IN THE COURT OF APPEAL OF NEW ZEALAND CA 124/00

BETWEEN	CRA3 INDUSTRY ASSOCIATION INCORPORATED
	Appellant
AND	THE MINISTER OF FISHERIES
	First Respondent
AND	THE MINISTER OF CONSERVATION
	Second Respondent
AND	DENISE ANNE REID AS REPRESENTATIVE OF NGATI KONOHI, HAPU, WHANGARA AND THE DIRECTOR-GENERAL OF CONSERVATION
	Third Respondent

Hearing:	27 February 2001
Coram:	Thomas J Ellis J Doogue J
Appearances:	J L Marshall and S J Grey for Appellant H M Aikman and K Anderson for Respondents
Judgment:	29 March 2001

JUDGMENTS OF THE COURT

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THOMAS J

[1] I agree with the judgment of Ellis and Doogue JJ, to be delivered by Ellis J. I wish only to emphasise that the Minister of Conservation's statutory role under s 5 of the Marine Reserve Act 1971 is not as predominant as appears to have been thought, nor the Minister of Fisheries' function as subservient as his Ministry appears to have accepted.

[2] Under s 5(9), the Minister of Fisheries must concur in the decision of the Minister of Conservation. As Ellis J has held, this means that the Minister must turn his mind to the objection, make any inquiries he considers appropriate and reach his own independent decision whether or not to agree with the decision of the Minister of Conservation. While entitled to place reliance on the views of the Minister of Conservation, he cannot accept them without bringing his own judgment to bear on his decision. This is essential when the impact of the reserve upon a fishery or part of a fishery is in issue. Yet, in this case, the deference of the Ministry of Fisheries' officials to the decision of the Minister of Conservation placed their Minister in real jeopardy of not complying with his statutory obligation.

[3] Tension between the Department of Conservation and Ministry of Fisheries obviously arose following the Minister of Fisheries' refusal to concur in the Minister of Conservation's proposal to establish a marine reserve at Parininihi. This tension is apparent in documents included in the Case on Appeal. It is understandable that the Department and the Ministry would wish to avoid anything in the nature of a confrontation. Politically, and having regard to the principle of ministerial responsibility, it was probably considered imperative. But in the ensuing discussion, the Ministry of Fisheries began to perceive their Minister's role to be effectively that of monitoring the decision-making process of the Minister of Conservation. Officials saw the Minister's function as being limited to confirming that the Minister of Conservation had sufficient information relating to fisheries to permit him to make a reasonable decision in respect of the criteria contained in s 5(6). Care was to be taken not to check whether the Minister of Conservation had made the "right" decision. The Minister was not to "second guess" why the Minister of Conservation made a particular decision or judge whether "he made a right or wrong decision".

They, the Ministry of Fisheries, were not to say that the Minister made a "bad decision".

[4] Doubts as to the Minister of Fisheries' role continued. The Department of Conservation, based on legal advice, took the view that it was not for the Minister of Fisheries to decide whether a marine reserve would unduly interfere with fisheries under s 5(6). This advice, and the position it favoured, was in error. Understandably, it left the Ministry of Fisheries in doubt as to just what their Minister was to concur in under s 5(9). His decision, they felt, had to "be based on something". Ultimately, the officials thought it acceptable for the Minister of Fisheries to agree with the Minister of Conservation's view under s 5(6)(c) if the information before the Minister of Conservation strongly suggested that fishing would not be unduly affected. In fact, of course, the Minister of Fisheries had to himself be satisfied that the reserve would not interfere unduly with commercial fishing.

[5] This ambivalent attitude impaired the Minister of Fisheries' decision-making process. For example, the final Concurrence Report concludes that the Minister of Conservation had sufficient information on which to consider all objections and that he fully recognised the effects of the proposed reserve on fishing and fisheries in reaching his decision it would not interfere with or adversely affect commercial, customary and recreational fisheries. There was no new information that would warrant the Minister of Conservation reconsidering his decision. It was on this basis, it was said, that there were no grounds on which the Minister of Fisheries could withhold concurrence. This attitude is perpetuated in the recommendations to the Minister. Thus, it is "noted" that the Minister of Conservation had considered the likely impacts of the proposed reserve on the seven to ten commercial CRA3 fishers and believed it would not unduly interfere with commercial fishing.

[6] I should add that I am not prepared to offset the import of the above material with the frequent directions contained in the reports to the Minister outlining the scope of his statutory responsibilities. No doubt such directions are necessary, but when read in context and having regard to the apparent expectation of at least one official that the decision could be challenged by way of judicial review, they have

the appearance of being boiler-plate statements. No such statements will suffice if the Minister of Fisheries has not assessed the impact of the reserve independently. While a co-operative and harmonious relationship between the Department of Conservation and Ministry of Fisheries is to be encouraged, the Minister of Fisheries cannot shed this independent function which he is to exercise pursuant to the statute. It is part of the statutory safeguard provided in the Act for commercial fishers.

[7] Mr Marshall, who appeared for the appellants, pressed their cause with his customary skill and persuasion. In the circumstances, one can understand his client's grievance. But notwithstanding the irregularities which have been revealed, I have not been convinced that the Minister of Fisheries' concurrence should be set aside. The reasons given in Ellis J's judgment must prevail. Apart from all else, the Minister of Fisheries' own assessment was that, on the basis that the total annual catch from the proposed reserve in respect of rock lobster potting was less than 10 per cent in terms of the overall catch from the wider CRA3 fishery, the level of interference caused by the reserve on the overall CRA3 fishery was not considered significant. This view is tantamount to an opinion that the reserve will not interfere unduly with commercial fishing, certainly to the extent that it outweighs the other criteria contained in s 5(6).

[8] As stated in Ellis J's judgment, the appeal is dismissed and the respondents are entitled to one set of costs which are fixed at $5,000, together with disbursements, which failing agreement to be determined by the Registrar.

JUDGMENT OF ELLIS AND DOOGUE JJ
(DELIVERED BY ELLIS J)

The appeal

[9] On 11 October 1999 Te Tapuwae o Rongokako Marine Reserve was established by Order-in-Council under section 4 of the Marine Reserves Act 1971 ("the Act"). It is situated at Kaiora between Pouawa River and Waiomoko River

north of Gisborne. The reserve is within the crayfish quota management area known as CRA3. The establishment of the reserve prevents commercial fishing, and crayfishing in particular, in it. The appellant represents crayfishers in that area and sought judicial review of part of the process leading up to the Order-in-Council, claiming the Minister of Fisheries had failed to find that the creation of the reserve would not "interfere unduly with commercial fishing" and so erred in "concurring" with the decision of the Minister of Conservation to create the reserve. In the High Court McGechan J dismissed the claim and the appellant appeals.

The application for the Reserve

[10] As the Long Title says, the Act provides for the setting up and management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as a habitat of marine life for scientific study. Reserves are administered by the Department of Conservation. Under s4 the Governor-General may declare an area to be a marine reserve by Order-in-Council. The procedure for such a declaration is set out in s5. In this case the Director-General of Conservation (hereafter referred to as the Director-General) and Ngati Konohi applied to the Director-General and the application was duly advertised, objections invited and written notice given as required. In particular the Secretary for Transport and the Director-General of Agriculture and Fisheries (as he used to be called) were given notice. Submissions both for and against the reserve were received. Many of the objections were met by a small reduction in the size of the Reserve to exclude Monowai Rock. The primary objector was the appellant representing crayfishers who fished in the Reserve. The procedure for dealing with objections is set out in the latter subsections of s5:

> "(4) The applicant may, on receiving any copy of objections under subsection (3) of this section, answer those objections in writing to the Director-General within 3 months from the date of first publication of the notice published pursuant to paragraph (b) of subsection (1) of this section, and the Director-General shall send any such answer he may receive within that time to the Minister for consideration.
>
> "(5) The Director-General shall refer to the Minister all such objections received within the said period of 2 months, and any answer received within the said period of 3 months.

"(6) Where any objection has been made in accordance with subsection (3) of this section, the Minister shall, before considering the application, decide whether or not the objection should be upheld and, in doing so, shall take into consideration any answer made to the objection by the applicant and, if the applicant is the Director-General, any report on the objection and the application the Minister may have obtained from an independent source. If the objection is upheld the area shall not be declared a marine reserve. In making any such decision, the Minister shall not be bound to follow any formal procedure, but shall have regard to all submissions made by or on behalf of the objector, and to any answer made by the applicant, and shall uphold the objection if he is satisfied that declaring the area a marine reserve would-

(a) Interfere unduly with any estate or interest in land in or adjoining the proposed reserve:

(b) Interfere unduly with any existing right of navigation:

(c) Interfere unduly with commercial fishing:

(d) Interfere unduly with or adversely affect any existing usage of the area for recreational purposes:

(e) Otherwise be contrary to the public interest.

"(7) The decision of the Minister shall be final.

"(8) The Director-General shall cause the Minister's decision, together with the grounds therefor, to be notified in writing to the objector and to the applicant.

"(9) If, after consideration of all objections, the Minister is of the opinion that no objection should be upheld and that to declare the area a marine reserve will be in the best interests of scientific study and will be for the benefit of the public, and it is expedient that the area should be declared a marine reserve, either unconditionally or subject to any conditions (including any condition as to providing the cost of marking the boundaries of the marine reserve under section 22 of this Act, and any condition permitting fishing within the reserve by persons not holding a permit issued under Part IV of the Fisheries Act 1983), the Minister shall, if the Ministers of Transport and Fisheries concur, recommend to the Governor-General the making of an Order in Council accordingly."

[11] All procedures were correctly followed in this case. The Minister of Conservation decided not to uphold any of the objections and in particular decided that the creation of the Reserve would not "interfere unduly with commercial

fishing". That is the fishing carried on by the members of the appellant association. That decision is not challenged.

[12] The Minister of Conservation therefore sought the concurrence of his colleagues the Ministers of Transport and Fisheries. The Minister of Fisheries (in fact the Associate Minister of Food, Fibre, Biosecurity and Border Control, for whom no acronym has been suggested so we shall refer to him as "the Minister") received a detailed Concurrence Report from the Ministry of Fisheries (MFish) dated 1 September 1999 which concluded with the following recommendation:

> "It is recommended that you:
>
> [a] Note the Minister of Conservation had taken into account all relevant information and fully recognised the short and long-term implications of the proposed reserve on commercial, customary and recreational fishers, and that there is no new information that would warrant the Minister to reconsider his decision.
>
> [b] Note that Te Ohu Kai Moana expresses concern that Ngati Konohi may not have full support of their application by their iwi, and requests that you delay your decision to grant concurrence until this issue is resolved.
>
> [c] Note that MFish considers the proposed reserve may have a significant short-term impact of 7- 10 commercial CRA3 commercial fishers.
>
> [d] Note that the Minister of Conservation has considered the likely impacts of the proposed reserve on the 7-10 fishers and believes it will not unduly interfere with commercial fishing.
>
> [e] Note that the rock lobster fishing industry may undertake High Court proceedings if the marine reserve application is gazetted.
>
> [f] **Agree** to grant concurrence pursuant to s 5(9) of the Marine Reserves Act 1971 to Te Tapuwae o Rongokako marine reserve application.
>
> [g] **Agree** to release the concurrence report under the Official Information Act 1982.
>
> [h] **Sign** the attached letter to the Minister of Conservation advising him of your decision."

[13] The Minister accepted and approved the recommendations on 6 September 1999 and signed the letter to the Minister of Conservation which reads:

"I refer to your request on 4 July 1999 in accordance with s 5(9) of the Marine Reserves Act 1971 that I consider concurrence to Te Tapuwae o Rongokako marine reserve application.

I advise that after careful consideration of the application I have decided to grant concurrence to Te Tapuwae o Rongokako marine reserve application as shown in the attached plan.

I have reached this decision after having positive regard to the purpose and objectives of the Marine Reserves Act 1971, and after considering my obligations under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and Fisheries Act 1996. I believe that you had taken into account all relevant information and fully recognised the short and long-term implications of the proposed reserve on commercial, customary and recreational fishers in reaching your decision to not uphold any objection under s 5(6) of the Marine Reserves Act 1971. I note that there is no new information that would warrant you to reconsider your decision."

The issues on appeal

[14] Mr Marshall posed three issues in this way:

Primary issue

1. Did the Minister of Fisheries "concur" with the Minister of Conservation's finding that the Marine Reserve would not "interfere unduly with commercial fishing"? (Sections 5(6)(c) and 5(9) of the Act)

The appellant submits that the answer to this question is "No".

Secondary issues

2. What is the correct interpretation of the phrase "interfere unduly with commercial fishing" in section 5(6)(c) of the Act?

The appellant submits that the Judge did not interpret this phrase, and that it is wide enough to cover a significant impact, at least in the short term, on 7-10 fishermen in the Gisborne Rock Lobster Fishery.

3. In considering whether the Marine Reserve would interfere unduly with commercial fishing, can the Minister of Fisheries take into account the wider public interest picture and any public benefit that may result from the Marine Reserve?

The appellant submits that the answer to this question is "No".

The meaning of "concur"

[15] McGechan J considered the significance of "concur" in s5(9) in this way (para 26 of his judgment):

> "Against that background, the requirement to "concur" assumes an intelligent appraisal by the Minister of Fisheries himself. It may be possible to "concur" blindly in some contexts. The essential and minimum meaning of "concur" is to "run with" or to "go along with" a decision; and in some circumstances that might be done as an act of faith. In this context, however, where the concurrence of the Minister of Transport and Minister of Fisheries is required as a safeguard for their particular interests, that is not contemplated. Parliament obviously expected the Ministers to give the questions on which concurrence was sought their own proper appraisal."

[16] Mr Marshall adopted this approach and Ms Aikman did not demur. We too agree that the Minister must turn his mind to the objection, make any enquiries he considers appropriate and make his own decision whether or not to agree with the decision of the Minister of Conservation. In so doing he is of course entitled to place reliance on the views of the Minister of Conservation, but should not accept them "blindly" especially where the aspect of the matter is one in which the Minister and his Department has expertise. This is plainly so when the impact on a fishery or part of a fishery is concerned.

[17] In reaching the decision whether or not to concur, the Minister must give consideration to the grounds of objection and also the wider picture. In our opinion this is the approach required by the test of "undue" interference imposed by s5(6)(c) in particular. All the matters listed in s6(a) through (e), including the public interest, comprise the wider picture. In our view the Minister must take these factors (if they are relevant) into consideration when deciding whether or not to concur. Our conclusion therefore involves answering the third issue "Yes".

The Concurrence Report

[18] The application to the Minister of Conservation was dated June 1998. It was a substantial document prepared by the Department of Conservation on its own

behalf and on behalf of Ngati Konohi. It included a section on the implications for all fishers and commercial fishers in particular. That said:

> "7.3 COMMERCIAL FISHERS
>
> The Pouawa, Whangara and Monowai Rocks reef system is fished by ten commercial rock lobster fishers (Gisborne Commercial Fisherman's Assn.). The proportion of these fishers' total fishing effort spent in the area varies between fishers but is estimated to range from 10% to 40% (Gisborne Commercial Fisherman's Assn.). If the application is successful this effort would be displaced to the remaining grounds. In the short term this would require adjustment of fishing patterns, and the catch per unit effort may initially decrease.
>
> The current fishery management regime, developed by the rock lobster industry in 1993, has resulted in rebuilding of the CRA3 rock lobster stock. In 1997 the stock had rebuilt to the point where the TACC was increased by 45% from 224.895 tonnes to 327 tonnes. Modelling of the likely consequences of this increase indicates the stock will continue to rebuild, and by the year 2000 will be just under twice the size of the stock in 1997 (1997 rock lobster fishery assessment). Therefore any adverse effects on rock lobster fishers associated with the establishment of the proposed marine reserve will be temporary, and will be offset by the continued growth of the CRA3 stock. In addition, research conducted at the Cape Rodney to Okakari Point Marine Reserve near Leigh indicates rock lobster are likely to forage beyond the boundaries of the proposed reserve and may be available to both commercial and recreational fishers (Shane Kelly personal communications). About 130 ha (9%) of the Pouawa, Whangara and Monowai Rocks reef system would remain outside the reserve.
>
> Some trawling occurs in the outer part of the proposal, along the edge of the deep reef slope off Pariokonohi Point (Fig.3). Some reef species are taken but the catch is predominantly widely distributed demersal species. This area is insignificant in terms of the overall size of the local inshore trawl fishery."

[19] A copy of the Applications were sent to the Chief Executive of the Ministry of Fisheries on 14 July 1998. The appellant filed its objection on 14 September 1998. The essence of the objection was that the ten CRA3 fishers currently operating within the proposed reserve stood to lose "a great deal". The submission was comprehensive and endeavoured to quantify the projected losses and also the

conflicts, difficulties and expenses involved. It also addressed the legal issues. The applicants responded with another comprehensive document in answer to the objection on 13 October 1998. In November 1998 the Department of Conservation arranged for meetings with MFish personnel. It is significant that when a previous proposal for a marine reserve at Parininihi in Taranaki had been approved by the Minister of Conservation and referred to the Minister for his concurrence, concurrence was refused. Both Ministries wish to avoid such a head on conflict in this case. Hence the decision to confer fully and at an earlier stage. A formal meeting took place on 21 January 1999. Shortly afterwards an independent review commissioned by the Director-General (under s5(6)) was presented by Montgomery Watson NZ Ltd. It was specifically directed to the possibility of undue interference with commercial fishing. It confirmed the Director-General's view that the proposed reserve did not so interfere. By April 1999 the Reserve was receiving the attention of senior officers of MFish and the Minister was briefed. In particular he was briefed on the claims by the appellants. The appellant also wrote directly to the Minister on 16 April 1999 urging him to withhold concurrence. On 20 April 1999 the Minister told his officials that he wished to avoid a repeat of the Parininihi situation and that he wanted the issues to be fully explored before he was asked to consider the application for concurrence.

[20] The Minister of Conservation formally applied to the Minister for concurrence on 4 July 1999. By this time the consideration of the application was well advanced and the opposition by the applicant extensively considered. There is evidence in Departmental memoranda of conflict between the Department of Conservation and Mfish over marine reserves arising from the Parininihi decision and in particular on 30 July 1999 there is a high level direction in Mfish:

> "1. Our advice must be self discrete and contained.
>
> 2. Must look at <u>our</u> Minister's decision-making process.
>
> 3. Need to confine our discussion to just <u>our</u> Minister's statutory role.
>
> 4. We are not to second guess why the Minister of Conservation make a particular decision <u>or</u> to judge whether he made a right or wrong decision.

5. We stick to our Minister's role only - we are not to say their Minister made a bad decision."

[21] This is interpreted by the applicant as meaning the Minister was not going to decide himself whether or not the creation of the Reserve unduly interfered with commercial fishing, and he felt obliged to endorse the Minister of Conservation's decision.

[22] Support for the applicant's views is contained in later Mfish internal memoranda of 23 and 31 August 1999. In the first an officer says in relation to the draft Concurrence Report:

> "1. Paras 2 and 21 to be revised to state what Minister can take into account in exercising concurrence report - not a question of just considering impact on fishing and fisheries.
>
> 2. Concurrence role
>
> - paper takes approach that not for Min. of Fish consistent with DOC legal advice to decide whether marine reserve will unduly interfere on fisheries as is M of C decision under s5(6). However not clear what M of F is to concur with under s5(9) - decision must be based on something - can argue that OK for M of F to decide if agree with DOC's view under s5(6) especially if info strongly suggests that fishing will be unduly effected.
>
> In this instance we agreed that approach OK as follows DOC legal advice and decision to concur is justifiable then have positive regard and purpose of MRA etc"

[23] In the second, another officer says:

> "As discussed you have asked for the concurrence paper to be updated to provide comment on the recent letters received from TOKM and the rock lobster council.
>
> Both are concerned that the Marine reserve will unduly interfere with commercial fishing and that on this basis the Minister should not concur. However the submissions do not raise any new information which should be brought to the M of Conservation's attention for him to take into account in reaching a decision. Note new para 73 makes his point.

(As we briefly discussed it is also not the Min of Fish's role to decide whether fishing will be unduly interfered with measured against the Fisheries Act)."

[24] The Concurrence Report in its final form contained the following paragraphs bearing on the Minister's decision:

"Executive Summary

2.In exercising your discretion to concur under s5(9), you must have positive regard to the purpose and objectives of the Marine Reserves Act 1971. This Act is designed to facilitate and manage the setting up of marine reserves. In exercising your discretion, it is relevant that you take into account your statutory obligations and functions under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and Fisheries Act 1996.

3.This report provides background information on the marine reserve application, summarises the likely impacts on fishing and fisheries, and notes that all relevant information was available to the Minister of Conservation. Mfish has considered this information and provides you with a recommendation on concurrence.

4.In summary, information from stakeholder groups and Ngati Konohi indicate that the proposed reserve will:

a) prevent Ngati Konohi from gathering kaimoana from the proposed reserve. However, Ngati Konohi continues to support their marine reserve application and wishes to exercise kaitaiakitanga over the fisheries resources in the proposed reserve using the Marine Reserves Act 1971.

b) not interfere unduly with or adversely affect any existing usage of the area for recreational purposes.

c) not have a significant impact on the CRA3 commercial fishery, but may have a significant short-term impact on several fishers who may take up to 40% of their catch from the proposed reserve.

5.The overall objective of Te Tapuwae o Rongokako marine reserve application is to preserve a range of marine habitats that are representative of the east coast of the North Island between Mahia Peninsula and East Cape, and that their preservation is in t he natural interest. The proposed reserve will achieve the purpose of the Marine Reserves Act 1971.

6.Mfish notes that the Minister of Conservation had sufficient information on which to consider all objections, and that he fully recognised the effects of the proposed reserve on fishing and fisheries

in reaching his decision that it will not unduly interfere with or adversely affect commercial, customary and recreational fishers. There is no new information that would warrant the Minister of Conservation reconsidering his decision. Therefore, there are no grounds on which to withhold concurrence."

[25] And later:

> **"Legal Requirements**
>
> 21. ...
>
> **22.** The matters that you must consider whether to grant or decline concurrence are not specified under the Marine Reserves Act 1971. However, you must have positive regard to the purpose and objectives of the Marine Reserves Act 1971 in exercising discretion to grant concurrence under s5(9). This Act is designed to facilitate and manage the setting up of marine reserves. In exercising your discretion, it is relevant that you take into account your statutory obligations and functions under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and Fisheries Act 1996."

[26] The report later dealt extensively with the effect of the Reserve on commercial fishing covering the same ground as already quoted from the Application. Mfish had, however, checked the information and itself received the submissions from the applicant in opposition. It is unnecessary to set it all out and in our opinion it shows that the Minister was fully advised of the facts and opinions that had been gathered. The report then summarised the viewpoint of the Department of Conservation, stated the opinion of Mfish on all aspects including commercial fishing and came to a series of conclusions, the last being:

> "76. Mfish concludes that the Minister of Conservation had sufficient information on which to consider all objections, and that he fully recognised the effects of the proposed reserve on fishing and fisheries in reaching his decision that it will not unduly interfere with or adversely affect commercial, customary and recreational fishers. Both the Minister of Conservation and Mfish have given stakeholders and tangata whenua an opportunity to present additional information in support of their views, and that no new information has become available that would warrant the Minister of Conservation to reconsider his decision. Therefore, there are no grounds on which to withhold concurrence.

Release of Concurrence Report

77. It is likely that your decision on concurrence to Te Tapuwae Rongokako marine reserve application will lead to requests under the Official Information Act 1982 for the release this concurrence report. Mfish is required to obtain your approval before this report can be released.

78. Mfish is not aware of any grounds to withhold this concurrence report."

[27] The report ended with the recommendations already set out and which the Minister accepted.

Criticism of the Minister's decision

[28] It is obvious from the wording of the parts of the Concurrence Report we have quoted, the Minister's letter of 6 September 1999 conveying his concurrence, and the office memoranda that MFish and the Minister were concerned not to disagree with the Minister of Conservation in a confrontational way. What was written makes it possible for the appellant to submit that the Minister was simply accepting the decision of the Minister of Conservation as to whether or not there was undue interference with commercial fishing, rather than making up his own mind. In our view, paragraph 22 of the Report (quoted in paragraph [17] above) sets out the proper approach. It refers to the purpose and objectives of the Act and also to the Minister's obligations and function under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Fisheries Act 1996. On the other hand, the wording of paragraph 76 (also quoted) indicates a deference to the Minister of Conservation's decision. While this is unfortunate, we read paragraph 76 against the factual background outlined above where MFish and the Minister made independent and thorough assessments of the impact on the CRA3 fishers. While the recommendations and the Minister's letter contain the same elliptical statements about the decision process, they too must be read in the light of the actual decision process.

Decision

[29] We have already said in agreement with McGechan J that in deciding whether or not to concur the Minister must make his own decision and have regard not only to the particular expertise available to him from his Ministry and his statutory functions under the legislation, but also to the wider picture. This wider picture includes the assessment by the Minister of Conservation of the desirability of creating the new Reserve. We have accordingly already answered Mr Marshall's third question "Yes".

[30] His second question is answered by saying that in our view McGechan J correctly dealt with what is involved with assessing what would unduly interfere with commercial fishing. The word "undue" involves an assessment of all the factors, one of which is the undoubted impact on the CRA3 fishers. The question is not whether it is "significant", but whether it is "undue". While we may be disposed to agree that the creation of the reserve had a significant effect on some fishers, the test implied by the word "undue" requires a balancing of the effect against the other values involved. "Undue" implies "Without due cause or justification...more than is warranted': The Shorter Oxford English Dictionary (1993). This leads us to answer Mr Marshall's primary question "Yes".

[31] We therefore agree with McGechan J. that the application for review had to be dismissed.

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