

**I TE KŌTI MATUA O AOTEAROA  
KI TE WHANGANUI-A-TARA ROHE**

**UNDER THE** Judicial Review Procedure Act 2016

**IN THE MATTER** An application for judicial review of a decision of the Minister of Oceans and Fisheries under s 13 of the Fisheries Act 1996

**BETWEEN** **THE ENVIRONMENT LAW INITIATIVE**  
First Applicant

**AND** **CARMEN HETARAKA on behalf of TE URI O HIKIHI HAPŪ**  
Second Applicant

**AND** **MINISTER OF OCEANS AND FISHERIES**  
Respondent

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**SUBMISSIONS OF INTERVENER - NEW ZEALAND SPORT FISHING COUNCIL  
INCORPORATED**

**Dated:** 4 October 2022

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**MAY IT PLEASE THE COURT:**

**1. SUBMISSIONS FOR INTERVENER – NEW ZEALAND SPORT FISHING COUNCIL INCORPORATED**

- 1.1 These brief submissions are filed for Intervener, New Zealand Sport Fishing Council Incorporated (**NZSFC**), a representative of recreational fishers.
- 1.2 NZSFC was both a member of the multi-party National Rock Lobster Management Group (**NRLMG**), and a submitter to the consultative discussion documents decision-making for 2020/2021 and 2021/2022, as noted in the filed brief evidence from Mr Torkington.<sup>1</sup>

**2. LEGAL PRINCIPLES**

- 2.1 Other than providing brief submissions in relation to the application of the best available information, NZSFC has reviewed the outline of the relevant legal principles in the submissions for Forest & Bird and the applicants and adopts those submissions.

**3. BEST AVAILABLE INFORMATION IN THE CONTEXT OF APPLICATION OF THE ENVIRONMENTAL PRINCIPLES**

- 3.1 The application of s.10 of the Fisheries Act 1996 (**FA**) requires the information principles to be taken into account by persons exercising or performing functions under the FA, including at s.10(d) that “*decisions should be based on the ‘best available information’*”.<sup>2</sup>
- 3.2 Information will be ‘best information’ if it has qualities that are desirable and relevant to the decisions at hand.
- 3.3 The Minister’s legal obligations<sup>3</sup>, include an obligation to consult. Before doing anything in relation to setting a total allowable catch for that stock the Minister (under s.12) must consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Maori, environmental, commercial, and recreational interests; and provide for the input and participation of tangata whenua. If the information before the Minister was wrong (not ‘best’) then it

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<sup>1</sup> [201.0208]

<sup>2</sup> S.2 FA – Best available information means the best information that, in the particular circumstances, is available without unreasonable cost, effort or time.

<sup>3</sup> refer applicant legal submissions at 27.

logically will also affect participation rights under the fisheries legislation, because the information is relied on for the purposes of consultation.

- 3.4 When considering the application of the environmental principles in s.9 and be information principles in s.10 the decision maker under the FA is effectively directed ‘to do the right thing’. The word “*should*” is used to indicate an obligation, duty or correctness.<sup>4</sup>
- 3.5 In a different legal context, the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Wanganui Conservation Board*<sup>5</sup> considered the question of whether the best available information had been applied by a hearings panel considering a proposal for seabed mining for iron sands under the Exclusive Economic Zone & Continental Shelf (Environmental Effects) Act 2012 (the **EEZ Act**). The relevant provision of the EEZ Act (s.61) differs from the FA by including elements of both the information principles and the precautionary principle in s.61 of the EEZ Act.
- 3.6 In *Trans-Tasman Resources* the majority of the Supreme Court considered that the decision maker had not correctly applied the information principles under equivalent provisions of the EEZ Act and that the consents may be granted on incomplete information, if that is the best available information and that, taking a cautious approach and favouring environmental protection, the decision-maker is satisfied that ‘bottom lines’ for environmental protection were met.<sup>6</sup> Judgements of the court are recorded separately. Glazebrook J (in the majority) found the panel’s consideration was tainted by fundamental error of acting on the basis of uncertain and incomplete information.<sup>7</sup>

#### 4. INFORMATION BEFORE THE HIGH COURT

- 4.1 In the context of an application to review, the decision maker has a duty of candour. *De Smith’s Judicial Review*, notes that this duty of candour “*has been described as a very high one to assist the court with full and accurate*

<sup>4</sup> Oxford Dictionary, online: “*Should*” – used to indicate obligation, duty or correctness...”

<sup>5</sup> *Trans-Tasman Resources Ltd v Taranaki-Wanganui Conservation Board* [2021] 1 NZLR 801

<sup>6</sup> At [273]– [274] per Glazebrook J, [294] per Williams J and [327] per Winkelmann CJ.

Compare at [117] per William Young and Ellen France JJ in *Trans-Tasman Resources Ltd v Taranaki-Wanganui Conservation Board* [2021] 1 NZLR 801.

<sup>7</sup> *Trans-Tasman Resources Ltd v Taranaki-Wanganui Conservation Board* [2021] 1 NZLR 801, at [271]; and see also Ellen France J’s reasons at N [143] and [129].

*explanations of all the facts relevant to the issues which the court must decide*".<sup>8</sup>

4.2 The expert evidence called for the Minister<sup>9</sup> appears more candid as to the effects of fishing on marine biodiversity in CRA1 than the advice provided to the Minister when making decisions the relevant years, with the Minister appearing (at [53] of his affidavit) to accept FNZ advice provided in preparing for this litigation that there is (and was) a reasonably strong evidential basis for the hypothesis (advanced by the applicants) in the north-eastern region of New Zealand.<sup>10</sup> There would appear no sound reason why available information could not have been provided to the Minister at an earlier stage in decision-making for the relevant years.

**Dated** 4 October 2022



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<sup>8</sup> *Ririnui v Minister of Lands* [2016] 1 NZLR 1056, per Arnold J at [50], and see *De Smith* (8<sup>th</sup> Edition) Judicial Review at [16-027].

<sup>9</sup> Refer affidavit of Professor Wing at [11]-[12] [201.0127 at 201.0131].

<sup>10</sup> Affidavit of Hon David William Parker, at [53] at [201.0165].