IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2010-409-002970
[2012] NZHC 933

BETWEEN	AKAROA MARINE PROTECTION SOCIETY INCORPORATED Applicant
AND	THE MINISTER OF CONSERVATION Respondent

Hearing: 9 February 2012

Counsel: R B Enright and R Makgill for Applicant
U R Jagose and A Camaivuna for Respondent

Judgment: 8 May 2012

JUDGMENT OF WHATA J

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Introduction

[1] Akaroa Harbour Marine Protection Society Inc ('the Society') made an application seeking a marine reserve in the vicinity of Dan Rogers' Bluff, Akaroa Harbour. The Minister of Conservation declined that application on the basis that the reserve would unduly interfere with or adversely affect existing recreational fishing. The Society's main complaint is that the Minister erred by failing to weigh the effects on recreational fishing against the full merits of the proposed reserve. The Society's other major complaint is that the Minister failed to be satisfied on the basis of sufficient information about key matters, including the effects on existing recreational usages. These failures are said to be compounded by the Minister's apparent failure to consider alternatives or refinements to the proposed marine reserve that might accommodate concerns about recreational fishing.

The Minister's power and duties

[2] The Minister's power to consider a marine reserve application is set out at s 5(6) and 5(9) of the Marine Reserves Act 1971. Most relevantly, s 5(6) dealing with objections records:

> **5 Procedure for declaring a marine reserve**
>
> ...
>
> (6) ... the Minister shall before considering the application, decide whether or not an objection is upheld and, in doing so shall take into consideration any answer of the applicant... and shall uphold the objection if he is satisfied that declaring the area a marine reserve would-
>
> ...
>
> (d) Interfere unduly with or adversely affect any existing usage of the area for recreational purposes:

[3] Section 5(9) then provides that if no objection is upheld, the Minister may, if the Ministers of Transport and Fisheries concur, recommend that the area under application be declared a marine reserve if the Minister is of the opinion that:

> ... 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 ... .

Background

[4] In December 1995 the Society made an application for an Order in Council seeking to establish a marine reserve in the Akaroa Harbour covering approximately 530 hectares or approximately 12% of the harbour area. The Marine Reserve application covers an area adjacent to the Dan Rogers' cliffs near the entrance to the harbour.

[5] As set out in a report produced by the Director-General of Conservation, the area is notable for spectacular volcanic cliffs, sea caves and sea stacks. The underwater topography consists of cliffs and bluffs falling vertically to the seabed and colonised by a rich diversity of plant and animal communities. At the base of Dan Rogers bluff, there are huge room-sized boulders that provide spectacular underwater scenery and habitat for different types of marine communities that are typical of parts of the exposed Banks Peninsula coastal environment. Sub-tidal communities comprise a colourful mosaic of species including giant bull kelp beds, green mussels, sea tulips, hydroids, sponges, sea squirts and sea anemones. The seabed supports populations of horse mussels, encrusting sponges, sea squirts, red algae, cushion, snake and biscuit stars; and a variety of tubeworms, molluscs and bivalves. The reef around Gateway Point supports an extremely rich and diverse fauna and flora, with at least 10% of the benthic species found in this area being 'undescribed'. The area also supports a diverse array of southern New Zealand fish species, including both rocky-reef fish and inshore pelagic fish, some of which have commercial value.

[6] The application was preceded by consultation in the early 1990s carried out with representatives of Ngai Tahu, Te Runaka o Onuku, the Ministry of Fisheries, the Ministry of Transport, the general public, commercial and recreational users and stakeholder groups.

[7] The formal application was publicly notified in January 1996. A total of 3,043 submissions were received. These included a total of 709 objections and 2,334 submissions in support.

[8] In April 1996 the applicant lodged a response to the objections and on 10 September 1996 the Director-General of Conservation provided a report on the proposed reserve. The report and, it appears the then Minister, viewed the application favourably.

[9] The application was then overtaken by other applications, including the Pohatu Marine Reserve ("PMR") application lodged on 18 January 1997 and the Akaroa Taiapure application. The PMR at Flea Bay was gazetted in July 1999. But the Taiapure application was, however, subject to a lengthy Taiapure Tribunal process, including an appeal to the High Court, with the result that it was not gazetted until 27 February 2006. Relevantly the Tribunal recommended that the area subject to the Society's application be excluded from the taiapure unless the marine reserve application was declined.

[10] In about late 2005 or early 2006 the marine reserve application was finally retriggered. The Minister re-notified the application in May 2006 calling for updated and new submissions. A total of 77 submissions were received.

The Director-General's report

[11] The Director-General produced a second report in October 2009. On the specific issue of whether the proposed reserve would interfere unduly with or adversely affect any existing usage of the area for recreational purposes, the report sets the frame for analysis in the following terms:

> 211. ... it is necessary to establish the existing recreational usages of the area proposed for the marine reserve; assess the extent to which a marine reserve would diminish any of those uses on both a qualitative and quantitative approach; further assess the extent to which a marine reserve would enhance those usages on a quantitative and qualitative approach; and then weigh up the detriments (if any) and enhancements (if any). If the enhancements outweigh the detriments, the Minister could conclude that the undue interference/adverse effect tests have not been made out. Conversely,

> if the detriments outweigh any enhancements, the Minister could conclude that the undue interference and/or adverse effects tests have been made out.

[12] The report then details the original objections, the applicant's answers to those objections and the further information obtained in 2006. The report analyses in a reasonably detailed way the level of recreational use. The report then concludes:

> 262. ... that there will be some level of effect through the loss of the area for fishers, particularly for divers and fishers in small vessels targeting blue cod (although not apparently reliably available at legal size) and rock lobster, if the area is made a marine reserve. The weight to be accorded this adverse effect is for the Minister to decide (para 210, pg 42).

[13] The report then analyses the information dealing with other forms of recreational use. The report states:

> 270. All of this information indicates how important this part of the coastline of Akaroa Harbour is for tourism and non-fishing recreational value. This is confirmed by all of the operators rating the area in the highest category as 'very important', on a 7-point scale from 'not important' to 'very important', when asked how important the site is as a feature of their tour.

[14] The report then surmises:

> 274. ... It would be fair to say that along with the general trend of marine reserves nationally, visitor numbers would be expected to increase over time and likely contribute to the local economy in some way, as awareness about the reserve grows and other eco-based activities develop.

[15] It then observes:

> 276. A case is made out for the proposition that the establishment of a marine reserve at the location applied for will enhance an already established pattern of non-extractive recreational use. ...

[16] Overall, the report concludes that there will be some adverse effect on recreational fishing from the establishment of the area as a marine reserve, but also that there are likely to be counter-balancing enhancements to recreation within the marine reserve through increased use of the area for other recreational activities. The options available to the Minister are then said to include:

> 280. ...
>
> > (a) conclude that the impact of declaring the area a marine reserve would not interfere unduly with or adversely affect any

existing usage for recreational purposes (recommended by the Department), or

(b) uphold the relevant objections on the grounds that declaring the area a marine reserve would interfere unduly with or adversely affect any existing usage for recreational purposes, or

(c) allow relevant objections in part, and exclude an area of significance for recreational fishing from the proposed marine reserve through a boundary adjustment on the grounds that declaring a marine reserve over the remainder of the area would not interfere unduly with or adversely affect any existing usage for recreational purposes.

The Minister's decision

[17] The Minister's decision records her understanding that she must decide whether to uphold any objection to the proposed reserve, and if so, refuse to proceed further with the application. She states that while she is not considering the application, she has considered the objections to it, the applicant's response and the report provided by the Department.

[18] The Minister refers to s 5(6) which details the grounds on which she may uphold an objection, and records the general nature of the objections. She rejects objections under s 5(6)(a)-(c) dealing with interference with estates and interests, rights of navigation and commercial fishing. She notes that there would only be a "minor" amount of displacement of fishing effort.

[19] In terms of s 5(6)(d) dealing with existing recreational uses, she identifies the legal threshold as follows:

31. I must be satisfied in overall terms that there will not be undue interference with or any adverse effect on the existing recreational usage of the area proposed for the marine reserve. To the extent that the application, if granted, would diminish existing use for a particular recreational purpose, qualitatively or quantitatively, that will prima facie be an adverse effect or an undue interference. If, however, I am satisfied that enhancement of other existing recreational uses will occur and will outweigh the detriments for existing use or recreational purposes then I could conclude that there is no adverse effect and that the interference is not undue.

[20] The Minister observes that current recreational usage is "fishing and nature tourism and the latter is primarily focussed on the scenic values of the land and sea interface." She further observes that non consumptive uses such as diving are now limited because of poor sea conditions and poor underwater visibility, and no real likely enhancement of those activities will occur as a consequence of the reserve.

[21] She concludes on s 5(6)(d):

> 34. While it is possible that there will be some enhancement of nature tourism as a result of the marine reserve, the degree of that enhancement is unclear. In any event I am not satisfied that it will outweigh the detriment to recreational fishers no longer being able to fish in the area. In short, I consider that declaring a marine reserve would interfere unduly with or adversely affect the existing usage of the area for recreational purposes.

[22] The Minister then deals with public interest considerations under s 5(6)(e). She specifically refers to objections linked to customary fishing, customary management and Treaty principles. She does not accept that the marine reserve will affect or breach the Ngai Tahu Claims Settlement Act 1998. She weighs the adverse effects of the proposed marine reserve on customary values against the benefits of the reserve in the following way:

> 43. Countervailing benefits that the proposed marine reserve may have include the fact that Akaroa Harbour is in a degraded ecological state which makes it highly desirable for a conservation zone to be established in the harbour so that it is protected from fishing and other exploitation in the long term; that the prevailing scientific view is that the proposed marine reserve would offer a good benchmark against which the success of measures implemented in the balance of the harbour may be assessed; that the proposed marine reserve would more effectively ensure ongoing protection of marine diversity in the harbour; that a marine reserve and taiapure operating side by side would be complementary; that a no-take marine reserve is likely to enhance fish stocks in the areas immediately adjacent to the reserve; the fact that the marine reserve comprises only 8% of the taiapure area; and the possibility that tangata whenua could be invited to participate in some sort of management role for the marine reserve if established.

[23] Having formed the view however that the marine reserve would unduly interfere with existing recreational use, she then moves to consider whether changing boundaries would assist. She observes that changing the boundaries would not tip the scales. The application is therefore declined.

The Minister's evidence

[24] The Minister describes the context of her decision and clarifies some of the reasons for her decisions. The Minister says she considered each matter under s 5 separately and only considered the effects within the area covered by the proposed marine reserve.[1] She records that she approached the assessment on the basis that she was required:

> "to determine what level of recreational usage, including fishing, occurred in the area of the proposed marine reserve and how good it was so that she could see whether, and to what extent, existing usage would be enhanced or diminished if the area was declared a marine reserve."

[25] The Minister confirms that she was not satisfied that the loss of recreational fishing would be outweighed by the benefits to other recreational users or that reducing the extent of the proposed reserve would reduce the adverse effects sufficiently.

The issues

[26] Two primary questions for resolution are agreed by the parties:

1. Did the Minister misapply the test in s 5(6)(d)?

2. Was it open for the Minister to be satisfied that the proposed marine reserve would interfere unduly with or adversely affect any existing usage of the area for recreational purposes?

[27] Central issues include:[2]

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[1] I record that the Minister's discussion on this point was dealing with cumulative loss of recreational fishing spots, rather than potential cumulative benefits.

[2] The Society identified seven primary problems with the Minister's decision: failure to have regard to the bigger picture; an inconsistent approach to cumulative effects; applied wrong test of "any" effect; inadequate information; unreasonable reliance on unreliable information; failure to consider alternatives; unreasonable exercise of discretion.

(a) Whether the Minister erroneously failed to assess the wider merits of the application, including the benefits of the reserve in areas outside of the proposed marine reserve area; and

(b) Whether there was sufficient, reliable information for the Minister to be satisfied? and

(c) Whether the Minister should have considered alternative options for the reserve.

Case for the Society

[28] The Society criticises what it calls the "atomised" approach taken by the Minister to the s 5(6) evaluation. It says the Minister should have assessed the objections by reference to the "bigger picture", including the statutory purpose and the overall merits of the proposed reserve. Instead, the Minister is described as taking an improperly narrow view, by segmenting the s 5(6) matters into discrete assessments and by considering only the benefits of the reserve in relation to usage within the area of the proposed reserve. Compounding this error, the Society observes that the Minister then had regard to the adverse cumulative loss of recreational fishing spots in and around the area. It says the Minister should have considered the full merits and effects of the application including both the "spill-over" benefits beyond the reserve, as well as the cumulative effects.

[29] The Society further contends that the Minister was also required to have regard to the overall merits of the proposed reserve when evaluating the degree of "undue" interference or "adverse" effect. It says that in *CRA 3*[3] the High Court and Court of Appeal said "undue" did not just mean "excessive", but included

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3 *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000, is affirmed by the Court of Appeal in *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345.

"unjustified" or unwarranted in a qualitative sense.[4] Therefore, the Society submits that the Minister fell into error by not factoring in the wider merits.

[30] The second primary limb to the Society's case is that the Minister did not have adequate information. The Society says that the information in support of the objections was of poor quality, uncertain, inconsistent, open to bias and unsubstantiated.

[31] The duty to have adequate information is said to be concomitant with the duty to be satisfied that the proposed reserve would unduly interfere with or adversely affect existing recreational uses.[5] The Society argues that "satisfied" is a strong decisional verb, signalling that the Minister must approach the objections with care. As marine reserves are matters of national interest, the Society maintains that additional conviction was required. It says that, given the quality of information, the Minister did not properly discharge her duty to be satisfied.

[32] This complaint is then linked to other issues, including the failure to consider alternative options for the reserve that might have mitigated the effects on existing recreational use.

[33] The Society's case is supported by a thorough review by Dr Rennie of the Minister's decision and the information relied upon by her. Mr Hosking, a former deputy Director-General of the Department of Conservation, also critically reviews the Minister's decision and the Director-General's report. A chronology of key events is also provided by Mr Reid. Various substantive and procedural weaknesses are alleged by these deponents.

Case for Minister

[34] On the scope of the Minister's enquiry, Crown counsel stressed that:

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4 *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000 at [35]-[36].

5 Citing by analogy *Westfield (NZ) Ltd v North Shore City* Council [20045] 2 NZLR 597 (SC) ("*Discount Brands*")

(a) The Minister must consider the objections and the applicant's response "*before considering the application*";

(b) Each matter under s 5(6) must be considered separately;

(c) Section 5(6)(d) imposes a sterner test than s 5(6)(a)-(c) by the inclusion of an "adversely affect" threshold, with the result that the Minister must also address whether the overall effect on existing recreational use in the area is adverse.

(d) If the Minister is satisfied on the information submitted through the objection process that the reserve would interfere unduly with, or adversely affect existing recreational usage, then that is the end of the matter – the application is not considered under s 5(9), and

(e) If no objections are upheld, the Minister then goes on to determine the application, weighing all of the information before her to determine whether to declare 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."

[35] The effect of all of this is that:

> 47. ...the Minister is looking "inward" and balancing the effects to existing use for recreational purposes in the area proposed for the reserve. She is not, yet, considering the 'wider picture' as per CRA3. She must decide whether, in declaring the area a marine reserve, the detriments to existing use for recreational purposes are outweighed by the enhancements to existing use for recreational purposes in the area. That balancing requires her to consider whether the effect is undue or unwarranted.

[36] The reasoning in *CRA3*[6] is distinguished on the basis that the decision under review in that case concerned an exercise of discretion by the Minister of Fisheries under s 5(9) to concur with the decision of the Minister of Conservation to declare a

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6 *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000, is affirmed by the Court of Appeal in *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345.

marine reserve. In contrast to the present facts, that decision to concur occurred within the wider full merits assessment contemplated by s 5(9). It is said therefore that observations in *CRA3* dealing with the wider public interest and public benefit are limited to the final decision stage.

[37] Counsel also rejects an elevated duty to be satisfied,[7] and says that the Act simply required the Minister to be satisfied, on her value judgment, following the prescribed process. Any alleged omissions are false wisdom of hindsight and any alleged gaps could have been filled by the applicant as part of the objection process.

[38] As to alleged problems with the information, the Society was afforded an opportunity to comment, and the information supplied was independently reviewed by the Department. Beyond this there is no requirement to undertake a further comprehensive assessment.

Principles of review

[39] This case does not call for an essay on the principles of judicial review. I simply proceed on the orthodox basis that I may review the decision for error of law, irrelevant considerations or failure to have regard to relevant considerations, procedural impropriety and/or irrationality.[8] I further proceed on the basis that an underlying objective of judicial review is to maintain the rule of law, reflecting judicial commitment to the principles of legality and substantive fairness.[9] This calls for careful scrutiny of the Minister's exercise of discretion so as to ensure that it was exercised lawfully,[10] while at the same time recognising that legality also demands that this Court must not usurp the Minister's statutory authority.

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[7] Citing *Major Electricity Users' Group Inc v Electricity Commission* HC Wellington CIV 2007- 85-2508, 14 March 2008, and *Marlborough Aquaculture Ltd v Chief Executive of the Ministry of Fisheries* HC Wellington CIV 2009-485-500, 13 June 2011.

[8] *Council of Civil Service Unions v Minister for the Civil* Service [1985] AC 374 (HL); *Peters v Davison* [1999] 2 NZLR 164 (CA) at 180.

[9] *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL) at 591; On the content of this commitment refer to the rule of law - *Hamed v R* [2011] NZSC 101, [24]-[32].

[10] *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [31].

Scheme of Marine Reserves Act 1971

[40] The discretionary power conferred by s 5(6) must be interpreted in light of the purpose and scheme of the Act.[11]

[41] Section 3(1) declares:

> **3 Marine reserves to be maintained in natural state, and public to have right of entry**
>
> (1) It is hereby declared that the provisions of this Act shall have effect for the purpose of preserving, as marine reserves for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life, of such distinctive quality, or so typical, or beautiful, or unique, that their continued preservation is in the national interest.

[42] Once a reserve is established, the reserve and marine life within it must be preserved and the latter protected in its natural state as far as possible.[12]

[43] The Act prescribes a two stage process for assessment of applications to establish a marine reserve. First, s 5 sets out the process for making an application,[13] notification,[14] objections, [15] and answers to the objections, [16] which are then sent to the Minister, all within five months of notification of the application.[17] Section 5(6) then prescribes that:

(a) Before considering the application, the Minister must decide whether any objections should be upheld, and in doing so shall take into account any answer;[18]

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11 Interpretation Act 1999, s 5
12 Marine Reserves Act 1971, s 3(2).
13 s 5(1)(a).
14 s 5(1)(b). s 5(1)(d) requires that notice in writing must be given to all persons owning any estate or interest in land in or adjoining the proposed reserve.
15 s 5(3)
16 s 5(4).
17 s 5(5)
18 s 5(6).

(b) If the applicant is the Director-General, then the Minister must obtain an independent report;[19]

(c) The Minister is not bound to follow any formal procedure, but must have regard to all submissions by objectors and any answer from the applicant.[20]

(d) The Minister must uphold any objection if satisfied that declaring the area a marine reserve would:[21]

> (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.

(e) If an objection is upheld, then the area "shall not be declared a marine reserve".[22]

[44] Second, if the objections are not upheld, and if the Minister is of the opinion that to declare the area a marine reserve will be in the best interests of scientific study, will be for the benefit for the public, and it is expedient that the area should be declared a marine reserve, the Minister shall, if the Minister of Transport and Fisheries concur, recommend to the Governor-General the making of an Order in Council accordingly.[23]

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19 Ibid.
20 Ibid.
21 Ibid
22 Ibid.
23 s 5(9).

[45] By contemporary standards[24] the application and objection process is relatively simple, with fixed periods for submissions and answers, no formal hearing procedures, and no express requirement for consultation or to give reasons. The second stage is equally simple, with no provision for consultation, submissions or a hearing process. This informality suggests that the Minister is conferred with a broad discretion (both procedurally and substantively) to resolve objections, and if she gets that far, to recommend (or not) that an area be declared a marine reserve.

[46] Balanced against this, the exercise of discretion must further the evident policy of the Act to:

(a) protect existing rights and uses from undue interference, and if so protected,

(b) require favourable recommendation where a marine reserve will be in the best interests of scientific study, for the public benefit and where it is expedient.

[47] Furthermore, the objection procedure provides the only opportunity for affected persons to participate in the decision making process. It is also the gateway through which an application must pass before the Minister may determine whether to recommend that an area is declared a marine reserve. The objection process is, therefore, more than simply a preliminary exercise on the way to a substantive decision. The Minister must resolve, in this stage, the competing claims, rights and interests of existing occupiers and users on the one hand, against the procedural expectations and substantive claims of the applicant on the other. A decision to uphold an objection is also a specified exception to, and precludes the Minister from, furthering the statutory purpose stated in s 3.

[48] Given the implications and the peremptory consequence of upholding an objection under s 5(6), the assessment of whether the reserve would interfere unduly

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[24] Compare provisions for resource consents applications, plan promulgation, requirements and designations, water conservation orders and heritage protection orders in the Resource Management Act 1991, as amended no less than five times.

with or adversely affect existing recreational usage is presumptively a substantive one.

[49] I turn now to examine the practical consequences of this for these proceedings.

Scope of inquiry

[50] I am satisfied that Minister was required to assess the merits of the proposed reserve, including the wider public interest, as part of the objection process. However, what those merits are, and the weight to be accorded to them, is entirely a matter for the Minister. My reasons follow.

[51] First, I join with the High Court and the Court of Appeal in *CRA3* that "undue" not only means excessive, but also means unjustified or unwarranted in a qualitative sense. More specifically, I apply the following reasoning of the Court of Appeal:[25]

> [30] ...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".

[52] I also respectfully agree with McGechan J (in the High Court) that:[26]

> One cannot sensibly look at whether something is warranted, or whether large and severe impacts should be accepted, without looking at the wider public interest picture. What are the overall public advantages which will flow from the interference? Only when that is assessed can one sensibly reach a view whether interference is undue.

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25 *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA).

26 *CRA3 Industry Association Inc v Minister of Fisheries* HC Wellington CP317/99, 24 May 2000, at [36]

[53] Indeed, the concept of undue must be interpreted in light of the purpose of the Act;[27] and it makes contextual sense to address whether the interference is justified in light of the Act's purpose. This does not require a final scientific conclusion about the benefits of the proposed reserve. But the Minister must consider the extent to which the proposed reserve might serve the statutory purpose and then weigh that against the implications for the existing use or right.

[54] Second, I do not accept the Crown's argument that the reasoning in *CRA3* is confined to the second stage analysis under s 5(9). The two specific issues considered by the Court of Appeal when dealing with the definition of undue were:[28]

> (a) What is the correct interpretation of the phrase 'interfere unduly with commercial fishing" in s 5(6)(c) of the Act, and
>
> (b) 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?

[55] The Court answered both questions in the affirmative. While the Court was dealing with a concurrence decision under s 5(9), the definitional reasoning and resolution of these issues is plainly relevant to the interpretation of s 5(6)(d). Indeed, there is a sound basis for concluding that the reasoning is binding on me and the Minister.

[56] Third, I accept that the direction in s 5(6) that the Minister must *before considering the application* decide whether to uphold an objection suggests that the merits are to be assessed at the second stage. But if that is so, it is honoured in the breach, as exemplified by the Minister's approach to her task under s 5(6)(e), where the Minister weighed the countervailing benefits of the reserve, informed by the statutory purpose, against the impact on cultural values. In any event, I consider that

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27 Interpretation Act 1999, s 5.

28 *CRA3 Industry Association Inc v Minister of Fisheries* [2001] 2 NZLR 345 (CA) at [14].

this temporal direction is simply aimed at ensuring that the Minister squarely and directly addresses each of the matters listed at s 5(6) in advance of making a recommendation. But this does not preclude an assessment of the merits, including wider public interest, of the proposal for the purpose of assessing whether the interference or adverse effects are unjustified.

[57] Fourth, while s 5(6)(d) is plainly concerned about preventing undue interference with or adverse effects on "existing usage of the area", there is no express or implied constraint on the areal extent of the benefits of the proposed reserve that might be relevant to the assessment of whether the interference or effect is undue or unjustified. Whether there are relevant benefits is a question of fact in each case and those benefits might conceivably extend beyond the areal extent of the proposed reserve.

[58] Finally, I consider that the "adversely affect" threshold should be applied consistently with the "interfere unduly" test, with the result that the Minister must be satisfied that the adverse effect would be both excessive and unjustified. This would align with the basic thrust of s 5(6) to afford protection from unjustifiable interference. It would also achieve an internally compatible approach to the threshold tests within s 5(6)(d), rather than risk making the undue interference test redundant. Furthermore, it cannot be that any scale of adverse effect on any existing recreational use triggers the requirement to uphold an objection. That would very likely leave no room for marine reserves where there is recreational fishing, bearing in mind that the gateway closes when the "adversely affect" threshold is crossed. Such an outcome would be discordant with the attainment of the statutory purpose of the Act.

[59] Moreover, the inclusion of an "adversely affect" test can be readily explained as simply widening the scope of the inquiry rather than fundamentally changing the threshold test for upholding an objection. A marine reserve for example may not physically interfere with a given recreational activity, but may nevertheless adversely affect that activity. For example, increased recreational tourism arising from the marine reserve may affect the quiet solitude of bird watchers. Given also the varied and evolving forms of recreational use, an "adversely affect" test is

functionally more likely to secure appropriate protection of them than a simple interference test.

[60] I therefore consider that the relevant threshold for "adversely affected" is whether or not there is an excessive and unjustified adverse effect on existing recreational activity. This requires not only an inward looking, net recreational benefit analysis, but consideration of the wider merits of the reserve and the extent to which it serves the statutory purpose.

[61] A curious feature of this case is that the Minister examined the relevant wider countervailing benefits for the purpose of s 5(6)(e). This is recorded at [43] of her decision. The apparent flaw[29] in the Minister's decision is that she did not undertake that countervailing benefit assessment for the purpose of s 5(6)(d), preferring to adopt a more confined inward looking recreational net benefit analysis. In doing so the Minister failed to have regard to a potentially relevant consideration. The correct approach would have been to undertake a similar analysis to that undertaken at [43] of the decision, where countervailing benefits are considered in the round. I deal with the materiality of this error below in my section dealing with relief.

[62] For completeness I do not criticise an approach involving separate consideration of each threshold matter identified at s 5(6). Parliament has plainly sought to ensure that each of the interests dealt with at s 5(6)(a)-(d) are separately considered and protected from undue interference. The error lies in failing to properly assess whether that interference, or in this case, the adverse effect, was unjustified.

Adequate information?

[63] The Society's contention that the requirement to be satisfied invokes the need for a reasonable standard of information is uncontroversial. All decision makers

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29 The decision does not record that the Minister excluded "spill over" or other benefits from consideration under s 5(6)(d). But the decision simply refers to recreational effects and enhancements. The countervailing benefits are wider than this, as [43] of the decision demonstrates.

must have sufficient, reliable information to make a decision.[30] But context is everything.[31] In cases where, as in *Discount Brands*,[32] the exercise of discretion will exclude participation in a hearing process, the standard of information must be commensurate to the task. As stated by Keith J in *Discount Brands*,[33] the standard of information had to be sufficient to reflect the potential impingement on the right to natural justice envisaged at s 27 of the New Zealand Bill of Rights Act 1990. But in cases where an affected person is afforded the opportunity to put all relevant information to the decision maker, then the informational burden on the decision maker is reduced accordingly. The Minister should be able to rely on interested parties to adduce information in support of their respective positions. Of course this is not a rule of thumb in all cases. Where the decision maker has an inquisitorial function, the nature of the duty might be such that further information is required to discharge the inquisitorial duty.

[64] Turning to the present facts, the applicant had an opportunity to put all information it considered relevant to the exercise of discretion under s 5(6). The Minister had the information supplied by the objectors and also obtained an independent report from the Director-General. Counsel for the Society conceded at the hearing that it had the opportunity to comment on that report, and changes were suggested.[34] Provided therefore that the information supplied to and relied upon by the Minister was not obviously wrong or misleading, then, in my view, the requisite standard was satisfied. Indeed the statutory scheme does not contemplate a full trial-like or inquisitorial exercise. Rather it simply requires consideration of the information put before the Minister.

[65] The Society alleges concerns about the quality of the information and inconsistency. But while it could be said that parts of the information were not

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30 *McGrath v Accident Compensation Corporation* [2011] NZSC 77 at [31].

31 *R v Secretary of State for the Home Department, ex parte* Daly [2001] UKHL 26 at [27]; *McGuire v Hastings District* Council [2002] 2 NZLR 577 (PC) at [9].

32 *Westfield (NZ) Ltd v North Shore City Council* [2005] 2 NZLR 597 (SC) ("*Discount* Brands").

33 Ibid at [54].

34 Initially the Society proceeded on the basis that there was no substantive opportunity to comment on a draft report (refer rebuttal of Mr Reid at 10). In fact track changes to the report made by the Society on the report had been forgotten.

scientifically robust and that the opinions expressed were disputable, given the totality of the information, the Minister's view is not so obviously wrong as to warrant intervention by this Court on review. In this regard it needs to be recalled that the assessment exercise is for the Minister, including the assessment of the quality of the competing information and the weight to be placed on it. She undertook that exercise and formed a view accordingly, assisted by the Director-General's report. I am therefore satisfied that she discharged the informational requirements contemplated by s 5(6).

[66] For completeness I examine the Society's specific concerns:

(a) *Uncertainty*: The Minister concluded that the degree of enhancement was unclear. The Society says the Minister should have taken steps to achieve more clarity. Yet there is nothing in the statutory process expressly requiring further investigation by the Minister. The duty to be satisfied does not extend to filling gaps left by an applicant or an objector. In any event, the finding that the "degree of that enhancement is unclear" at [34] of her decision was a finding reasonably available to the Minister.[35] A linked issue about a lack of opportunity to provide a response to the draft report has now been conceded as incorrect.

(b) *Unsubstantiated, bias and inconsistency:* The Society claims that the Minister placed substantial weight on unsubstantiated and conflicting views of objectors but failed to place equal weight on competing views. The fine grained assessment of weight to be given to information must be for the Minister, provided there is some reasonable basis for it. I am not persuaded by the illustrations of allegedly weak, illogical and contradictory opinions provided by Dr Rennie (for example about water clarity). I do not consider that these are so obviously unreasonable as to undermine the Minister's

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35 While the report refers to a "case is made out", the statistical and other information contained in the report is not conclusive one way or other.

conclusions.

(c) *Poor quality*: The Society says that the only purported research data on existing uses was of little weight. The Society is particularly critical of surveys conducted after notification of the proposed application. A report from a student at Canterbury University is also criticised. Apparently it was not peer reviewed and was funded by an opponent, Ngai Tahu. It is further said that there was no robust data on who actually fished, the frequency of fishing or where they fished. Be that as it may, the Minister had the benefit of the Director-General's independent report, which concludes that "there will be some level of effect on existing through the loss of the area for fishers, particularly for divers and fishers in small vessels".[36] While some of the information was disputable, there was a reasonable basis for the Minister's conclusion about the significance of the effect on existing fishers.

(d) *Unsupported by fact*: The Society says that the Director-General's report states that there are likely to be positive enhancements while the Minister says the degree of enhancement is unclear. I accept that the report is somewhat more confident about the likely outcome than the Minister. The Minister also says that she relied on the report in forming her view. It could be said therefore that the Minister's observation about the unclear nature of the enhancements does not logically follow from the report. But the Minister is entitled to accept or reject the conclusions of the report provided there is a reasonable basis for doing so. Furthermore the Minister records in her decision at [34] that "in any event" she is not satisfied that the enhancements will outweigh the detriment to recreational fishers. Plainly the Minister considered the potential enhancements, notwithstanding her concerns about the degree of them.

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[36] At [262].

Alternatives

[67] The Society's concern about the failure to consider alternatives is also misplaced. Certainly, the Minister's written decision does not expressly deal with alternative options for the reserve, including allowance for some fishing or changes to the areal extent of the reserve. The Minister's evidence however is that she did consider changes to the area of the reserve to accommodate some fishing, but did not consider that to be appropriate. Initially I had some disquiet about relying on this ex post facto evidence, given the risk of rationalisation after the event. But here the Minister's evidence is directly relevant to a primary issue in dispute (as was the Minister's evidence about excluding cumulative effects from consideration). There is no challenge to her credibility. Therefore to ignore her evidence on this would be to proceed on a false premise. The Minister also circled "no" on the recommendation sheet in respect of the option to exclude an area of significance for recreational fishing. Accordingly, I see no error of substance under this head, as the primary alternative was in fact considered and rejected.

[68] I would add further that it must be for an applicant to set the frame for the Minister's decision by putting forward any suggested alternatives. The Society in fact did not support recreational take inside the proposed reserve.[37] Therefore the case for the Society on the failure to consider that alternative must be described as weak.

Relief

[69] The jurisdiction to refuse relief is strictly limited.[38] I accept that the Court of Appeal in *Rees v Firth*[39] recently said:

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[37] Affidavit of Laura Louise Allum at [38].

[38] See discussion in Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Brookers, Wellington 2007) at 26.4.1; *Air Nelson Limited v Ministry of Transport* [2008] NZCA 26; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 (HL); *Murray v Whakatane District Council* (1997) 3 ELRNZ 308 (HC) at 312-313, affirmed by the Court of Appeal in *Waiotahi contractors Ltd v Murray* [1999] 3 NZLR 276 (CA) at [22]; *Just One Life Ltd v Queenstown Lakes District Council* [2004] 3 NZLR 226 (CA) at [39].

[39] [2011] NZCA 668 at [48], [2012] 1 NZLR 408.

> ... given the discretionary nature of public remedies, it may be that a more nuanced approach is necessary in the generality of cases.

[70] The Court of Appeal there referred to an article by Gerard McCoy, "Public Law Potpourri".[40] Mr McCoy refers to cases where relief was refused, it appears primarily on the basis that no injustice would arise from such refusal. I can readily accept that the absence of an injustice would provide a sound basis for declining relief.[41] However, an underlying premise of judicial review, as I have said, is the maintenance of the rule of law and it is the role of this Court to see that it is maintained.[42]

[71] A complicating feature of this case is that consideration of whether the interference or the adverse effects are undue or unjustified is squarely a matter for the Minister. Not every technical failure to have regard to a relevant matter will give rise to relief. The weight attributable to a relevant matter will depend on the importance that the Minister attaches to them. The Minister must frame her assessment in light of the statute's purpose and policies,[43] and her reasons for attributing weight must be rational and transparent. But beyond this, her discretion is not amenable to mathematical dissection.

[72] It is also evident, in my view, that the Minister took a somewhat generous approach to the assessment, favourable to the Society, by adopting a net recreational benefit approach to the assessment. While that was an approach available to the Minister, it was equally available to the Minister to consider whether there needed to be direct mitigation of the adverse effect on recreational fishers. Furthermore, it

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40 [2009] NZLJ 352 and in particular at 354.

41 Refer also to GDS Taylor, *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington 2010) at 5.25-5.26.

42 Refer *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42 (HL) at 64, 67; H.W.R. Wade and C.F. Forysth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 17-20; *Boddington v British Transport Police* [1999] 2 AC 143 (HL) at 161, 171; *Auckland District Court v Attorney-General* [1993] 2 NZLR 129 (CA) at 133; *Hamed v R* [2011] NZSC 101 at [24]-[32]; Philip A Joseph *Constitutional & Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 6.2.2 and cases cited therein. Consider also Mark Elliott "Judicial Review's Scope, Foundations and Purposes: Joining the Dots" [2012] 1 New Zealand Law Review 75 at 78-80.

43 Refer [41] and [46] above.

appears at least from the Minister's affidavit that the adverse cumulative effects of the reserve were not considered, thereby providing a more favourable gloss on the overall merits of the marine reserve.

[73] Be that as it may, the critical issue for the Minister to determine was whether or not the interference and the adverse effects were justified in the circumstances. That must, in my view, include at least a consideration of the wider countervailing benefits of the reserve. To the extent that the Minister excluded those matters from consideration she had an incomplete picture. This is substantively relevant, because it precluded the Minister from then finally determining whether or not the application should receive a favourable recommendation. The error therefore is not of such a quality that might warrant refusal of relief.

[74] I record that I have also considered the delay in bringing these review proceedings. But when that is set against the very lengthy delay in getting a decision, the Society could fairly complain about uneven standards were I to refuse relief on that basis.

Form of relief

[75] The Society has sought referral of the decision back to the Minister for reconsideration, with consequential directions as to further reports that the Minister should obtain, and with a direction that the Minister should consult or create a process for input for affected submitters and objectors. An alternative approach is for the Court to quash the decision in its entirety. This option is not preferred by the Society.

[76] The respondent submits that the Society's desired relief goes much further than is permissible. It says if the Court finds the decision unlawful it may in its discretion quash the decision and return the matter to the Minister for a fresh decision.

[77] I agree with Crown counsel. The primary relief sought by the Society goes well beyond the proper bounds of relief in this context. Were I to direct the Minister

in the way sought, I would be stepping outside of the statutory process specifically contemplated by Parliament. I therefore prefer to proceed on a much more confined basis.

Result

[78] The answers to the questions posited by the parties are:

(a) Yes, the Minister did misapply the legal test in s 5(6)(d);

(b) Yes, (in terms of the adequacy of the information) it was open for the Minister to be satisfied that the proposed marine reserve would interfere unduly with or adversely affect any existing usage of the area for recreational purposes.

[79] In light of my first answer, I consider that the assessment under s 5(6)(d) must be reconsidered in light of the countervailing benefits of the proposed reserve. I consider that the benefits assessment should be similar in kind to the analysis recorded at [43] of the Minister's decision in relation to s 5(6)(e). It is for the Minister to determine whether she requires any further information or other input. But given that she has already assessed the relevant countervailing benefits under s 5(6)(e), I do not consider it is necessary to make any directions in that regard.

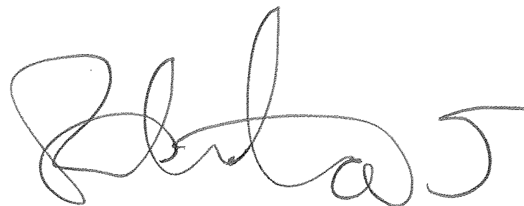
[80] Accordingly I make the following orders:

(a) The Minister's decision is quashed;

(b) The assessment under s 5(6)(d) must be reconsidered in accordance with my observation at [79].

Costs

[81] The Society has been partially successful and is entitled to costs, discounted by two-thirds to reflect the limited extent of its success. If quantum cannot be agreed, submissions are to be filed within 21 days of this judgment.



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