IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLT NO. 18/2015

IN THE MATTER	of Section 66A(3) of the Constitution, the Marine Resources Act 2005, and Part 1A of the Judicature Act 1980-81
AND IN THE MATTER	of an Application for judicial review
BETWEEN	**WILLIAM FRAMHEIN** as Apai Mataiapo Komono for the Aronga Mana of Te Au O Tonga First Applicant
AND	**TE IPUKAREA SOCIETY INCORPORATED** an incorporated society Second Applicant
AND	**ATTORNEY-GENERAL** sued on behalf of the Crown First Respondent
AND	**MINISTER OF MARINE RESOURCES** Second Respondent
AND	**SECRETARY OF MARINE RESOURCES** Third Respondent

Hearing Date: 3 to 6 July 2017

Counsel: Mr I Hikaka and Mr J Cundy for Applicants
Mr D James, Solicitor-General, and Ms A Herman for Respondents

Judgment: 15 December 2017

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

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Introduction

[1] Fishing has long held an important place in Cook Islands' culture. Not only is fish a staple food for many Islanders, but fish and fishing have long been a rich centre of custom and spirituality. Even today, artisanal fishing plays an important role in many Cook Islanders' food security, family income, and general social wellbeing.[1] In recent years, commercial fishing by foreign vessels has also become an important source of revenue for the Cook Islands Government.

[2] In the Western and Central Pacific Ocean, one of the most important methods of commercial fishing is the purse seine method.[2] This uses a large wall of netting to surround and uplift a school of fish. Purse seine vessels in the region largely target the skipjack species of tuna. But as will be discussed below, certain forms of purse seining can result in increased by-catch of non-target species, including tuna species that are threatened or endangered. This factor, and the potential to harvest large quantities of tuna, means purse seine fishing can be controversial.

[3] Until recently, purse seine fishing has not regularly occurred in Cook Islands waters. However, between 2013 and 2016, the Cook Islands Government made a series of decisions increasing the potential volume of purse seine catches within the Cook Islands' exclusive economic zone ("EEZ"). The plaintiffs now seek judicial review of those decisions. In short, they say that the respondents' decision-making processes did not comply with the Marine Resources Act 2005, and did not comply customary law as said to be required by article 66A(3) of the Constitution.

General background

[4] The Cook Islands Government has allowed foreign vessels to engage in large-scale commercial fishing within the country's EEZ since the early 1960s. However, purse seine fishing was not formally permitted until the 1980s, when the Cook Islands entered a

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1 Oceanic Fisheries Programme "The potential for interactions between commercial tuna fisheries and Cook Islands artisanal fisheries" (Issue-Specific National Report 5.2, December 2012) at 30.

2 Across the region, purse seine vessels uplift around 67 per cent of the total tuna catch.

multilateral treaty with the United States of America permitting use of the method.[3] Even then, it was not until 2012 that the United States uplifted its first significant purse-seine catches in the Cook Islands under that treaty.

[5] Longline fishing has, therefore, been the main commercial fishing method used in the Cook Islands. This method involves the setting of deep baited hooks, and it targets the albacore species of tuna.[4] In contrast, Cook Islands' artisanal fishers (meaning small-scale semi or non-commercial fishers) predominantly fish by trolling.[5] Although artisanal catch levels per species vary across islands, 70 per cent of the total yield is comprised of yellowfin tuna.

[6] Purse seine fishing is often conducted in conjunction with items called fish aggregating devices, or FADs. These man-made, floating objects are deployed at sea.[6] They cause tuna and other fish to aggregate around them, facilitating the identification and uplifting of large schools of fish. They can greatly increase the efficiency and yield of purse seine fishing ventures.[7] But the use of FADs can also result in much higher by-catch of other, non-targeted species such as bigeye and yellowfin tuna.[8] This makes the use of FADs controversial in some circles.

[7] This by-catch issue is particularly important in these proceedings. Both parties provided affidavits from expert witnesses as to this matter. Dr David Pauly, a French tuna scientist from the University of British Columbia gave evidence for the applicants. Dr John Hampton, a chief scientist at the Pacific Community's Oceanic Fisheries Programme

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3 Treaty on Fisheries between the Governments of Certain Pacific Island States and the United States of America 26 ILM 1048 (opened for signature 2 April 1987, entered into force 15 June 1988).

4 Long line fishing makes up around 9 per cent of the total tuna catch across the Western and Central Pacific Ocean region.

5 Also known as the pole and line method. Other artisanal fishing methods used in the Cook Islands include the vertical longline, drop-stone, single-hook drift lines, and harpoons.

6 Section 2 of the Marine Resources Act defines fish aggregating device:

> "Fish aggregating device" means any man-made or partly man-made floating or semi-submerged device, whether anchored or not, intended for the purpose of aggregating fish, and includes any natural floating object on which a device has been placed to facilitate its location.

7 Purse seine sets where FADs are used are called "FAD sets" or "associated sets". Purse seine sets where FADs are not used are called "free school sets" or "unassociated sets".

8 FADs can also increase the by-catch of endangered shark and turtle species.

("OFP"),[9] gave evidence for the respondents. Although there was some disagreement between the witnesses as to the by-catch issues, they broadly agreed on the following key matters:

(a) Bigeye tuna is overfished in the Western and Central Pacific Ocean, having fallen to 16 per cent of the levels it would be without commercial fishing. This level is below the Western and Central Pacific Fisheries Commission ("WCPF Commission")[10] limit reference point of 20 per cent.

(b) Bigeye tuna continues to be overfished at a rate 157 per cent above the maximum sustainable yield;

(c) Yellowfin tuna is being fished at a rate that is at or close to the maximum sustainable yield.

[8] With those matters in mind, I turn to set out the general narrative surrounding the respondents' decisions expanding the Cook Islands' purse seine fishery.

Narrative

Exploring the possibility of an expanded purse seine fishery

[9] From early 2011 to March 2013, the Ministry of Marine Resources ("MMR") began to explore the possibility of an expanded purse seine fishery in Cook Islands waters. Over this period the Ministry considered or received four reports relating to this matter. It is necessary to summarise these reports in some detail as they are directly relevant to the applicants' judicial review claims.

[10] First, the MMR commissioned Dr Patrick Lehodey, a tuna scientist from the French Space Agency, to assess the abundance of skipjack tuna by using previous catch records and

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9 See [12] below.

10 See [14] below.

environmental parameters. His report was released on 13 April 2012 ("the Lehodey Report"). Its introduction sets out the scope and objectives of the research:[11]

> Over the past five years, the total catch of the four main species of tuna from Western and Central Pacific ocean (WCPO) has increased, with the catch of ~2,468,000 tonnes in 2009 being the highest recorded. Skipjack dominates the total catch of tuna from the WCPO and almost all the catch of this species is undertaken by purse seining. There is only occasional catch of skipjack by the purse seine fisheries in the Cook Islands' Exclusive Economic Zone (EEZ) despite that this species is likely present in abundance. Its distribution is however likely not constant and varies greatly according to [El Niño Southern Oscillation] events.
>
> The Ministry of Marine Resources is conducting an exploratory study to assess the potential of development associated to this resource in a sustainable way. In particular, MMR is interested to acquire in a very short term an overview of the oceanography and variability in skipjack population dynamics in the Cook Islands EEZ. Then MMR would like to explore fishing effort[12] scenarios. This report provides a study of oceanographic conditions in the Cook Islands EEZ and presents the results of simulations conducted for the analysis of skipjack dynamics in the Cook Islands EEZ.

[11] Dr Lehodey simulated the effect of increasing purse seine fishing within the Cook Islands EEZ based on 1,000 fishing days per year. Of these fishing days, 350 would involve the use of FADs, and 650 would not. The calculations were also conducted on the basis that fishing efforts outside the Cook Islands would remain unchanged. The report tentatively concluded that this scenario could generate an average total yield of 27,000 metric tonnes. In addition, the report commented that the use of FADs could affect the mortality of bigeye tuna:

> A fishing scenario based on a total of 1,000 fishing days per year predicted a catch of 27,000 metric tonnes. However, this scenario is based on the fishing effort deployed in the [Western and Central Pacific Ocean] between 2004-08. The actual catch would be influenced by the most recent level of catch and effort in the region and the natural variability of skipjack stock. In addition, there are several sources of uncertainty in these estimates coming from the model and the necessary simplification used.
>
> But most importantly, the development of skipjack purse seine fishery in the northern part of the Cook Islands EEZ should consider the use of FAD fishing, since this region is also one of the most favourable spawning habitats known for Pacific bigeye tuna. The development of skipjack fishing using free school sets rather than FAD sets should be a priority to sustain the

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11 Patrick Lehodey "Oceanography and skipjack dynamics in the Cook Islands EEZ: Final Report to the Secretary of Marine Resources, Cook Islands", 13 April 2012.

12 A "fishing effort" is an operation to catch fish on a particular day or occasion (whether or not fish are actually caught).

> [Western and Central Pacific Fisheries Commission] effort for reducing juvenile bigeye mortality.

[12] Second, the MMR commissioned a report by the Oceanic Fisheries Programme ("OFP Report") on the potential for interactions between commercial tuna fisheries and Cook Islands artisanal fisheries.[13] The OFP is the main provider of scientific advice and services to the WCPF Commission's Scientific Committee. It is the region's scientific authority on tuna fisheries, and it has access to comprehensive current and historical data. The main finding of its report was that industrial and artisanal fleets were largely targeting different fish species, and that interactions are most likely to emerge over yellowfin tuna and wahoo, the main shared species.

[13] Thirdly, the December 2012 Conservation and Management Measures ("2012 CMM") passed by the WCPF Commission are also relevant.[14] The WCPF Commission is the international body responsible for the management of tuna stock in the Western and Central Pacific Ocean.[15] It was established to assess and manage the impact of fishing on stock levels both within and beyond national jurisdictions. It can impose conservation and management measures ("CMM") to ensure the long-term conservation and sustainability of tuna and other fish stocks. The WCPF Commission has various branches, including a Scientific Committee to consider appropriate conservation measures, and a Technical and Compliance Committee which monitors countries' adherence to CMM.

[14] The 2012 CMM recognised that bigeye tuna was subject to overfishing, that yellowfin stocks were fished at capacity, and that interactions did occur between the fisheries for these species and skipjack tuna. As interim measures for 2013, the 2012 CMM, amongst other matters, required coastal states, including the Cook Islands, to establish catch limits for purse seine fisheries within their EEZs.[16] The 2012 CMM also prohibited the use of FADs between

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13 Oceanic Fisheries Programme "The potential for interactions between commercial tuna fisheries and Cook Islands artisanal fisheries" (Issue-Specific National Report 5.2, December 2012).

14 "Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean" 2012-01 (Western and Central Pacific Fisheries Commission, ninth regular session, 2-6 December 2012).

15 The WCPF Commission was established under the WCPO Convention – see below at [45](c). It has 32 member countries, including all Pacific Island nations (together with New Zealand and Australia), along with major fishing nations such as the United States of America, the European Union, China and Japan.

16 Article 14.

the months of July and September, and further required parties to adopt one of two other options restricting their use:

(a) A further one-month ban on the use of FADs in October; or

(b) An annual limit on FAD sets to 8/12 of the average FAD sets between 2001-2011 for the CCM,[17] or for a SIDS[18] CCM, 8/9 of the three-years' average of 2009-2011 of the CCM.

[15] Lastly, the MMR released its own 2012 Annual Report on Cook Islands Tuna Longline Fishery.[19] As noted earlier, the first significant purse seine catches were not landed in the Cook Islands until that year, so the report only discussed the purse seine method in passing.[20]

[16] Also important to note is that the MMR engaged in some consultation about the proposed expansion of purse seine fishing. Meetings were held with various bodies, including Cabinet, the Cook Islands Party caucus, the Cook Islands Fishing Association executive and members, the House of Ariki and Koutu Nui, the Commerce Commission, and Te Ipukarea Society (the second applicant, an environmental protection NGO). Four public meetings were also held about the matter. In April 2012, public meetings were held in Aitutaki and Rarotonga. Two further public meetings were held in Rarotonga, in January and February 2013.

The decisions expanding purse seine fishing

[17] On 26 February 2013, the Marine Resources (Purse Seine Fishery) Regulations 2013 ("Regulations") were promulgated. The Regulations concurrently brought into force the Skipjack Tuna Purse Seine Fishery Plan ("Plan"). The decisions to promulgate these two instruments are the subject of the applicants' judicial review proceeding.

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17 No definition of CCM is provided in the 2012 CMM, but I understand it means something to the effect of Co-operating Commission Member.

18 Small island developing states.

19 Georgia Langdon "Cook Islands Longline Fishery: Annual Report 2012" (Ministry of Marine Resources, 2012).

20 The United States landed its first significant purse seine catches in the Cook Islands in 2012, totalling 12,794 metric tonnes. A record longline catch was also reported that year, totalling 15,500 tonnes.

[18] Both the Regulations and the Plan will be considered in some detail below. For the purpose of this overview, however, it is useful to note that these instruments created an annual purse seine effort limit of 1,250 days per year. No catch limit is specified, however. The Secretary of Marine Resources, Mr Benjamin Ponia, says the effort limit was based on the information in the Lehodey Report and the MMR's 2012 Annual Report.

[19] It does not appear that significant purse seine fishing occurred in the years 2013 and 2014. In 2015, the Cook Islands entered into agreements with two Korean fishing companies and a New Zealand company, for a total of 560 fishing days for the year. But less than 100 days of fishing actually occurred before these agreements expired.

[20] In October 2015, the Cook Islands entered into negotiations with the European Union with a view to signing a Sustainable Fisheries Partnership Agreement ("Partnership Agreement"). On 21 October 2015, the parties initialled the draft Partnership Agreement, attached to which was an Implementation Protocol that would permit European Union vessels to catch 7,000 tonnes of tuna annually in return for a financial package of €5.3 million over four years.

[21] These proceedings were filed shortly thereafter, in November 2015.

[22] In the meantime, the MMR engaged in public meetings about the draft Partnership Agreement and Implementation Protocol. In June 2016, Parliament established a special purse seine Select Committee to consider the genuineness and grievances of the purse seine petitioners and other related matters.

[23] The European Union formally adopted the Partnership Agreement and Impletation Protocol in May 2016, and they were ratified by the Cook Islands government in October 2016.[21]

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[21] Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands [2016] OJ L131/3.

An overview of the claim

[24] The applicants challenge three decisions made by the Cook Islands' government related to purse seine fishing. These decisions are:

(a) The Crown's decision to promulgate the Regulations under s 92 of the Marine Resources Act 2005 ("Act").

(b) The Secretary of Marine Resources' decision to promulgate the Plan under s 6 of the Act; and

(c) The Minister of Marine Resources' decision to enter the Partnership Agreement and the Implementation Protocol with the European Union. This decision was made under s 9 of the Act.

[25] The applicants plead four causes of action in relation to these decisions. The first three causes of action seek that the three decisions be quashed on the following procedural grounds:

(a) The decisions allegedly are in breach of the Marine Resources Act because they were not made in a manner consistent with international law, in particular, the customary law obligation to carry out an environmental impact assessment.

(b) The decisions allegedly do not comply with the precautionary approach required by the Marine Resources Act.

(c) The decisions allegedly are in breach of both the Marine Resources Act and article 66A(3) of the Cook Islands' Constitution because the Aronga Mana were not consulted during the decision-making processes. Article 66A(3) provides that traditional Māori custom is part of Cook Islands' law until an Act provides otherwise.

(d) The (alternative) fourth cause of action seeks an order that the Secretary of Marine Resources consult with key stakeholders, including the applicants, and to also review the Plan.

[26] The first, second and fourth causes of action are brought together by Mr Framhein and Te Ipukarea Society. The third cause of action is brought by Mr Framhein alone. Mr Framhein is Apai Mataiapo Komono for the Aronga Mana of Te Au O Tonga, and so he has the position of a traditional leader of that vaka in accordance with Cook Islands' custom. Te Ipukarea Society is a non-government organisation concerned with the promotion and protection of the Cook Islands' environment. Both applicants were represented by Mr Hikaka, who was supported by Mr Cundy.

[27] The Solicitor-General for the respondents denies all four causes of action. He says the respondents have complied with their obligations under the Act. As to the respondents' alleged failure to consult with the Aronga Mana, the respondents say there is no sufficient prior evidence of the alleged custom, and that in any event, such consultation did occur on a number of levels, including with Aronga Mana.

The key enactments

The Marine Resources Act 2005

[28] The Act is the parent enactment for the three challenged decisions. It provides for "the conservation, management and development of marine resources and related matters".[22] Section 3 sets out the Act's objective, function and authority; matters which are relevant to the applicants' claim:

> **3. Objective, Function and Authority**
>
> (1) The principal objective of this Act and the Ministry of Marine Resources **is to provide for the sustainable use of the living and non-living marine resources** for the benefit of the people of the Cook Islands.
>
> (2) The Ministry of Marine Resources has the principal function of, and authority for the conservation, management, development of the living and non-living resources in the fishery waters in accordance with this Act and the Ministry of Marine Resources Act 1984.
>
> (3) This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under this Act and the Ministry of Marine Resources Act 1984 shall act, **in a manner consistent with the Cook Islands international and**

[22] Long title.

regional obligations relating to the conservation and management of living and non-living resources in the fishery waters.

(4) To ensure that the objectives, functions and authority provided under this Act and the Ministry of Marine Resources Act 1984, and Cook Islands obligations under international and regional law are effectively discharged, the provisions of **this Act shall prevail in the event of inconsistency or incompatibility with any other Act or instrument** having the force of law in the Cook Islands from time to time, **except for the Constitution of the Cook Islands.**

[Emphasis added]

[29] Section 4 sets out principles and measures that are mandatory considerations for certain decisions made under the Act. Again, these are important to the applicants' claim in these proceedings:

4. Principles and Measures

The Minister, or Secretary, as appropriate, when performing functions or exercising powers under this Act, shall take into account the following-

(a) environmental and information principles in relation to achieving the sustainable use of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks -

(i) decisions should be based on the **best scientific evidence available** and be designed **to maintain or restore target stocks** at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;

(ii) the precautionary approach should be applied;

(iii) impacts of fishing on non-target species and the marine environment should be minimised;

(iv) biological diversity of the aquatic environment and habitat of particular significance for fisheries management should be protected;

…

[(d)] social, cultural and equity principles –

(i) the maintenance of traditional forms of sustainable fisheries management;

(ii) **protection of the interests of artisanal fishers**, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;

(iii) **broad participation by Cook Islanders** in activities related to the sustainable use of marine resources.

[Emphasis added]

[30] Section 6 sets out the procedure by which "designated fisheries" may be established. Designated fisheries are particular stocks of fish, or fishing operations based on such stocks, which are considered to be in the national interest and which also require "management measures" to ensure sustainable use of that fishing resource. Section 6 provides that for each designated fishery, the Secretary is required to prepare a fishery plan, as the Secretary did in this case. Plans must also include the management measures to be applied to the fishery, and these measures have the same force and effect as regulations promulgated under the Act.

[31] Section 9 permits the Minister to enter into access and fisheries management agreements. It is this provision which permitted the Cook Islands government to enter into the Partnership Agreement and the Implementation Protocol. Relevant to this proceeding is subsection (3), which provides:

(3) Fishery allocations under access agreements shall—

(a) not exceed a level consistent with the long-term conservation and sustainable use of fishery resources and the protection of fishing by Cook Islanders;

(b) be consistent with any applicable fishery management plan; and

(c) be made taking into account, inter alia, the following considerations as may be appropriate -

(i) past and present fishing patterns and practices;

(ii) submission of information for the conservation, management and development of fish stocks;

(iii) contributions to research in the fishery waters; and

(iv) whether such allocations would advance development of the fishing industry in the Cook Islands.

Marine Resources (Purse Seine Fishery) Regulations 2013

[32] The Regulations came into force on 27 February 2013. They declare commercial fishing of skipjack tuna, using the purse seine method, to be a "designated fishery" under s 6

of the Act. The Regulations apply to all commercial purse seine operations.[23] They also bring the Plan into force, and set various key limits on fishing by purse seine vessels:

> **7. Limits on fishing effort**
>
> (1) Fishing by purse seine vessels is **limited to 1,250 days per annum** in the fishery waters.
>
> (2) The Secretary may determine the total levels of purse seine catch in the fishery waters.
>
> (3) If the secretary considers the total level of purse seine catch in the fishery waters **exceeds 30,000 metric tonnes i**n any four consecutive quarterly year period [sic], he or she **must review the impact of this level of catch on achievement of the objectives** in the fishery plan.
>
> (4) As a result of a determination under sub-clause 3 the Secretary **may reduce the total fishing allowance** by purse seine fishing, or apply appropriate limits to fishing in the fishery waters, which may include time/area closures.
>
> (5) The Secretary, with the approval of the Minister, and in consultation with key stakeholders in purse seine fishing, may apply additional limits to purse seine fishing if he or she is of the opinion that it is in the interest of the sustainability or economic viability of the purse seine fishery.
>
> [Emphasis added]

[33] The Regulations also govern the licensing and operation of purse seine fishing vessels.[24] Licensed purse seine vessels are prohibited from fishing within 48 nautical miles of Rarotonga and 24 nautical miles of any other island in the Cook Islands (this limit has since been increased to 50 nautical miles).[25] Lastly, the Secretary is given broad powers to issue directives giving effect to the regulations[26]

Purse Seine Fishery Plan (2013)

[34] The Plan came into force on the same day as the Regulations (27 February 2013). Consistent with the Regulations, it adopts an effort limit of 1,250 fishing days and does not

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23 Except for exploratory fishing, and fishing beyond the Cook Islands' fishery waters: reg 6.

24 See regs 8-13.

25 Regs 13(2) and (3).

26 Reg 14.

specify a catch limit.[27] The Secretary, however, is required to carry out a review if the total catch exceeds 30,000 tonnes in any four consecutive quarters.[28]

[35] The Plan also includes the following observations as to the conservation and management considerations of a purse seine fishery:

> **9. Appropriate Scale and Extent of the Fishery**
>
> a) Despite a long period of access for the US fleet, there are only sporadic results and one comprehensive year of catch history to fully understand the likely catch rates and catch values of the domestic purse seine fishery;
>
> b) Stock assessment conducted by the oceanography division of the French Space Agency (CSL) suggest [sic] that biomass of skipjack tuna in the Cook Islands waters is 189,000 tonnes and **fishing effort of 30,000 tonnes will not significant [sic] reduce spawning biomass** below the forty percent reference point commonly utilized in fisheries management.
>
> **10. Impacts and Interactions**
>
> a) **The impact on tuna stocks**. While there no substantial concerns [sic] about the risk of overfishing of the skipjack stock which is expected to make up the bulk of the purse seine catch in Cook Islands waters, **there are concerns about the status of yellowfin tuna, and particularly bigeye tuna**, which will also be caught in the purse seine fishery;
>
> b) The relatively high catch rates of juvenile bigeye tuna in waters north east of the Northern Cook Islands. The bigeye tuna bycatch rates from sets on floating objects/FADs are known to be moderately high in waters adjacent to the Cook Islands EEZ in the north east, **but there is little information available on bigeye bycatches in Cook Islands waters.** If these are less than bycatches in the north and east then fishing in Cook Island waters could provide an alternative fishing ground that would reduce impacts on juvenile bugeye [sic] compared with where the fleet now operates;
>
> c) The impact on non-target species, particularly whale sharks, sharks and sea turtles. **No information is available on the impact of this fishing on non-target species** in Cook Islands waters;
>
> d) The impact on the longline fishery. Since the existing longline fishery targets mainly albacore, and the purse seine fishery targets mainly skipjack, the interactions between the two fisheries will be more limited that if they were both targeting the same stock. However, **yellowfin is an important secondary target stock for both the**

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27 Clause 13(a).

28 Clause 13(b).

> **longline and purse seine fisheries**, and a single purse seiner can catch as much yellowfin tuna as the existing fleet of around around longliners. To a lesser degree the same likely [sic] to be true of bigeye tuna.
>
> [Emphasis added]

[36] The Plan expressly refers to "the key principles and obligations in international law relating to offshore fisheries, including the application of the precautionary approach", as well as the WCPF Commission's 2012 CMM.[29]

[37] The Plan provides for annual consultation with "key stakeholders", a term that is not defined:

> **12. Stakeholder consultation**
>
> a) The Secretary shall organise consultations with key stakeholders in the purse seine fishery at least once in each calendar year.
>
> b) The scope of the consultations shall include matters--
>
> (i) relating to the management and regulation of fishing including licensing and conditions of fishing;
>
> (ii) related to the development of fishing and fish processing including purse seine fishing, marketing or processing;
>
> (iii) related to socio-economic or environmental impacts of large pelagic fishing, processing and marketing; and
>
> (iv) such other issues relating to the large pelagic longline fishery as the Secretary may decide.

[38] Also provided for is a biennial review of the Plan.[30]

[39] The Plan also includes a condition that no licensed purse seine vessel shall fish within 48 nautical miles of Rarotonga, and 24 nautical miles of any other island of the Cook Islands.[31] This has now been increased to 50 nautical miles.

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29 The plan has two clause 12s; this is at the first clause 12(a) and (b).

30 Clause 21.

31 Article 18(b) and (c), consistent with reg 13(2) and (3) of the Regulations.

Sustainable Fisheries Partnership Agreement and Implementation Protocol 2016

[40] The Partnership Agreement sets out that its underlying principles and objectives include the promotion of responsible fishing in the Cook Islands' waters, and also that the Cook Islands must not give more favourable conditions to other foreign fleets.[32] The Partnership Agreement is to apply for eight years, and provides for "tacit renewal" for an additional eight-year period. Most of the Partnership Agreement's other terms are broad, and instead refer to the Implementation Protocol for further details.[33] The key terms of the Implementation Protocol are as follows:

[41] The Implementation Protocol is to apply for four years, during which four tuna purse seine vessels may fish for highly migratory species.[34]

[42] For the first two years, the European Union shall pay the Cook Islands €385,000 for access to the Cook Islands' fishery areas. This reduces to €350,000 for the third and fourth years. These sums are equivalent to a "reference tonnage" of 7,000 tonnes per year.[35]

[43] A process is set out in relation to this "reference tonnage":[36]

(a) When the total catches of European Union vessels reach 80 per cent of the reference tonnage, the Cook Islands shall monitor the catches of European Union vessels on a daily basis, and inform European Union authorities immediately when the reference tonnage is reached.

(b) When the total catches of European Union vessels reach 80 per cent of the reference tonnage, the parties "shall immediately consult each other and analyse the relationship between the catches of the Union vessels and the

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32 Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands [2016] OJ L131/3 at art 3.

33 Protocol on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands [2016] OJ L131/10.

34 Article 1(1).

35 Article 2(2)(a).

36 See art 2(5).

fishing limits specified in the Cook Islands national legislation in view of ensuring that such legislation is respected".

(c) Once the reference tonnage is reached, the amount paid by ship owners for catches beyond the reference tonnage is to increase by 80 per cent.

[44] Apart from the requirement for consultation and the increased cost for catches beyond the reference tonnage, there are no catch limits or effort limits provided for in the Implementation Protocol or Partnership Agreement.

International instruments

[45] Apart from domestic legislation, the Cook Islands fisheries regime is influenced by three international instruments:

(a) *The United Nations Convention on the Law of the Sea* ("UNCLOS") is the head agreement governing, amongst other matters, states' rights to exploit and manage fishery resources with their EEZs.[37] Article 1 of UNCLOS lists skipjack tuna, bigeye tuna and yellowfin tuna as species considered to be highly migratory.

(b) *The Straddling Fish Stocks Agreement* ("SFS Agreement") formed part of the implementation of UNCLOS. It is aimed at ensuring the long-term conservation and sustainable use of straddling and highly migratory fish stocks.[38] It provides for the establishment of regional fisheries management organisations to manage trans-boundary fish stocks:

(c) *The Convention for the Conservation and Management of Highly Migratory Fish Stock in the Western and Central Pacific Ocean* ("WCPO Convention")

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37 United Nations Convention on the Law of the Sea 1833 UNTS 5 (opened for signature 10 December 1982, entered into force 16 November 1994).

38 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 2167 UNTS 3 (opened for signature 4 December 1995, entered into force 11 December 2001).

was established to implement the objectives of the SFS Agreement in the Western and Central Pacific Ocean region.[39]

First cause of action: error of law – failure to act in a manner consistent with international obligations

[46] The applicants say the respondents erred in law or acted under errors of law because they did not conduct an environmental impact assessment (EIA) when issuing the Regulations, Plan and Implementation Protocol.

[47] The parties agree that s 3(3) of the Act requires decisions under the Act to be made in a manner consistent with the Cook Islands' international obligations. The parties also appear to accept the finding of the International Court of Justice in *Pulp Mills on the River Uruguay*, to the extent the Court recognised that customary international law requires states to conduct EIAs in certain circumstances.[40] But the parties disagree as to whether the respondents adequately conducted an EIA in the present case.

[48] The applicants' position essentially rests on three points:

(a) The Cook Islands' international law obligations require an EIA to be conducted in situations where a project is liable to *affect* a shared resource, rather than only where a risk is of a "significant" nature.

(b) The purse seine fishing activities contemplated by the Fishing Plan and the Regulations pose a real and clear risk of harm to a shared resource as well as a Cook Islands resource – one that should be properly assessed by an EIA.

(c) The respondents cannot point to anything that would amount to an EIA in this case.

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[39] Convention for the Conservation and Management of Highly Migratory Fish Stock in the Western and Central Pacific Ocean 2275 UNTS 43 (opened for signature 5 September 2000, entered into force 19 June 2004).

[40] *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14.

[49] The respondents deny each of these points. They say their decision-making processes complied with their specific obligations to assess environmental impacts. By the end of the hearing, I understood the Solicitor-General's position essentially to be that:

(a) It is for the state to determine the scope and content of an environmental impact assessment, so long as the state undertakes the minimum requirements.[41]

(b) Insofar as international law required the respondents to conduct an EIA, the respondents have sufficiently and appropriately assessed the potential impacts of purse seine fishing on the regional tuna stock. This is indicated by the initiation or consideration of the Lehodey Report; the Oceanic Fisheries Programme report; the 2012 CMM arising out of the 2012 WCPO Convention; and the Plan itself.

[50] As a point of law, the Solicitor-General also stressed that in the context of judicial review, courts should take a tolerant look as to whether the respondents acted reasonably in making its decisions. However, "unreasonableness" is not a pleaded cause of action. The applicants' causes of action allege errors of law arising from the respondents' failure to follow due process.

What were the respondents' international law obligations in relation to an EIA?

[51] I first need to ascertain the respondents' international law obligations in relation to an EIA when making the Regulations, the Plan, and in entering into the Partnership Agreement and Implementation Protocol.

[52] The applicants have provided an expert affidavit from Dr Katherine Miles, a lecturer in international law at the University of Cambridge. I set out her helpful description of how customary international law obligations come into existence:

> Rules of customary international law are binding on all States. They are not rules that have been expressly agreed to by all states in the sense of treaties.

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41 The Solicitor-General originally submitted that there is no current international practice in the context of fisheries which requires states to undertake an EIA before developing fisheries within their exclusive economic zones. This point, however, was not carried into closing submissions.

> Rather, they emerge over time out of the practice of States and crystallise into binding rules of international law.
>
> Two components of the rule must be present, one objective and one subjective: there must be widespread and consistent state practice, accompanied by *opinio juris sive necessitatis* (commonly abbreviated to *opinio juris*), being States' belief that the action is required by law. …
>
> For a practice to attain the status of customary international law, there must be a consensus of States accepting that practice as international law. Once a practice has been established as a rule of customary international law, it is not open to individual States to derogate from it. There can, however, be a period of contention and uncertainty during the emergence of a new rule of customary international law. A State is entitled to object to the application of it to a new rule of customary international law at the inception of the rule, but not once the emerging rule has become firmly established as a rule of customary international law … A lengthy period uniform and consistent practice is not required for a practice to become legally binding. The practice can be of a short duration …
>
> In short, rules of customary international law contain legally binding obligations to which all States must submit.[42]

[53] Dr Miles also refers to the *Pulp Mills* decision of the International Court of Justice which, as noted, recognised that EIAs have become a requirement under customary international law where there is a risk that an activity may have a significant adverse impact in a transboundary context. The Court observed:[43]

> 204. … In this sense, the obligation to protect and preserve, under Article 41 (a) of the Statute, has to be interpreted in accordance with **a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.** Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.
>
> [Emphasis added]

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42 I note Dr Miles' description is consistent with the approach set out by Clifford J in the New Zealand High Court decision *Bin Zhang v Police* [2009] NZAR 217 (HC) at [24]-[25].

43 *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 at 83.

[54] The Court went on to say that it is for each state to determine the specific content of an EIA in each particular case, having regard to the project's magnitude, likely adverse impact, and the need to exercise due diligence:[44]

> 205. … Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.
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> [Emphasis added]

[55] The International Court of Justice has since elaborated on the required content of EIAs under customary international law. In *Certain Activities Carried Out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River* the Court confirmed the statements from *Pulp Mills* that customary international law requires states to conduct an EIA where there is a risk that a proposed activity will have a significant adverse impact in a transboundary context, or on a shared resource.[45] The Court went on to set out some broad obligations surrounding the conduct and content of EIA:

(a) Before embarking on a project having the potential to adversely affect the environment of another state, a state must ascertain if there is a risk of *significant* transboundary harm (or of *significant* harm to a shared resource). If so, this risk triggers the requirement to carry out an EIA.[46] In conducting this preliminary inquiry, states should "have regard to the nature and magnitude of the project and the context in which it was to be carried out".[47]

(b) If the requirement to conduct an EIA is triggered, the state must conduct an EIA in order to *confirm* the existence of and assess the potential risk of that

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44 At 83.

45 *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment)* [2015] ICJ Rep 665 at 706.

46 At 706-707.

47 At 720.

harm. The content of the EIA would depend on an objective evaluation of all the relevant circumstances of the case.[48] And as noted in *Pulp Mills,* it is for the state to determine the content of the EIA, although the state would have to exercise due diligence in conducting it, having regard to the nature and magnitude of the activity and its impact on the environment.[49]

(c) If the EIA confirms a risk of significant transboundary harm, the state planning the activity must notify and consult with the potentially affected states, in good faith, to determine the appropriate measures to prevent or mitigate that risk.[50]

[56] Two different projects were at issue in that decision. Costa Rica had complained that Nicaragua had not conducted an EIA before dredging the San Juan River, which sits on the border of the two countries and flows into Costa Rica's Colorado River. But the Court found that Costa Rica's complaint failed at the preliminary-inquiry stage – Nicaragua was not required to carry out an EIA because the dredging programme did not give rise to a risk of significant transboundary harm:

> 105. The Court notes that the risk to the wetlands alleged by Costa Rica refers to Nicaragua's dredging activities as a whole, including the dredging of the 2010 *caño*. … The principal risk cited by Costa Rica was the potential adverse impact of those dredging activities on the flow of the Colorado River, which could also adversely affect Costa Rica's wetland. In 2006, Nicaragua conducted a study of the impact that the dredging programme would have on its own environment, which also stated that the programme would not have a significant impact on the flow of the Colorado River. This conclusion was later confirmed by both Parties' experts. Having examined the evidence in the case file, including the reports submitted and testimony given by experts called by both Parties, the Court finds that the dredging programme planned in 2006 was not such as to give rise to a risk of significant transboundary harm, either with respect to the flow of the Colorado River or to Costa Rica's wetland. **In light of the absence of risk of significant transboundary harm, Nicaragua was not required to carry out an environmental impact assessment.**
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> [Emphasis added]

[57] The other project at issue was a road Costa Rica was constructing along the same passage of water, on its side of the border. Nicaragua complained that an EIA had not been

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48 At 707 and 720.

49 At 721.

50 At 707 and 724.

conducted. But Costa Rica argued the road's construction carried no risk of significant transboundary harm, and that even if it was required to conduct an EIA, it had fulfilled that obligation by carrying out a number of environmental impact studies.

[58] On the first point, the Court held the preliminary threshold for triggering the obligation to conduct an EIA was met: the road project was substantial, its planned location could easily affect the river through sediment erosion, and the road would pass through a wetland of international importance.[51] On the second point, the Court held that Costa Rica had failed to comply with its customary law obligation to conduct an EIA because its environmental impact studies were conducted after the construction of the road commenced:

> 160. Turning now to the question of whether Costa Rica complied with its obligation to carry out an environmental impact assessment, the Court notes that Costa Rica produced several studies, including an Environmental Management Plan for the road in April 2012, an Environmental Diagnostic Assessment in November 2013, and a follow‑up study thereto in January 2015. These studies assessed the adverse effects that had already been caused by the construction of the road on the environment and suggested steps to prevent or reduce them.
>
> 161. In its Judgment in the *Pulp Mills* case, the Court held that the obligation to carry out an environmental impact assessment is a continuous one, and that monitoring of the project's effects on the environment shall be undertaken, where necessary, throughout the life of the project …. Nevertheless, the obligation to conduct an environmental impact assessment requires an *ex ante* evaluation of the risk of significant transboundary harm, and thus "an environmental impact assessment must be conducted prior to the implementation of a project" … In the present case, Costa Rica was under an obligation to carry out such an assessment prior to commencing the construction of the road, to ensure that the design and execution of the project would minimize the risk of significant transboundary harm. In contrast, Costa Rica's Environmental Diagnostic Assessment and its other studies were *post hoc* assessments of the environmental impact of the stretches of the road that had already been built. These studies did not evaluate the risk of future harm. The Court notes moreover that the Environmental Diagnostic Assessment was carried out approximately three years into the road's construction.
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> 162. For the foregoing reasons, the Court concludes that Costa Rica has not complied with its obligation under general international law to carry out an environmental impact assessment concerning the construction of the road.

[59] The applicants plead and Mr Hikaka submitted that customary international law requires states to carry out an EIA before engaging in activities "that *may cause harm* to a shared resource", meaning the obligation to conduct an EIA can be triggered even where the

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[51] At 720-721.

risk of transboundary harm (or of harm to a shared resource) is not of a "significant nature". But I see nothing in the International Court of Justice decisions, or in Dr Miles' affidavit, to support this lower threshold. The respondents' obligation at the preliminary stage was, therefore, to ascertain whether the purse seine fishing expansion did lead to a risk of *significant harm* to the shared tuna resources.

[60] As to the minimum content of the EIA (should one be required), it seems clear this matter remains for the respondents to determine.[52] But as noted above at [55](b), the EIA should be carried out with due diligence, with the level of diligence being proportional to the nature and magnitude of the purse seine expansion and its likely impact on shared tuna stocks. To that extent, if a proposed purse seine expansion is substantial and might cause extensive harm to shared tuna stocks, the content required for the EIA will be greater than where the expansion is more modest and the risk of harm is consequently smaller. It is also clear that the EIA must be performed before embarking on the proposed activity, and that the obligation continues as long as the activity is carried out.

[61] Lastly, there is the obligation to consult, in good faith, with affected states about the impact of the activity. I see no reason why consultation could not happen through the relevant intergovernmental bodies, where appropriate.

[62] During oral submissions, the Solicitor-General conceded that an EIA was required in relation to the proposed purse seine expansion under the Regulations, Plan and Partnership Agreement. This was a departure from his original position that an EIA was not necessary.[53]

[63] I accept the Solicitor-General's concession, but I observe that it was arguable that the purse seine expansion (as provided for by the Regulations, Plan and Partnership Agreement) would not create a risk of *significant* harm to the shared resources of bigeye and yellowfin

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52 I note that in separate opinions for *Certain Activities Carried Out by Nicaragua*, Judges Bhandari, Owada and Duggard elaborate, in their own ways, on the possible content requirements of EIA. Those views may be instructive to states as custom in this field develops. But given these views are separate to the opinion of the Court, and are by no means unanimous, it cannot be said that they are indicative of customary international law.

53 There were two reasons given for this original position. First, the Solicitor-General said the requirement for an EIA had not been triggered because the proposed expansion posed no risk of *significant* harm to shared resources. Second, it was submitted that an EIA was unnecessary because there is no state custom of conducting them in relation to purse seine fishing.

tuna.[54] If that were so, the respondents would not be required to conduct an EIA under customary international law. Given the concession, I do not need to reach a concluded view on this point.[55]

[64] However, I understand the Solicitor-General's concession was influenced by recognition of the duties and responsibilities of the Cook Islands as a party to the WCPO Convention, which in Part II sets out principles and measures for the conservation and management of highly migratory fish stocks. Articles 7 and 8.3 confirm that the principles and measures are to be applied by "coastal states" in the exercise of their sovereign rights for exploring, exploiting, conserving and managing migratory fish stocks. The Solicitor-General nevertheless emphasised that it is for the state, in this case the Cook Islands, to determine the scope and content of the EIA which will be moderated by the impact on the shared resource.

Did the respondents comply with their obligations in relation to EIA?

[65] The second issue is whether the respondents complied with their customary international law obligations in relation to EIA. At this point, it is necessary to recall the broad agreement between the parties' witnesses that:[56]

(a) Bigeye tuna is overfished in the Western and Central Pacific Ocean, having fallen to 16 per cent of the levels it would be without fishing. This level is below the WCPF Commission limit reference point of 20 per cent.

(b) Bigeye tuna continues to be overfished at a rate 157 per cent above the maximum sustainable yield;

(c) Yellowfin tuna are being fished at a rate that is at or close to the maximum sustainable yield.

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54 This is largely because the Cook Islands' purse seine expansion comprises only a small proportion of the total, region-wide, purse seine fishing days and catches that the WCPF Commission set in its 2012 CMM.

55 Section 36 of the Environment Act 2003 requires an EIA for activities within the EEZ which are likely to cause "significant environmental impacts". This may lend support to the Solicitor-General's concession.

56 See above at [7].

[66] The Solicitor-General maintained his alternative submission that, to the extent an EIA was required, it was conducted through the procurement and analysis of the Lehodey Report, the OFP Report, consideration and implementation of the 2012 CMM, and also the MMR's own 2012 Annual Report on Cook Islands Tuna Longline Fishery.

[67] The applicants dispute the adequacy of these reports on the following grounds:

(a) The Lehodey Report only modelled the sustainability of skipjack tuna fishing. It did not model or assess the effect of purse seine fishing on bigeye and yellowfin tuna stocks.

(b) The OFP report does not comment on the proposed expansion of purse seine fishing in the Cook Islands. It is based on data from between 1990 and 2010 (before there was significant purse seine fishing in the region), and focuses on the interaction between artisanal and longline fisheries. It does not assess the impact that an expanded purse seine fishery will have on artisanal and subsistence fishers.

(c) The WCPF Commission's 2012 CMM and overall management role does not abrogate the respondents' obligation to conduct an EIA in relation to the impacts of purse seine fishing within the Cook Islands' EEZ. The WCPF Commission's regional system relies on EIAs being carried out by individual states.

[68] I agree with the applicants that without more, the Lehodey Report and the OFP Report would be insufficient to constitute an EIA. Those reports do not meaningfully assess the impact of an expanded purse seine fishery on bigeye and yellowfin tuna stocks. But I depart from the applicants when it comes to the weight the respondents were entitled to place on the 2012 CMM. These were carefully developed measures produced by an intergovernmental body to which the Cook Islands is a party, and the respondents were entitled to place significant weight on them. This is particularly so given the Cook Islands is a small and developing country, with comparatively limited resources on which it can draw when assessing the environmental impact of an expanded purse seine fishery. Even more so given the primary environmental impacts of purse seine fishing are likely to be regional, rather than restricted to the Cook Islands' EEZ.

[69] The 2012 CMM were developed in direct response to the regional overfishing of bigeye and yellowfin tuna. In particular, the WCPF Commission put in place measures to limit the impact of purse seining. This included the seasonal prohibition of FAD sets (between July and October) and annual purse seine catch limits. And I accept the respondents' submission, and the evidence of their witness Dr John Hampton, that the WCPF Commission has the best available information.

[70] I do not accept the applicants' insistence that in addition to the role played by the WCPF Commission, the MMR had a separate obligation to carry out a full EIA in relation to the impact of purse seining within the Cook Islands' EEZ. The Cook Islands is an active and compliant member of the WCPF Commission as is evidenced by its various reports and Mr Ponia's affidavit. The MMR provides information and data to the WCPF Commission in accordance with its obligations, as do other member states. It receives valuable reports from the WCPF Commission and its agencies, based on the best available information and scientific evidence.[57] These inform and guide decisions in the exercise of the Cook Islands' sovereign right to explore and exploit fish stocks within its EEZ, such as tuna.

Conclusion

[71] Given these matters, I agree with the Solicitor-General that an EIA was sufficiently conducted through the respondents' receipt and consideration of the Lehodey Report, the OFP Report, the 2012 CMM, and also the MMR's own 2012 Annual Report on Cook Islands Tuna Longline Fishery. I therefore dismiss this cause of action.

Second cause of action – failure to comply with section 4 of the Act, including the precautionary principle

[72] The second cause of action alleges the respondents erred in law by not complying with s 4 of the Act. I set it the provision again for convenience:

> **4. Principles and Measures**
>
> The Minister, or Secretary, as appropriate, when performing functions or exercising powers under this Act, shall take into account the following-

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[57] See, by way of example, Shelton Hartley et al "Stock Assessment of Bigeye Tuna in the Western and Central Pacific Ocean" WCPF-SC10-2014 (WCPF Commission Scientific Committee, Majuro, Republic of Marshall Islands, July 2014).

(a) environmental and information principles in relation to achieving the sustainable use of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks -

(i) decisions should be based on the best scientific evidence available and be designed to maintain or restore target stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors;

(ii) the precautionary approach should be applied;

(iii) impacts of fishing on non-target species and the marine environment should be minimised;

(iv) biological diversity of the aquatic environment and habitat of particular significance for fisheries management should be protected;

…

[(d)] social, cultural and equity principles –

(i) the maintenance of traditional forms of sustainable fisheries management;

(ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;

(iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.

[73] Section 4 provides that persons making decisions under the Act "shall take into account" the listed principles and measures. In the words of Lord Hewart CJ, this involves "paying attention to a matter in the course of an intellectual process".[58] This means that so long as the respondents genuinely turned their minds to the listed matters when making the decisions, they were free to adopt, reject or attribute as much weight to them as they saw fit.[59] This interpretation is consistent with the recognition in the introductory words of s 4 that the principles and measures are to be "take[n] into account", "as appropriate", and the use of the subjunctive form, for example "impacts of fishing on non-target species and the marine environment should be minimised". From the wording of s 4, the listed matters are to be

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[58] *Metropolitan Water Board v Assessment Committee of the Metropolitan Borough of St Maryleborne* [1923] 1 KB 86 (KB) at 99.

[59] See *New Zealand Transport Agency v Architectural Centre Inc* [2015] NZHC 1991, (2015) 19 ELRNZ 163 at [60]-[63].

considered and evaluated but are not substantive requirements to which the respondents were required to give effect when making the decisions.

[74] The precautionary approach to be taken into account under s 4(a)(ii) is not defined in the Act. But all parties accept the WCPO Convention's elaboration of it in the context of fisheries:[60]

(a) States are to be more cautious when information is uncertain, unreliable or inadequate. The absence of scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.[61]

(b) States must determine stock-specific reference points based on the best available scientific information, and must also determine the action to be taken when reference points are exceeded.[62] When reference points are approached, they will not be exceeded. If they are exceeded, immediate action must be taken in accordance with the earlier-determined plan.[63]

(c) If the status of target or non-target or associated or dependent species is of concern, states must subject such stocks to enhanced monitoring in order to review their status and the efficacy of CMM.[64]

(d) For new and exploratory fisheries, states are to adopt, as soon as possible, cautious CMM, including catch limits and effort limits.[65]

[75] By closing submissions, the applicants' points on this cause of action had been refined to six particular grounds. I will address each in turn.

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60 This mirrors the requirements set out in article 6 of the SFS Agreement.

61 Article 6(2).

62 Article 6(1)(a).

63 Article 6(3).

64 Article 6(4).

65 Article 6(5).

Fishing effort limits

[76] First, the applicants say the respondents failed to apply the precautionary approach by disregarding the Lehodey Report's recommendations that there was scope for a fishing effort of 1,000 days per year without damaging skipjack tuna stocks. They say it is inconsistent with the precautionary approach for the effort limit to be set at 1,250 days.

[77] Mr Benjamin Ponia, the Secretary of the MMR, gave evidence by affidavit as to the development of the purse seine expansion. Mr Ponia deposed that it was the findings of the Lehodey Report and the 2012 catch history which led the Ministry to propose "a conservative catch limit of 1,250 fishing days" in the Plan and Regulations. Mr Ponia also noted that he presented the Cook Islands' effort limit (of 1,250 days) to the 10th regular session of the WCPF Commission in December 2013, and that the Commission has subsequently granted the Cook Islands an EEZ limit of 1,250 fishing days.

[78] In his November 2013 letter seeking the WCPF Commission's approval for the limits, Mr Ponia wrote:

> … I am writing to you to advise the Commission of the purse seine effort limit, that the Cook Islands has established for our EEZ.
>
> Accordingly, the Cook Islands would therefore like to declare the following limits for purse seine fishing for your EEZ:
>
> - Catch limits of skipjack tuna is limited to an accumulative total of 30,000 metric tonnes in any consecutive four quarterly period.[66]
>
> - Effort limits for purse seine fishing is limited to 1,250 fishing days per annum.
>
> Moreover, these limits have been adopted and legislated for pursuant to the Cook Islands Marine Resources Act 2005 and in particular, the Marine Resources (Purse Seine Fishery) Regulations 2013 and the Purse Seine Fishery Plan (2013).

[79] The respondents' expert witness, Dr John Hampton, was of the opinion that the effort limits established in the Plan and Regulations are precautionary. The Solicitor-General also

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[66] I observe, however, that this statement is not correct. There is no catch limit for skipjack tuna in the Regulations or the Plan. They only provide for the Secretary to carry out a review if the catch exceeds 30,000 tonnes in any four consecutive quarters. However, it is apparently the MMR's policy to apply the 30,000-tonne limit as a cap, which was accepted by the applicants.

noted that in July 2016, the Forum Fisheries Agency supported the limit of 1,250 days at the Cook Islands Parliamentary Select Committee on Purse Seine Fishing.

[80] But given my interpretation of s 4 outlined above, the issue is not whether the limit of 1,250 days is *actually* precautionary. The issue is whether the respondents genuinely paid attention to the precautionary approach during the decision-making processes. This means evidence relating to matters occurring after the decisions were made, or of experts' retrospective reflection on the decisions' substantive effects, is of no relevance. The proper evidence to consider (at least insofar as the Plan and Regulations are concerned) is that possessed by the respondents in February 2013, namely the Lehodey Report and the 2012 catch history.

[81] The 2012 catch history was about the previous catch efforts by longline fisheries. Mr Ponia does not explain how it is relevant to the setting of catch limits for skipjack purse seine fisheries, and I struggle to see how it is evidence that the respondents properly considered the precautionary approach.

[82] The Lehodey Report identified the potential for a fishing effort of 1,000 days per year, with 65 per cent of those days being FAD free, in order to protect bigeye tuna. Perhaps the highest the Lehodey Report can be read in favour of the respondents is where the Report notes that, based on an annual catch limit of 1,000 days per year, the spawning biomass of skipjack would remain "well above" the reference indicator for sustainable exploitation:

> The decrease in skipjack spawning biomass is predicted to remain well above the value of 40% of unfished spawning biomass, used as a reference indicator of sustainable exploitation, in both the CPFC [sic] and the Cook I. EEZ.

[83] This finding indicates that an effort limit above 1,000 days per year might be feasible, at least insofar as its effect on skipjack biomass. But the biomass figures in the report are not presented in a way which allows for simple extrapolation into higher effort limits. There was an apparent absence of scientific information available to the respondents as to the effect of a limit of 1,250 days.

[84] Section 4 requires the respondents to turn their minds to the fact that a cautious approach was required due to the lack of scientific information on annual fishing efforts of 1,250 days, and also in light of the fact this was largely a new fishery. But Mr Ponia simply states in his affidavit that "… the limits … were determined after careful consideration of

science and catch history". It would have been preferable for Mr Ponia to provide detail as to the basis for his assessment of "a conservative catch limit of 1,250 fishing days" and the science and catch history to which he gave "careful consideration". But his assessment is supported by the subsequent expert opinion of Dr Hampton and by the Forum Fisheries Agency, and also by the approval for 1,250 fishing days sought and granted by the WCPF Commission in late 2013 (albeit primarily for implementing regional limits).

[85] While I have reservations as to the caution the Secretary claims in his approach to setting effort limits, clearly he advisedly addressed the matter.

Non-target species

[86] Second, the applicants say the respondents acted contrary to s 4 because they did not properly assess the impact of the purse seine expansion on non-target species, particularly bigeye tuna and endangered species.

[87] However, I agree with the respondents that they were entitled to, and did, place significant weight on the findings of the WCFP Commission, as expressed in the 2012 CMM. These specifically addressed the impact of purse seine fishing on the non-target species, particularly bigeye tuna. Moreover, clause 10 of the Plan specifically notes the concerns of the impacts on bigeye tuna.[67]

[88] As to the consideration of by-catch of other endangered species, this is mentioned in clause 10 of the Plan, which simply notes that "no information is available on the impact of this fishing on non-target species in Cook Islands waters." Mr Ponia, however, did refer to the consideration of the matter in his affidavit:

> The statement … that I did not take into account the impacts on species such as whale sharks, sharks, and turtles is incorrect as the database of observer reports filed on board purse seiners fishing in the Cook Islands EEZ indicate minimal impact on the species survival. For example, since 2010 there has been 12 turtles landed by purse seiners. There is 100 per cent coverage of observers on board purse seiners.

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[67] See [35] above.

[89] This statement indicates that the respondents did consider the impact of the purse seine expansion on other endangered species. It also indicates that there was some relevant data to which Mr Ponia turned his mind.

FAD restrictions

[90] Thirdly, the applicants say the restrictions on FADs are unlikely to achieve the stated aim of conserving bigeye tuna stocks. In particular, they say the four-month annual FAD ban referred to by Mr Ponia is unlikely to be effective when there is nothing in the Regulations, the Fishery Plan or the Partnership Agreement that requires fishing without FADs.

[91] In his affidavit, Mr Ponia said the Cook Islands had committed to an annual four-month ban on the use of FADs in order to conserve bigeye tuna stocks in the region. He said this measure causes significant loss of revenues. Such a measure would appear to be consistent with restrictions called for by the 2012 CMM. But I accept the applicants' point that it is unclear how this "ban" is effective. I have not been presented with any legal recognition of it, nor of any mechanism for its enforcement. It is not mentioned in the Regulations, the Plan, the Partnership Agreement or the Implementation Protocol. It would appear that purse seine fishers in the Cook Islands could legally conduct their entire fishing efforts using FADs, at any time during the year.

[92] The Cook Islands Offshore Fisheries Annual Report 2015, however, does refer to the four-month FAD closure, and the data appears to indicate that it is complied with (regardless of enforceability).

[93] However, even in the absence of a legally enforceable ban, it does not follow that the respondents failed to consider the mandatory considerations in s 4 of the Act. Indeed, the respondents submit that the precautionary approach does not require the banning of certain fishing methods on the basis of differential impacts on target or non-target species. They say other factors must also be considered. I agree, and note that s 4 requires decision makers to consider various and wide-ranging matters, and that different outcomes may be available in given situations depending on the weight to which decision makers attribute each matter. I accordingly see no basis for interference on the basis of there being an error of law.

Harm occurring elsewhere

[94] Fourthly, the applicants say the respondents wrongly justified the purse seine expansion by reference to damage to bigeye tuna stocks occurring elsewhere in the region. The applicants say this is not a relevant consideration under s 4 of the Act.

[95] This alleged error of law is based on a single sentence in Mr Ponia's affidavit. I set out the sentence in its context:

> Paragraphs 8 and 12a of the K Passfield affidavit sworn on 6 July 2016 is incorrect that the MMR is contravening the precautionary principles of the MRA by allowing a purse seine FAD fishery with bigeye tuna by-catch. This is because the levels of allowable fishing in the Cook Islands EEZ were determined after careful consideration of science and catch history. The limits established by the MMR are conservative in order to minimize the impact on the health of bigeye tuna which is a by-catch of purse seining on FADs. **The Cook Islands EEZ makes a minimum contribution to overall mortality of bigeye stocks and is 0.2 per cent of the total catches of bigeye tuna in the region (2010-2014).**
>
> [Emphasis added].

[96] The comment appears to be little more than a passing observation in affidavit evidence. Read in context, it is not clear Mr Ponia took into account, as a salient factor, the mortality of bigeye stocks elsewhere in region when the decisions were made. Mr Ponia does not appear to be saying that he did so. I therefore do not find this allegation to be supported by the evidence, and the matter does not require further consideration.

Artisanal fishers

[97] Fifthly, it is alleged the respondents failed to take into account the interests of artisanal and subsistence fishers, as required under s 4(d)(ii).

[98] However, the respondents note that the MMR commissioned and considered the report by the OFP in 2012, which assessed the potential for interaction between commercial tuna fisheries and Cook Islands' artisanal fisheries.[68] That report did not refer to the effects of an expanded purse seine expansion, and the applicants challenged a submission by the respondents that it did. However, I consider the respondents were entitled to be instructed by its conclusion that industrial and artisanal fleets were largely targeting different species of

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68 See above at [12].

fish (with artisanal fishers mainly targeting yellowfin tuna and wahoo, and purse seine fishers targeting skipjack tuna), notwithstanding that the industrial fishing experience relied upon was principally longline fishing. The MMR accepted and has implemented recommendations for a programme to monitor artisanal catches.

[99] Prior to signing the Partnership Agreement and the Implementation Protocol, the respondents also had regard to a presentation the OFP delivered to the Cook Islands Parliamentary Select Committee on Purse Seine Fishing. That presentation observed:

> Catches by small-scale artisanal fishers in the Cook Islands are dominated by yellowfin tuna. Given the low catch of yellowfin tuna by purse seiners in the Cook Islands EEZ, the risk of negative impacts on the performance of small-scale fisheries by increased purse seining are not likely to be great. It is understood that Cook Islands has already prohibited purse seining within 24 nmi of of islands in the north of the EEZ, and this would afford additional protection to small-scale fisheries. If negative impacts are detected, extending these closed areas out to 50 nmi could be considered.

[100] Consistent with this, the Plan originally included a condition that no licensed purse seine vessel shall fish within 48 nautical miles of Rarotonga, and 24 nautical miles of any other island of the Cook Islands.[69] Moreover, at a cabinet meeting on 21 March 2017 this was increased to 50 nautical miles.

[101] Having regard to these matters, I do not agree that the respondents failed to consider the interests of artisanal and subsistence fishers.[70] In my view, the fact the respondents specifically sought out and received information pertaining to artisanal fishers indicates the matter was considered during the decision-making processes.

Partnership Agreement and Implementation Protocol

[102] Lastly, the applicants say the respondents failed to consider the precautionary approach when entering the Partnership Agreement and the Implementation Protocol. In particular, they allege the documents merely provide for consultation and price increases when the reference tonnage (7,000 tonnes) is approached, there being no actual effort limit. The applicants say this is in breach of the precautionary principle's requirement for specific

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69 Art 18(b) and (c).

70 See [12] and fn 13 above.

limits to be set. The applicants also say the respondents failed to have regard to the Spanish fleet's heavy reliance on FADs and its unusually high by-catch of bigeye tuna.

[103] The Agreement and Protocol might appear to allow for potentially unlimited exploitation of the Cook Islands' fishery, provided that EU vessels are willing to pay the increased cost for catches beyond the reference tonnage.[71] But it does not follow from this that the respondents failed to consider the precautionary approach or the other mandatory considerations under s 4 of the Act. The applicants are not challenging the decision to enter the agreements on the ground of unreasonableness.

[104] Indeed, a number of matters in the documents indicate that the respondents did have the precautionary approach in mind. For example, the preamble to the Partnership Agreement notes that the parties are:

> AWARE of the importance of the principles established by the Code of Conduct for Responsible Fisheries adopted at the Food and Agriculture Organisation (FAO) Conference in 1995

[105] Similarly, the Partnership Agreement also notes that the parties "hereby undertake to promote responsible fishing in the Cook Islands' waters as provided in the Code of Conduct for Responsible Fishing…".[72] These references are significant because the Code of Conduct for Responsible Fisheries specifically refers to the precautionary approach and states' obligation to apply it.[73]

[106] Moreover, the Implementation Protocol provides that a "Joint Committee" (made up of EU and Cook Islands' representatives)[74] may reassess and review the fishing opportunities in the Protocol insofar as:[75]

> the resolutions and conservation and management measures of the [WCPF Commission] support that such an adjustment will secure the sustainable management of tuna and tuna-like species in the Western and Central Pacific

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71 See [43] above.

72 Article 3(1).

73 Food and Agriculture Organisation of the United Nations "Code of Conduct for Responsible Fisheries" (28th Session of the FAO Conference, Rome, Italy, 31 October 1995) at Articles 6.5 and 7.5.

74 Partnership Agreement at Article 6(1).

75 Implementation Protocol at Article 5(1).

> Ocean, noting that the Parties have a special interest in managing the bigeye tuna stock.

[107] It can be inferred from these references that the respondents paid attention to the precautionary approach when deciding to enter the Partnership Agreement and the Implementation Protocol. I therefore find this allegation is not made out.

Conclusion

[108] Despite my reservations on the issue of the fishing effort limits, on balance, I consider there is no basis for this Court to intervene on the second cause of action. If I had not so decided, none of the alleged errors was so egregious as would have persuaded me to exercise my discretion to quash the decisions as sought by the applicants.

[109] The second cause of action is dismissed.

Third cause of action– failure to consult with the Aronga Mana

[110] The third cause of action is brought by Mr Framhein alone. In short, he says the Minister and the Secretary had a duty to consult the Aronga Mana before promulgating the Regulations and the Plan and before initialling the Partnership Agreement and Implementation Protocol, but did not do so. This duty is said to arise from custom, which applies via article 66A(3) of the Cook Islands' Constitution and s 4(d) the Act, when read together.

[111] Article 66A of the Constitution speaks to the role of customary law in the Cook Islands' legal system, and provides as follows:[76]

> **66A. Custom –**
>
> (1) In addition to its powers to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.
>
> (2) In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands.

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[76] Article 66A was inserted into the Constitution by s 7 of the Constitution Amendment (No.17) Act 1994-95.

(3) Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment.

(4) For the purposes of this Constitution, the opinion of the Aronga Mana of the island or vaka to which a custom, tradition or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom, shall be final and conclusive and shall not be questioned in any court of law.

[112] For convenience, I also repeat the relevant parts of s 4 of the Act:[77]

4. Principles and Measures

The Minister, or Secretary, as appropriate, when performing functions or exercising powers under this Act, shall take into account the following-

…

[(d)] social, cultural and equity principles –

(i) the maintenance of traditional forms of sustainable fisheries management;

(ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;

(iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.

Preliminary issues

[113] Two preliminary issues need to be addressed before the third cause of action is considered in more detail. These relate to the definition of "Aronga Mana", and Mr Framhein's standing to bring this cause of action.

Who are the Aronga Mana referred to in article 66A of the Constitution?

[114] The Constitution does not define the term "Aronga Mana". Parliamentary discussion during the passage of the relevant constitutional amendment indicates that some considered the term to be sufficiently well known by Cook Islanders as to not require definition.[78]

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77 Set out more fully above at [29].

78 (31 March 1995) 16 CIPD 1985.

[115] The Court of Appeal considered the meaning of Aronga Mana in *Hunt v de Miguel*.[79] That case will be discussed in some detail below. For present purposes, it is sufficient to record that the Court noted the Aronga Mana might be broadly defined as "a group of traditional leaders for a particular district".

[116] In attempting to pin down a more specific definition, the Court took guidance from two ordinary statutes, noting that even those definitions were unfortunately devoid of details:[80]

> Rarotonga Local Government Act 1988:
>
> "Aronga Mana" includes those persons invested with the title in accordance with the native custom and usage of that part of Rarotonga from which that title is derived and which title is recognised by such native custom and usage as entitling the holder to be a member of the Aronga Mana of Rarotonga in the Koutu-Nui of the Cook Islands;
>
> Environment Act 2003:
>
> "Aronga Mana" includes those persons invested with a title in accordance with the native custom and usage of the islands of the Cook Islands [from] which that title is derived and which title is recognised by such custom and usage as entitling the holder to be a member of the Aronga Mana of the Cook Islands;

[117] The Court of Appeal did not reach a conclusive definition based on these statutory definitions:

> 11. These definitions speak of including "persons vested with a title in accordance with the native custom and usage of that part of Rarotonga …" or "of the Islands of the Cook Islands". This rather implies that there might need to be some evidence of the investiture of the persons in question. Under these definitions there seems to be no limit on the number who may be appointed or invested. These provisions are devoid of any details as to the appointment and operation of Aronga Mana. This may be contrasted with the extensive procedural mechanisms contained in the House of Ariki Act 1966 dealing at length with matters of appointment of Arikis to that House.

[118] The Court went on to express regret that the Cook Islands Parliament has not defined the term, nor how the Aronga Mana is to be constituted, nor who is to verify its composition, nor the mechanism by which it is to express its decision or opinion as to custom.[81] In another

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79 *Hunt v de Miguel* CA2/14, 19 February 2016.

80 At [10]-[11].

81 At [72]-[73].

recent case, the Court of Appeal repeated that expression of regret, making "a plea for enlightenment from the Legislature on this issue".[82] For reasons that will later become apparent, I join the Court of Appeal's plea.

Does Mr Framhein have standing to bring this claim?

[119] The other preliminary issue is whether Mr Framhein has standing to bring this claim. Mr Framhein's father (Mr Tekeu Framhein) is one of the ten Ui Mataiapo O Arai-Te-Tonga, in the vaka Te Au O Tonga. In 2007, Mr Tekeu Framhein bestowed Mr Framhein with the title of Apai Mataiapo Komono.

[120] As his father's Komono (representative or deputy), Mr Framhein has all his father's power and authority, and so is one of the Aronga Mana. It is therefore not disputed that Mr Framhein has standing to bring the proceedings on behalf of the Aronga Mana for Te Au O Tonga.

[121] However, during an interlocutory hearing for these proceedings, Weston CJ raised concerns as to Mr Framhein's standing to bring the third cause of action on behalf of the Aronga Mana on a national level:[83]

> [17] It seems to me that the Applicant's challenge in this case proceeds on a national basis. If that is so, there must be an argument that the Aronga Mana should be thought of in national terms rather than simply regional. The Aronga Mana, as currently cited in the Statement of Claim, is that of Te Au O Tonga, being one of the three vaka on Rarotonga. Mr Framhein's affidavit, however, does range wider than that and includes, for example, the Aronga Mana of Pukapuka. Ultimately, of course, this will be a matter for the Applicants and their advisers, but it seems to me that the Applicants need to be thinking about the Aronga Mana in a national sense. If that is so, the question then to be considered is how the views of the Aronga Mana are to be assembled and how they are to be communicated to the Court. …
>
> [18] … A related component of this difficult issue is who is going to be liable for costs if an adverse award is made against the Aronga Mana. It is easy enough for someone to say we are Aronga Mana but it is not so easy to determine who ultimately would be paying an adverse costs award if one were to be made. …

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82 *Browne v Munokoa* [2017] CKCA 1 at [38].

83 *Framhein v Attorney-General* HC Rarotonga Plaint No. 18/2015, 19 September 2016 (Minute).

> [19] … Consequently, I have directed that, at the same time as filing the Fourth Amended Statement of Claim, there should be further evidence filed, either by Mr Framhein or others, addressing the sort of problems I have sketched out above.

[122] In accordance with that direction, Mr Framhein filed a series of affidavits to confirm the extent of support for the proceeding amongst those claiming to be Aronga Mana throughout the Cook Islands. I accept the affidavits suggest unanimous (or near unanimous) support from the claimed Aronga Mana of the three vaka of Rarotonga (Te Au O Tonga, Takitumu and Puaikura), and the islands Pukapuka, Atiu and Mangaia, as well as substantial support from the Aronga Mana of Mitiaro and Aitutaki.

[123] Nevertheless, the Solicitor-General challenges Mr Framhein's standing to bring the third cause of action on behalf of the Aronga Mana for other islands or vaka apart from Mr Framhein's own vaka (Te Au O Tonga). Given that the deponents of the affidavits have not been joined as parties, the Solicitor-General says Mr Framhein has no right to be identified as the representative of all three vaka of Rarotonga and of the outer islands, in the sense of being their voice to the Court. The Solicitor-General says they are effectively seeking the benefit of an audience before the Court without being exposed to the responsibilities that a party should carry in a protracted dispute, such as liability for costs.

[124] In *Proprietors of Wakatū v Attorney-General*, members of the New Zealand Supreme Court made observations about standing in cases involving collective Māori interests.[84] The Chief Justice proposed that where a claim involves Māori collective interests, a flexible approach to standing should be adopted.[85] Glazebrook J suggested that claims involving Māori collective interests can often be pursued by way of representative actions, and that where a claim is a true "collective claim" (which would be outside the representative action rules), the proper plaintiff could be determined in accordance with tikanga (New Zealand-Māori customary law).[86] O'Regan and Arnold JJ's observations were more narrowly focussed on the facts of the case before them.[87] While they did not dismiss the Chief Justice's point as to the need for flexibility in Māori collective claims, they did not see the

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84 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

85 At [491].

86 At [649]-[662].

87 At [790] to [802].

present case as being suitable for adopting a relaxed approach. William Young J did not address the issue in detail as he considered the overall claim had been largely precluded by legislation.[88]

[125] *Wakatū*, however, was not a judicial review case. It was a private-law claim relating to historical breaches of fiduciary duties.[89] So the issue of standing primarily related to the "personal interest" of the claimant(s) to represent the private interests of other members of the relevant tribal groups. In the present case, the Solicitor-General has raised valid questions as to personal interest aspect of Mr Framhein's standing. To the extent that Mr Framhein purports to appear on behalf of the deponents of the affidavits he filed, it may have been preferable for Mr Framhein to bring his claim as a representative proceeding under r 45 of the Code of Civil Procedure of the High Court 1981. If that were to occur, perhaps a "flexible approach" might be adopted when assessing the deponents' standing to speak on behalf of the Aronga Mana of their own islands or vaka.

[126] But judicial review proceedings can also engage a different aspect of standing, that being the "public interest" in ensuring the law is properly complied with.[90] In my view, the public interest aspect of Mr Framhein's claim outweighs the concerns as to any shortcomings in his personal interest standing. Mr Framhein has raised valid concerns as to the Aronga Mana's rights to consultation during the respondents' decision-making processes. Those concerns are of general and constitutional importance. I agree with Mr Hikaka that, in a technical sense, it does not matter how widely the proceeding is supported amongst the Aronga Mana. The issue is whether the respondents had a duty to consult with the Aronga Mana on the decisions in question, and whether they failed to do so. To that extent, any one of the Aronga Mana must have standing to bring the proceedings. If there are residual issues relating to Mr Framhein's personal interest standing, they might be best addressed when considering relief.

[127] I therefore conclude that Mr Framhein has standing to bring the third cause of action.

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88 At [951]-[953].

89 Although *Wakatū* was not such a case, I also note the need for caution in referring to New Zealand decisions which involve the partnership between Māori and the Crown under the Treaty of Waitangi.

90 See *Smith v Attorney-General (Judicial Review: Standing)* [2017] NZHC 1647, [2017] NZAR 1094.

The parties' submissions

[128] Mr Hikaka for Mr Framhein says that in accordance with native custom of the Cook Islands, the Aronga Mana, as tiaki (guardians and protectors), are responsible for and required to be consulted in relation to matters concerning the distribution of food resources of the sea, including fisheries.

[129] Three statements signed by claimed Aronga Mana from across the Cook Islands have been adduced as evidence to confirm the identities of the members of the Aronga Mana, and to indicate the Aronga Mana's opinion as to custom surrounding sea food (kai moana). There is a single statement representing the Aronga Mana of Te Au O Tonga, Takitumu and Puaikura (the three vaka of Rarotonga). There are two separate statements from the Aronga Mana of Aitutaki and Atiu. According to Mr Hikaka, each statement has been widely signed, insofar as:

(a) All but one of the 23 Aronga Mana of Atiu have signed the statement;

(b) For the vaka of Rarotonga, only two (out of 10) Mataiapo of Te Au O Tonga and two (out of 32) Mataiapo of Takitumu have declined to sign; and

(c) A majority of the Aronga Mana of Aitutaki have signed, including all three of the current Ariki and 55 Mataiapo.

[130] The signatories of the three statements express their opinion as to custom in the following terms:

> 1. As a matter of traditional Maori custom, the Aronga Mana are the tiaki (guardians) of the moana (sea), including the kai moana (seafood).
>
> 2. The Aronga Mana are responsible for preserving kai moana, not only for present generations but also for future generations.
>
> 3. Examples of how the Aronga Mana exercise customary rights and responsibilities include:
>
> (a) the placing of a ra'ui over certain areas to prevent fishing or gathering kai moana in those areas;
>
> (b) The placing of ra'ui over certain fish species or types of kai moana to prevent taking of those fish or kai moana;

(c) The granting of permissions or approvals to take fish or kai moana;

(d) Considering what steps are appropriate to ensure that the kai moana resource is used in accordance with principles of preservation and protection of its inherent value (mauri);

(e) Monitoring the status of kai moana and the taking of kai moana.

4. As a matter of custom, the Aronga Mana must be informed of proposals in relation to kai moana so that they can carry out their rights and responsibilities in relation to the resource.

5. As a matter of custom, the exercise of these rights and responsibilities by the Aronga Mana extends out beyond the reef and includes the Moana Nui a Kiva (the Pacific Ocean).

6. This statement represents the opinion of the undersigned Aronga Mana on the custom relating to kai moana and the role of the Aronga Mana as tiaki of that resource.

[131] Mr Hikaka says that pursuant to article 66A(4) of the Constitution, the three signed statements are sufficient to constitute a final and binding opinion of the Aronga Mana, meaning that the opinion espoused cannot be called into question by this court. Further, he says that under article 66A(3) of the Constitution, the custom is part of Cook Islands' law because nothing in the Act (or any other enactment) contradicts the tiaki role of Aronga Mana in relation to kai moana (including the right to be informed about related proposals). He submits that the considerations set out in s 4(d) reinforce the Aronga Mana's role in this respect.[91]

[132] Given these matters, Mr Hikaka says the respondents were under an obligation to consult the Aronga Mana when making the Regulations, the Plan, and before initialling the Partnership Agreement and Implementation Protocol. Counsel says the respondents did not engage in meaningful consultation with the Aronga Mana before making these decisions, and so therefore acted under an error of law.

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91 Particularly given that s 4(d) requires relevant decision makers to take into account:

(i) the maintenance of traditional forms of sustainable fisheries management;

(ii) protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and of aquaculture; and;

(iii) broad participation by Cook Islanders in activities related to the sustainable use of marine resources.

[133] The Solicitor-General responds to these allegations from a number of angles: As I understand his submissions, he says there is insufficient verifiable evidence to substantiate a relevant proven custom within the meaning of article 66A(4), and also that article 66A(4) cannot operate on a national level. The Solicitor-General challenges the factual basis of Mr Framhein's claim as well, saying the respondents demonstrated a constant willingness to consult with the vaka and the Islands' customary interests, and that consultation occurred on a number of levels including with Aronga Mana. He also submits that the Regulations and Plan are "enactments" within the meaning of article 66A(3), which must prevail over any alleged inconsistent custom. On this latter submission, however, I agree with the applicants that it is circuitous and fallacious.

Discussion

[134] From the evidence, it is clear the respondents engaged in no specific consultation with the Aronga Mana before the decisions to promulgate the Regulations and the Plan.[92] Mr Ponia notes that in 2016 he held two meetings with the Aronga Mana about the purse seine expansion and the EU Agreement:

(a) The first was held in Tupapa, Rarotonga on 23 March 2016. Mr Ponia records it as being for the audience of "Aronga Mana and local fishermen", although this description is disputed.[93] It was attended by 25 people. But Mr Hikaka emphasises that this meeting was held after the (October 2015) initialling of the Partnership Agreement and Implementation Protocol.

(b) The other meeting was held in Aitutaki on 20 October 2016 for the "Aronga Mana of Aitutaki", and had 100 people in attendance. But Mr Hikaka emphasises that this meeting was held after all the relevant decisions had been made, occurring six days after the Partnership Agreement and Implementation Protocol was signed.

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92 I note that on 20 May 2011, the Secretary and Minister also held a meeting about purse seining with the House of Ariki and Koutu Nui.

93 One person who attended the meeting, Mr Philip Nicholas, has deposed that the meeting was only for fishermen, and that Mr Ponia objected to a non-fisherman who attempted to contribute.

[135] There being no evidence that specific consultation with the Aronga Mana occurred before the impugned decisions were made, I do not agree with the Solicitor-General's claim that the respondents consulted with the Aronga Mana. The issue, therefore, is whether the respondents had a duty to do so.

[136] In judicial review proceedings, care must be taken to identify the source and nature of any alleged duty to consult, and the way in which that duty is said to have been breached.[94] Consultation obligations ordinarily arise through statute, parties' legitimate expectations, or possibly from the demands of fairness and natural justice in particular circumstances.[95] The respondents' duty to consult in this case is alleged to arise, perhaps uniquely, from the (claimed) customary law requirement for the Aronga Mana to be informed of proposals in relation to kai moana (see at [130] above).[96]

[137] In this context, it is helpful to begin with some comments on the operation of article 66A. Although its operation is not immediately clear, the Court of Appeal recently provided some clarification in *Hunt v de Miguel*.[97] The Court explained that the article was intended to give greater recognition of custom in the Cook Islands, unless that custom is expressly ousted by statute or is inconsistent with the Constitution:

> 56. Reading Article 66A as a whole, it is clear that the intention of Parliament in inserting Article 66A in 1995 was to provide for greater recognition and protection of custom and usage in the Cook Islands — or, as the Crown put it, "to acknowledge the worth and dignity of traditional Cook Islands custom". Indeed, the effect of related Article 66A(3) is that custom and usage shall take precedence in the Cook Islands, unless expressly ousted by statutory law, or else inconsistent with the Constitution. Thus the idea that the people themselves (collectively, through their relevant Aronga Mana) would determine the custom to be followed pursuant to Article 66A(4) (unless otherwise ousted by statute or the Constitution) is entirely consistent with the elevation of customary law under the related sub-articles of Article 66A.

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94 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [296], [313].

95 See *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 370; *Lower North Island Red Deer Foundation Inc v Minister of Conservation* [2017] NZAR 1058 (HC) at [49].

96 I record that the respondents' alleged duty to consult is not pleaded as arising from a legitimate expectation or from the demands of fairness.

97 *Hunt v de Miguel* CA2/14, 19 February 2016. The Court of Appeal later repeated and affirmed its findings as to article 66A in its 2017 decision *Browne v Munokoa* [2017] CKCA 1 at [35]-[39].

[138] The Court explained that if the Aronga Mana from a local area/vaka gave an opinion on custom or usage, then pursuant to article 66A(4), the Court would, as a matter of evidence, have to treat that opinion as a conclusive expression of that custom or usage (provided the custom was consistent with the Constitution or "any enactment"):

> 63. Rather, the correct interpretation to be given to Article 66A(4) is that espoused by the Crown in its submissions: that Article 66A(4) is to be interpreted in accordance with the distinction between, on the one hand, the binding status of evidence regarding custom given by the Aronga Mana and, on the other, the Court's jurisdiction (as affirmed by Article 66A(3)) to apply that custom in a way that is consistent with the Constitution and other statutory enactments.
>
> 64. Thus in practice, if the relevant Aronga Mana gives satisfactory evidence as to its properly formulated opinion on the precise content of local custom or usage, then as an evidentiary matter that evidence must, pursuant to Article 66A(4), be treated by the Court as "final and conclusive". However, the Court must still, if called upon to do so, determine whether that custom is consistent with the Constitution or "any enactment". If it is not, then notwithstanding the binding evidentiary submission of the Aronga Mana, the relevant statute or provision of the Constitution will prevail pursuant to Article 66A(3).

[139] Article 66A therefore provides an alternative to the common law approach of recognising and integrating custom into a legal system.[98]

[140] In the present case, Mr Framhein says the Aronga Mana's three signed statements means the custom has been "proved" in terms of article 66A(4), to the effect that under Cook Islands' law the respondents were required to inform and consult the Aronga Mana about the purse seine expansion. By obtaining the signed statements, described at [129] above, Mr Framhein has attempted to circumvent the evidential problems faced by the vaka in *Hunt v de Miguel*, where the Court of Appeal was not satisfied that the group claiming to be Aronga Mana had established who comprised the appropriate Aronga Mana of the vaka in question (Te Au O Tonga), nor that the correct body had formed an opinion on the asserted custom.

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[98] The majority of the New Zealand Court of Appeal in *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 explained that under modern common law, indigenous customary law is to treated as integrated into the common law of a jurisdiction. This would appear to be broadly consistent with article 66A(3). But in terms of recognising custom, the common law requires the Court to be satisfied that the claimed custom is long-standing; has continued without interruption since its origin; is reasonable; is certain in its terms; and has not been displaced by clear statutory wording. Article 66A(4) would appear allow these criteria to be displaced by the provision of the opinion of the Aronga Mana (provided that the custom is consistent with the Constitution or "any enactment").

[141] I share the Court of Appeal's concerns noted above[99] about the meaning of Aronga Mana, the composition and verification of its members, and the mechanism by which Aronga Mana are to express decisions or opinions as to custom.[100] So despite the great lengths to which Mr Framhein and his legal team have gone to avoid these problems, they continue to loom in the present case. For example, other than the signatories' own claims, I have no evidence that the signatories are actually the Aronga Mana of the vaka or island they claim to represent, and I have no evidence that the list of the Aronga Mana in the statements are complete and exhaustive. Further difficulty is caused by the fact that only a majority of the Aronga Mana of Aitutaki have signed the statement – it being unclear whether an opinion by the majority of the Aronga Mana is sufficient to comprise a conclusive opinion in terms of article 66A(4).

[142] But even if I were to proceed on the basis that the statements are conclusive as to custom, I would not find that the custom required the respondents to consult specifically with the Aronga Mana when making the decisions expanding the purse seine fishery. This is because the respondents did not know about the claimed custom (that Aronga Mana must be informed of all decisions relating to kai moana) before they made the challenged decisions. Indeed, the signed statements were not produced until at least late 2016 or early 2017. That was after all relevant decisions were finalised. And there is no indication that such a custom was brought to the respondents' attention at an earlier time.

[143] Mr Hikaka submitted that there is no need for native custom to be enunciated before the Crown is required to engage in consultation. He submitted that the Crown has the responsibility to consider custom, not for custom to be codified and provided to the Crown. However, to accept Mr Hikaka's submission would effectively impose a duty on public bodies to proactively investigate and consult as to whether and what custom might be relevant to every administrative law decision. I am not aware of any Cook Islands' laws that would warrant recognition of such a duty,[101] and I do not read s 4(d) of the Act as going this far. The practical difficulties of such an obligation could be immense.

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99 See at [119]-[120].

100 Mr Framhein did not advance his case on the basis of common law recognition of custom.

101 This might be different to the position in New Zealand (where the principle of good faith under the Treaty of Waitangi has been incorporated into many enactments) or in Canada (where s 35 of the Constitution Act 1982 preserves the honour of the Crown and the goal of reconciliation with Aboriginal peoples).

[144] I acknowledge that in some circumstances, the demands of fairness and natural justice might give rise to consultation obligations in relation to custom and usage. That might be so where a decision maker knows, or is made aware, of a credible but not-yet-proven claim as to a specific customary interest that could be adversely affected by a contemplated decision.

[145] But in this case, I accept the Solicitor-General's submission that nothing indicates the Minister or Secretary could (or should) possibly have contemplated a custom whereby the Aronga Mana might exercise tiaki over kai moana more than 50 nautical miles off the coast, or that custom mandated that the Aronga Mana be consulted in respect of proposals in relation to kai moana in such distant waters. Nor could the Minister or Secretary have been expected to contemplate that there was established such a custom consistent across all vaka and islands, transcending local and geographical boundaries.

[146] Section 4(d) of the Marine Resources Act does not take Mr Framhein's case further. Although it requires decision makers to consider certain cultural matters which might be within the Aronga Mana's purview, it does not mandate specific consultation with the Aronga Mana. So while engagement with the Aronga Mana might have been one way for the respondents to discharge their s 4(d) obligations, it was ultimately for the respondents to decide whether that should involve the Aronga Mana.[102]

Conclusion

[147] Given these matters, I do not find that a duty to consult the Aronga Mana existed when the Regulations and the Plan were promulgated, or when the Partnership Agreement and Implementation Protocol were initialled. I therefore dismiss the third cause of action.

Fourth cause of action (alternative) – failure to comply with the Fishery Plan

[148] In the fourth cause of action, the applicants seek an order requiring the Secretary to carry out consultation with key stakeholders, including the Aronga Mana and the second applicant, and to review the Plan – as is said to be required by the Plan.

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[102] *McInnes v Minister of Transport* [2001] 3 NZLR 11 (CA).

Discussion

[149] By clause 5 of the Regulations, the Plan came into force on 27 February 2013 (the same date as the Regulations). Clause 12 of the Plan provides for consultation with "key stakeholders" in the purse seine fishery, to be organised by the Secretary at least once in each calendar year. Clause 21 provides for biennial reviews of the Plan, consultation by the Secretary with key stakeholders, and recommendations to the Minister "as to the continued management of the purse seine fisheries".

[150] Mr Ponia's evidence does not suggest that either of these consultations and reviews have taken place. Rather, he refers to the annual reviews by the Scientific Committee and the Technical Compliance Committee of the WCPF Commission.

[151] The respondents submit that the review dates must be measured from the date of commencement of fishing pursuant to the Plan, which they say is early 2017. I reject that submission. There is nothing in the Plan or the Regulations to support it.

[152] The consultation and reviews of the Plan are important. They are consistent with and support that an EIA is an ongoing process, a proposition the Solicitor-General advanced and endorsed in submissions. The Secretary has possibly been deflected from these particular requirements in the Plan by the establishment of the Select Committee in June 2016 (which reported in August 2016) in response to petitions and grievances about the MMR's purse seine fishery decisions. But these requirements in the Plan, which was prepared by the Secretary himself under s 36 of the Act, must be observed and implemented.

[153] "Key stakeholder" and "stakeholder" are not defined in the Plan. Given my conclusions on the third cause of action, the Aronga Mana would not fall within such a category. Nor, I consider, would the second applicant. However, given the sensitivity of the purse seine fishing issue, the respondents may see merit in wider consultation.

Conclusion

[154] I decline the relief claimed by the applicants in the fourth cause of action, but my comments above are referred to the Secretary for his consideration.

Result

[155] All causes of action are dismissed.

Observations

[156] While I have concluded there are no reviewable errors of law of such a nature or degree as to require the Court's intervention on judicial review, I am left with areas of concern. They include the minimal level of consultation preceding the 27 February 2013 decisions to promulgate the Regulations and the Plan; the "soft" catch limits in the Partnership Agreement and Implementation Protocol (when the WCPO Convention stipulates that both catch and effort limits are to be imposed as part of the CMM for new or exploratory fisheries), and the absence of apparent adherence to the ongoing nature of the EIA process and the requirements for review. I refer these observations to the second and third respondents for consideration.

[157] Counsel clearly contributed considerable effort to their submissions in this important case. I was greatly assisted and am grateful to them.

Costs

[158] There is a significant and genuine public interest component to these proceedings. Therefore, while the respondents would normally be entitled to costs as the successful parties, I am not inclined to make an award of costs in this case.[103] If there are matters any party wishes to draw to my attention on the issue of costs, I will receive memoranda by the end of January 2018.

Judith Potter, J

Judith Potter, J

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103 See *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 525-526.

Glossary

Aronga Mana	Traditional leaders
CMM	Conservation & Management Measures
2012 CMM	December 2012 Conservation & Management Measures
EA	Environment Act 2003
EEZ	Exclusive Economic Zone [200 nautical miles from baseline]
EIA	Environmental Impact Assessment
FAD	Fish Aggregating Device
FAO	Food & Agriculture Organisation of the United Nations
Fishing effort	An operation to catch fish on a particular day or occasion (whether or not fish are actually caught).
FFA	Forum Fisheries Agency
Implementation Protocol	Implementation Protocol attached to Partnership Agreement
Lehodey Report	Report by Dr Patrick Lehodey, 13 April 2012
MMR	Ministry of Marine Resources
MRA	Marine Resources Act 2005
OFP	Oceanic Fisheries Programme
OFP Report	Report by OFP, December 2012
Partnership Agreement	Sustainable Fisheries Partnership Agreement with the European Union 2016
Plan	Skipjack Tuna Purse Seine Fishery Plan 2013
Regulations	Marine Resources (Purse Seine Fishery) Regulations 2013
SFS Agreement	Straddling Fish Stocks Agreement
SIDS	Small Island Developing States
SPC	Fisheries Aquaculture and Marine Ecosystems Division of the Pacific Community (Science advice to WCPF Commission)
Territorial Sea	12 nautical miles from baseline
UNCLOS	United Nations Convention on the Law of the Sea 1982
Vaka	Tribe / district / local area. There are three vaka in Rarotonga – Te Au O Tonga, Puaikura, Takitumu
WCPF Commission	Western and Central Pacific Fisheries Commission
WCPO	Western and Central Pacific Ocean
WCPO Convention	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean