 2021/22 TAC Decision and the 2022/23 TAC Decision involved errors of law and were therefore unlawful (**Judgment**).¹
38. The Court found the first four grounds of review were established and made declarations of unlawfulness in relation to both decisions on the basis of those four grounds.

¹ *Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969.

39. The Court directed that the Minister reconsider the 2022/23 decision in accordance with the findings in the Judgment.
40. The Court accepted that the best available information on the effect of rock lobster fishing on the aquatic environment and trophic cascades was that in the expert evidence filed by the Applicant.

Particulars

That evidence is relied on in its entirety, but includes the passages below.

Dr Jeffs, a Marine Scientist, stated in his affidavit dated 6 May 2022 that:

“31. In my view, the proposed adjustments to the TAC for CRA1 in 2021/22 are based entirely on the management of the estimated population size of rock lobsters for maintaining ongoing fishing activities. They do not include environmental considerations, such as addressing the need to avoid, remedy or mitigate ongoing adverse ecological change in the coastal environment resulting from rock lobster fishing. While overall reductions in fishing harvest should help to support the overall extent of the rock lobster population in CRA1, further research and monitoring is required to determine the extent to which the rock lobster population needs to recover in size to provide sufficient abundance in shallow coastal waters for arresting and/or reversing the adverse ecological changes. In this regard, the advice to the Minister that all of the TAC options presented for the 2022/23 Decision will allow rock lobster to fulfil its role in the ecosystem has no scientific basis that I am aware of, and is therefore misleading.

32. Most importantly, in all shallow coastal areas within CRA1 containing urchin barrens and any remaining seaweed habitat, the abundance and size of rock lobsters urgently needs to be increased so that lobster predation pressure on sea urchins is sufficient to reduce their numbers to reverse the decline in the seaweed habitats and allow urchin barrens to revert to seaweed habitat. Achieving this may require spatial controls on rock lobster fishing activity as well as significant reductions in TAC especially in and around shallow coastal habitats. It is possible that other management measures may also be effective and warrant consideration. For example, an upper size limit on lobster could retain larger rock lobsters in the population that are likely to have a proportionally larger impact on sea urchins.”

Dr Shears, an Associate Professor at the University of Auckland, stated in his affidavit dated 6 May 2022:

“13. The abundance of rock lobster on rocky reefs has been greatly reduced and the size structure severely truncated by fishing. By that I mean lobster now are very rare on shallow reefs and they are predominantly small, as fishing selectively removes larger individuals... the extremely low densities of rock lobster on rocky reefs across northeastern New Zealand (including CRA1 and CRA2 areas) mean they no longer play an important role as predators in the ecosystem—thus they are commonly referred to as being ecologically or functionally extinct.

...

53. [N]one of the options proposed will have in terms of avoiding, remedying or mitigating the adverse effects of rock lobster fishing on rocky reef ecosystems. Ecological feedbacks act to maintain both kelp forest and kina barren states. As such, once you have a shift from one to other it is hard to reverse (this is called hysteresis). This is evidence within northern New Zealand marine reserves, where despite full/no-take protection of predator populations it has taken decades for the predators to control kina numbers and allow kelp to recover. Predator numbers need to increase, they need to grow to large sizes (large predators are the most effective predators of kina), and then they need to consume enough kina to reduce their numbers below the threshold required to maintain barrens. This threshold is very low and therefore this process takes decades. Consequently, relatively small increases in abundances of predators that may occur following decreases in TAC are extremely unlikely to have any detectable impact on reversing kina barrens.

54. For the above reasons, I do not believe that reversals of kina barrens can be achieved through TAC reductions alone. TAC reductions combined with large spatial closures or the fishery would provide a more effective means of rebuilding wider stocks and allowing lobster abundance and size to increase within closed areas to a point where they can reverse the non-linear impact of fishing within defined areas. Following kelp forest recovery in closed areas, harvest of rock lobster may be possible provided that abundance and size structure were maintained above a level required to control kina populations. This would then rely on ecological feedbacks associated with kelp forests (including predation) maintaining this state and preventing the shift to kina barrens.

55. The long-term approach used to manage rock lobster stocks has, and continues to, completely ignore the science that demonstrates clear and significant ecosystem-level consequences of fishing a highly important reef predator. In order to effectively avoid, remedy or mitigate the adverse effects of rock lobster fishing, and preserve these ecologically and economically valuable inshore ecosystems for future generations, management needs to acknowledge the science and move beyond simply adjusting TACs in order to maintain a fishery.”

Dr Kerr, a science advisor, stated in his affidavit dated 6 May 2022 at [53] that:

“48. In my view, based on the research and studies referred to above, and by reference to my observations diving for nearly forty years within the CRA1 area, Dr MacDiarmid’s finding that rock lobster are ecologically extinct certainly applies equally to ecosystems within the CRA1 area.

...

53. The advice to the Minister in respect of both his 2021/22 and 2022/23 Decisions refer to biomass increasing as a result of the TAC options proposed. As reflected in the 2006 Shears et al study, once rock lobster stocks have been fished to low levels, there is no evidence that even drastic changes to fishing quotas (for example, allowing recreational fishing only, as was the case at Mimiwhangata Marine Park) will result in long-term recovery.

54. Once stocks are at present low levels, only the application of no-take areas or fishing moratoriums can support recovery effectively. In my view, and based on the findings of the Shears study, the levels of crayfish currently within CRA1 would require no-take, and the adjustments to the TAC proposed for both the 2021/22 and 2022/23 Decisions would not allow for recovery, contrary to what the advice to the Minister suggests.

55. The ecological effects of allowing crayfish to be taken at unsustainable levels is significant, both in terms of the effects on the aquatic environment (given then established link between removal of crayfish and proliferation of kina barren) and to the species itself, as described by Dr MacDiarmid. These ecological effects are extensively documented and well understood. To the extent that the advice to the Minister stated that the science is controversial, hypothetical or equivocal, or that the matter is complex and the relationship between rock lobster abundance and urchin barrens is unknown, that advice is wrong.

56. These effects, and how to avoid, remedy, and/or mitigate them, do not appear to have been considered at all when developing the TAC proposals that were put before the Minister in respect of his 2021/22 Decision. The advice to the Minister in respect of his 2022/23 Decision is that all of the proposed options would allow rock lobster to continue to fulfil its ecological role within CRA1. As noted above, in my view rock lobster are ecologically extinct within CRA1, and as such cannot fulfil their ecological role at current levels. For the reasons set out above under the heading "Recovery", in my view the advice that any of the TAC options would allow rock lobster to continue to fulfil, or fulfil its ecological role to a greater extent, is wrong."

The Decision under review

41. Following the Judgment, FNZ:
- (a) Held an iwi fisheries forum (**IFF**) with the Te Hiku o Te Ika forum on or about 30 November 2022;
 - (b) Held an IFF with the Mid North forum on or about 9 December 2022;
 - (c) Opened public consultation on *Review of sustainability measures for spiny rock lobster (CRA 1) for 2023/24 (Discussion Paper)* on 10 January 2023; and
 - (d) Closed public consultation on the Discussion Paper on 8 February 2023;
42. In March 2023, the then-Minister announced his decision for the 2023/24 sustainability round, decreasing the TAC from 193 tonnes to 172 tonnes (the **Decision**). The letter communicating the decision is in the name of Hon Stuart Nash and is undated, and was released on 30 March 2023.
43. The Decision was made in reliance on advice from FNZ contained in the Decision Paper.
44. The Decision Paper states it was developed in response to the findings in the Judgment.

45. The Decision Paper accepts that “spiny rock lobster abundance is below a level that enables them to meaningfully contribute to the control of kina populations”. It states that the more research and analysis is required to understand the “biomass threshold and size frequency distribution of spiny rock lobster required to prevent further kina barrens from occurring or to reverse existing kina barrens”.
46. The Decision Paper states the estimated B_{MSY} reference level provides guidance for the review of sustainability measures and does not take into account wider ecosystem considerations or the interdependence of stocks.
47. The Decision Paper proposed:
- (a) Option 1: maintaining the TAC of 203 tonnes on the basis that the TAC has recently been decreased and that these decreases have assisted in maintaining CRA 1 at or above the B_{MSY} reference level.
 - (b) Option 2: decreasing the TAC by 5.7 per cent to 182 tonnes, recognising that the biomass increases expected under this option are greater within a shorter timeframe.
 - (c) Option 3: decreasing the TAC by 10.8 per cent to 172 tonnes, recognising that the biomass increases under this option are greater within a shorter timeframe than Option 1 and 2.
 - (d) Option 4: decreasing the TAC by 21.8 per cent to 151 tonnes, recognising that the biomass increases under this option are expected to be greatest and fastest compared to the other options.

(the Options)

48. FNZ recommended that the Minister select Option 3 or 4, and stated that on balance, it prefers Option 3 as this option acknowledges the uncertainty relating to the level that spiny rock lobster should be at to allow them to play their part in controlling kina populations and delivering other ecosystem functions.
49. The Decision Paper states that a decrease in the TAC alone “may not result in significant change”. It proposes further consultation on additional measures to address the problem of kina barrens.
50. The Decision Paper states that weight may be placed on the availability of additional tools in the future so long as the Minister is clear on the timeframe over which they will be developed. However, the Decision Paper states, the current decision must promote the purposes of the Act.

First ground of review – the Minister failed to take into account relevant considerations because the Options proposed in the Decision Paper do not reflect the purposes and principles of the Fisheries Act.

51. The purpose of the Act, as set out in s 8, is to provide for the utilisation of fisheries resources while ensuring sustainability, which means maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations and avoiding, remedying or mitigating any adverse effects of fishing on the aquatic environment.

52. When setting a TAC, the Minister must take into account:
- (a) the environmental principles in s 9; and
 - (b) the information principles in s 10.

Environmental Principles

53. The stock assessments, the biomass projections derived from those stock assessments and the estimated B_{MSY} reference levels all model a single stock, the CRA1 stock (the **single stock assessments**).
54. The Options developed in the Decision Paper are entirely or principally predicated upon the single stock assessments.
55. In addition, the single stock assessments do not take into account or reflect the ecosystem approach or the environmental principles and purpose of the Act. The Decision Paper does not cure this defect.

Information Principles

56. The best available information is that significant reductions to the TAC, combined with large spatial closures, are needed to remedy or mitigate the adverse effects of rock lobster fishing in CRA1.
57. None of the Options involved significant reductions to the TAC either alone or combined with large spatial closures.
58. No options for greater reductions to the TAC, either alone or in combination with large spatial closures, were presented to the Minister.
59. The Decision Paper represented to the Minister that the Options would provide varying levels of “certainty” that they would allow rock lobster to play their part in controlling kina populations and delivering other ecosystem functions, either on their own or in conjunction with other measures.
60. The Decision Paper also represented to the Minister that the Options provided for varying levels of “precaution”.
61. The Minister was not provided with any information to support either representation, which is contradicted by the best available information.

Particulars

Even if the exact biomass and size frequency distribution of spiny rock lobster required to prevent further kina barrens from occurring or to reverse existing kina barrens was unknown, a precautionary approach required the Minister to take action to ensure sustainability by maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations and avoiding, remedying and/or mitigating the adverse effects of rock lobster fishing on the aquatic environment.

62. The Decision Paper therefore failed to advise the Minister on a range of options that were consistent with the purposes of the Act and the options presented to the Minister failed to take into account the principles of the Act.

63. The Minister erred by:
- (a) Relying on incorrect advice that any of the proposed Options were consistent with the purposes of the Act and/or took into account the principles of the Act.
 - (b) Not considering materially greater TAC cuts, either alone or in combination with large spatial closures.

Wherefore the applicant seeks:

- A. a declaration that the Decision was unlawful.
- B. an order setting the CRA1 TAC at zero pending the Minister making a new decision.
- C. such further relief as the Court thinks just.
- D. costs.

Second ground of review – the Minister took into account irrelevant considerations in the 2023/24 Decision by placing weight on hypothetical future sustainability measures

The Applicant repeats paragraphs 1 to 50 above and says further that:

64. The undated summary of the Minister's Decision (**Decision Letter**) states that "I note that reductions to the TAC, TACC, and the allowance for recreational fishing alone, are unlikely to be enough to address the issue of kina barrens. Therefore, I have directed Fisheries New Zealand to provide me with additional advice by July 2023 on addressing kina barrens within CRA1, including consideration of further measures such as a maximum legal size for rock lobster, splitting the Quota Management Area, spatial restrictions and targeted culling of kina."
65. The Decision Paper states that the Minister can place weight on the availability and potentially more effective tools and assessment information in the future so long as the Minister is clear over the timeframe over which they will be developed, noting that the Minister must ultimately be satisfied that the current decision promotes the purposes of the Act.
66. The Act only allows the Minister to take into account existing controls or sustainability measures that apply to the stock.
67. It is unclear what the future tools and assessment information will be and there is no certainty as to if or when they will be implemented in CRA1.
68. The Minister was not provided with any information, nor the best available information, about when, whether and how such future tools and assessment information would take effect in concert with the Options.
69. Placing weight on hypothetical sustainability measures when making a TAC decision is inconsistent with the information principles in the Act, especially where there was and is no evidence that the hypothetical sustainability measures will have the desired effect.

70. The development of hypothetical sustainability measures in the future is too speculative for the Minister to legitimately place weight on while making a decision under the Act.
71. In any event, the Minister must still be satisfied that the Decision promotes the purposes of the Act. For the reasons outlined in the First Ground of Review, the Decision does not do this.
72. The Minister erred by placing weight on speculative and hypothetical sustainability measures.

Wherefore the applicant seeks:

- A. a declaration that the Decision was unlawful.
- B. a direction that the Minister remake the Decision without having regard to speculative and/or hypothetical sustainability measures.
- C. an order setting the CRA1 TAC at zero pending the Minister making a new decision.
- D. such further relief as the Court thinks just.
- E. costs.

Third ground of review – the Decision was unreasonable because it was not supported by evidence

The Applicant repeats paragraphs 1 to 50 above and says further that:

73. In the Decision Letter, the Minister states the Decision to reduce the TAC is intended to move the stock to an as yet unknown level, that in combination with other measures, will allow rock lobster to play their part in controlling kina populations and delivering other ecosystem functions in CRA 1.
74. The Minister's Decision was unreasonable because:
- (a) it was unsupportable on the best available evidence;
 - (b) the best available information is and was inconsistent with the Decision; and
 - (c) purported reliance on hypothetical or speculative possible future steps is irrational in the scheme of the Act.

Particulars

- (a) The Decision Paper did not refer to any evidence to support the advice that the small reduction to the TAC will allow rock lobster to play their part in controlling kina populations and delivering ecosystem functions, either alone or in conjunction with other hypothetical sustainability measures.
- (b) The best available evidence is inconsistent with the Decision because it concludes that significant reductions in the TAC, along with spatial

closures, are needed in order for rock lobster to control kina populations and deliver other ecosystem functions.

- (c) There was no evidence that the other hypothetical sustainability measures referred to in the Decision Paper will allow rock lobster to play their part in controlling kina populations and delivering other ecosystem functions in CRA 1, either alone or in conjunction with the reduction to the TAC.
- (d) The hypothetical sustainability measures were not the subject of real or existing policy development but were invented in order to justify the Decision. There was no evidence or basis on when or how they would be implemented, let alone if they ever in fact would be.

Wherefore the applicant seeks:

- A. a declaration that the Decision was unreasonable because it was not supported by evidence and in fact contradicted the best available evidence.
- B. a direction that the Minister remake the Decision without having regard to speculative and/or hypothetical sustainability measures.
- C. an order setting the CRA1 TAC at zero pending the Minister making a new decision.
- D. such further relief as the Court thinks just.
- E. costs.

Fourth ground of review – failure to comply with s 12 Fisheries Act 1996 (failure to provide for the input and participation of tangata whenua)

The Applicant repeats paragraphs 1 to 50 above and says further that:

- 75. The second applicants are tangata whenua, being hapū that are Māori holding mana whenua over an area of moana covered by the CRA1 area.

Particulars

- (a) The second applicants hold mana whenua in accordance with tikanga, and have done so since time immemorial.
- (b) The second applicants hold mana whenua over an area that extends into the moana: at its southern end is bounded by the ngā Pukehaua maunga and ngā Pukehuia maunga and at its northern end is bounded by the northern shores of the Hokianga moana.
- 76. The second applicants have non-commercial interests in the rock lobster stock.
- 77. The second applicants have an interest in the effects of fishing on the aquatic environment in the area under CRA1 in which they hold mana whenua.
- 78. The Minister failed to provide for the input and participation of the second applicants before making the Decision.

Wherefore the applicant seeks:

- A. A declaration that the Decision was unlawful.
- B. an order setting the CRA1 TAC at zero pending the Minister making a new decision.
- C. such further relief as the Court thinks just.
- D. costs.

Fifth ground of review – Failure to comply with s 12 Fisheries Act 1996 (kaitiakitanga)

The Applicants repeats paragraphs 1 to 50 and 75 to 78 above and say further:

- 79. The second applicants exercise kaitiakitanga over their mana whenua in accordance with tikanga tuku iho Māori.
- 80. The Minister was required to have particular regard to kaitiakitanga as exercised in accordance with the tikanga tuku iho Māori of the second applicants.
- 81. The tikanga of kaitiakitanga as exercised by the second applicants requires particular actions be taken when the sustainability of a species or ecosystem, or connection between those things is threatened.

Particulars

- (a) The tikanga of kaitiakitanga required that wānanga and hui be held.
- (b) The tikanga of kaitiakitanga required that the wānanga and hui consider tiro tiro, kōrero tukuiho, and tūpuna mātauranga.
- (c) The tikanga of kaitiakitanga required that consideration be given to:
 - (i) implementation of rahui (including both as to a 'no take' or 'restricted/controlled' take basis);
 - (ii) kōrero tuku iho, whakapapa, tapu, noa, mauri, mana, ingoa tawhito, waiata, poroporoaki, haka;
 - (iii) the appointment of kaiako, kaiwhakaruruhau, kaiawhina and kaitautoko to undertake work necessary to support/ensure the restoration of damage or depletion;
 - (iv) any other actions required as a result of the above processes to remedy and ensure tikanga is upheld and living connections are kept in good regard (safe) i.e. demarking areas or changing the names of places, species, people.
- 82. The Minister failed to have particular regard to kaitiakitanga, as exercised by the second applicants in accordance with tikanga Māori, before making the Decision.

Wherefore the applicant seeks:

- A. a declaration that the Decision was unlawful.
- B. an order setting the CRA1 TAC at zero pending the Minister making a new decision.
- C. such further relief as the Court thinks just.
- D. costs.

Address for Service

This document is filed by **Annette Sykes**, solicitor for the Applicant, whose postal address is 8/1 Marguerita Street, Rotorua 3010. The address for service of the Applicant is the offices of Annette Sykes & Co.

Documents for service on the filing party may be left at that address for service or may be—

- (a) posted to PO Box 734, Rotorua 3040; or
- (b) emailed to asykes@annettesykes.com and counsel for the Applicants at hart.reynolds@millslane.co.nz and isaac.hikaka@millslane.co.nz.