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Introduction and summary

[1] This case is a sequel of sorts. In November 2022, following judicial review proceedings brought by the Environmental Law Initiative (ELI), Churchman J set aside two decisions of the Minister for Oceans and Fisheries (the Minister) determining the total allowable catch (TAC) for red rock lobster, commonly known in New Zealand as crayfish,¹ in the Northland quota management area (CRA1). The Judge directed the Minister to reconsider the 2022/23 TAC decision in accordance with the findings in the judgment.²

[2] In March 2023 the Minister issued a new TAC decision (the 2023 TAC decision) which sought to address the defects Churchman J had identified.³ The Minister reduced the TAC for CRA1 by around 11 per cent from 193 to 172 tonnes. As part of the same decision, the Minister decreased the total allowable commercial catch (TACC) from 105 tonnes to 89 tonnes.

[3] ELI now challenges the Minister’s new decision, arguing it still fails to confront the urgent crisis which afflicts the marine environment in the eastern part of the fishery.

[4] Like many sequels, this proceeding is more complex than its predecessor, though both cases concern the downstream environmental effects of overfishing. The 2022 judgment criticised the Minister (or, more accurately, the officials advising the Minister) for misstating the devastating effect the loss of crayfish off the east coast has had on the once-abundant kelp forests that grew on the sea floor.⁴

[5] That criticism is not open to ELI in the present proceeding. The Ministry’s 2023 TAC decision paper accurately explained the way the loss of crayfish in eastern Northland has led, indirectly but inevitably, to significant damage to kelp forests in that part of the fishery. To oversimplify for the purposes of this introduction, crayfish

¹ *Jasus edwardsii*, also called koura, the southern rock lobster and spiny rock lobster. A second rock lobster species – packhorse rock lobster (*Sagmariasus verreauxi*), also known as green rock lobster, is managed through the PHC1 fishery. In this judgment, all references to “rock lobster”, “lobster” and “crayfish” are references to *Jasus edwardsii*.

² *Environmental Law Initiative v Minister for Oceans and Fisheries* [2022] NZHC 2969 [2022 judgment].

³ Letter from Hon Stuart Nash regarding changes to sustainability measures for the Northland spiny rock lobster fishery (CRA 1) and attached summary (March 2023) [the 2023 decision letter].

⁴ 2022 judgment, above n 2, at [113] and [115].

eat kina, and kina eat kelp. The loss of a principal predator means kina populations have exploded, leading to the destruction of kelp forests and the creation of “kina barrens”.

[6] In this proceeding, ELI contends the Minister, having recognised the need for urgent action to address the widespread kina barrens in eastern Northland, has nonetheless selected a response which will make no material difference to the problem. Instead of criticising the Minister for minimising or misunderstanding the crisis, as ELI did in 2022, in this proceeding ELI alleges the Minister, while purporting to address the problem, has selected a response which will be entirely ineffectual.

[7] The Minister’s 2023 decision, set out in a letter to stakeholders in March 2023, expressly addressed the need to increase the abundance of crayfish off Northland’s east coast. He declared the TAC reduction was designed to “meaningfully contribute to” control of kina populations. But ELI says the reduction the Minister selected does not go anywhere near far enough. More importantly from an administrative law perspective, ELI says the Minister’s decision will simply not do what it is designed to do. It says the consensus of expert evidence demonstrates an 11 per cent TAC reduction across the CRA1 fishery will do nothing to reverse the loss of kelp forests.

[8] As I explain in more detail below, I agree. While the experts who made affidavits differ in their assessment of what is required to control kina populations and begin to reverse the loss of kelp, all accept that an untargeted 11 per cent reduction in the CRA1 TAC will have no material effect. Overall TAC reduction is less important than measures which ensure crayfish populations increase significantly in areas where kelp has been lost or kelp forests are under particular stress. Other parts of the fishery — notably the areas off Northland’s west coast — are under little or no pressure. A reduction in TAC is a blunt tool, and there was ample information to indicate it would have little effect where it was needed.

[9] As occurred in the 2022 proceeding, and in cases such as *Air Nelson v Minister of Transport*,⁵ the advice the Minister received unwittingly led him into error. In this case the decision paper advised him a modest TAC reduction would help crayfish play

⁵ *Air Nelson v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139.

their part in addressing the kina barrens,⁶ yet the evidence shows the change was not capable of making any material difference. The Minister was not presented with the best available information, and there was no rational link between the reduction he selected and the problem he was trying to address.

[10] Both the 2022 proceeding and this proceeding have highlighted the difficult issue of how the Minister should assess TAC in a fishery where stock numbers are broadly healthy, but where historic fishing in a particular part of the fishery has badly damaged parts of the marine environment. It is apparent the collateral damage to the wider environment will continue unless the forces driving it are reversed.

[11] ELI argued that in those circumstances the Minister's only option was to close the fishery, or at least make a radical reduction to the 2023/24 TAC. That course would have ensured crayfish populations in the vicinity of the kina barrens were left undisturbed. That said, the course ELI proposes would have presented its own set of problems. The overwhelming majority of commercial fishers operate in the west of the fishery; only a handful of crayfish are taken by commercial fishers in the east. Closure of the commercial fishery would have done virtually nothing to help rebuild crayfish stocks in those areas where a resurgence is urgently needed.

[12] Closure (or near-closure) of the fishery would have had a profound effect on the livelihood of commercial fishers operating in the west, while doing nothing to help the damaged areas recover. Commercial operators would undoubtedly have accused the Minister of acting irrationally, effectively putting them out of business because of an environmental issue on the far side of the fishery, which they were powerless to affect.

[13] I acknowledge immediately that the Minister and his advisers were in a difficult position. In 2022 the Court effectively directed the Minister to take steps to address the problem of kina barrens, yet the measures which might have permitted a properly tailored response, such as subdivision of the fishery and well-designed spatial closures, were not yet available. He was, in effect, required to make a targeted decision with

⁶ *Review of sustainability measures for spiny rock lobster (CRA 1) for 2023/24* (Fisheries New Zealand, Decision Paper, March 2023) [decision paper] at [371].

only the bluntest of instruments — a fishery-wide determination of TAC, TACC and recreational allowances — available to him.

[14] Nonetheless, the challenging nature of the decision did not absolve the Minister of responsibility for setting catch levels in a way which accorded with the requirements of the Fisheries Act 1996 (the Act). The evidence shows the TAC and TACC the Minister selected would satisfy neither of the Act's critical purposes.⁷ The new TAC and TACC levels were not capable of making a difference to the kina barrens in the east of the fishery, and unnecessarily curbed utilisation in the west.

[15] Having committed to begin the process of reversing the kina barrens in the eastern part of the fishery, the Minister was obliged to target his response as best he could. The evidence shows that while commercial fishing has virtually disappeared from the east coast, that is still where most recreational fishing occurs. While the small fishery-wide reduction the Minister chose was incapable of making a difference to the problem of kina barrens, the same could not be said of a steep reduction in the recreational catch. Given the limited arsenal then available to him, the Minister was obliged to consider a major reduction in the type of fishing making the greatest ongoing contribution to the problem.

[16] In addition to commenting on the Minister's 2023 TAC decision, this judgment discusses the wider suite of tools available to the Minister to ensure crayfish can still be harvested sustainably from the Northland fishery, while at the same time protecting and preserving crayfish populations in those areas where stock losses have led to the destruction of marine ecosystems which accompanies large-scale loss of kelp. I am confident a combination of measures will be selected to address the problem of kina barrens when the Minister makes his next set of decisions about the fishery.

Relevant provisions

[17] The decision ELI seeks to review was made under s 13 of the Act. The Minister's opening reference point, when setting TAC in each fishery, is the level of

⁷ See [20] below for discussion of the purposes of the Fisheries Act 1996.

the target stock which “can produce the maximum sustainable yield [MSY, or B_{MSY}],⁸ having regard to the interdependence of stocks”.⁹ Section 2 of the Act relevantly provides:

maximum sustainable yield, in relation to any stock, means the greatest yield that can be achieved over time while maintaining the stock’s productive capacity, having regard to the population dynamics of the stock and any environmental factors that influence the stock.

[18] In the CRA1 fishery, the TAC was already at a level which would maintain the *overall* crayfish population at or above the level required to maintain maximum sustainable yield. The relevant parts of s 13 provide:

- (2) The Minister shall set a total allowable catch that—
- (a) maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
 - ...
 - (c) enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks.

[19] In addition to the requirements of s 13, the Minister must set the TAC for each fishery in light of a series of general principles which govern all Fisheries Act decisions.

[20] Section 8(1) provides that the purpose of the Act is “to provide for the utilisation of fisheries resources while ensuring sustainability”. Whether that apparently simple phrase gives rise to a single objective, or to two potentially competing ones, was the subject of extensive discussion in argument. The Supreme Court has recently removed any doubt. In *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc*, the Court observed the Act “adopts a single objective, the elements of which are complementary; utilisation of stock includes its conservation, and the Act pursues sustainable utilisation to meet the

⁸ BMSY is shorthand for biomass, maintained at maximum sustainable yield.

⁹ Fisheries Act 1996, s 13(2)(a).

reasonably foreseeable needs of future generations.”¹⁰ Put another way, “utilisation may not jeopardise sustainability”.¹¹

[21] In addition to maintaining the target species at or above a level that will produce the maximum sustainable yield, s 9 of the Act requires the Minister to consider the wider effects of altering aspects of the marine ecosystem. Section 9 provides:

9 Environmental principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following environmental principles:

- (a) associated or dependent species should be maintained above a level that ensures their long-term viability:
- (b) biological diversity of the aquatic environment should be maintained:
- (c) habitat of particular significance for fisheries management should be protected.

[22] Section 10 provides:

10 Information principles

All persons exercising or performing functions, duties, or powers under this Act, in relation to the utilisation of fisheries resources or ensuring sustainability, shall take into account the following information principles:

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

¹⁰ *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] NZSC 111, [2024] 1 NZLR 511 at [15].

¹¹ At [83].

Factual background

Kelp, kina and crayfish

[23] As with any sequel, it is helpful to begin by setting out the story so far. The 2022 proceeding sought to challenge two Ministerial TAC decisions for CRA1 — those for the 2021/22 and 2022/23 fishing years.¹²

[24] While the 2022 proceeding was concerned with the allowable crayfish catch, there was no dispute overall crayfish numbers in the fishery were at or above a sustainable level.

[25] Rather, the case centred on the downstream effects of changes in the crayfish population on other aspects of the marine ecosystem. Loss of crayfish on the eastern side of the fishery has led to a substantial increase in the population of kina, or sea urchins. Crayfish are a major predator of kina, and the loss of the crayfish population has meant that one of the most important natural controls on the kina population is no longer present in the numbers required to maintain balance in the wider ecosystem.

[26] The significant increase in the kina population has led, in turn, to the destruction of kelp forests; kina are omnivorous, but their preferred food is kelp. Increased kina numbers can lead to the wholesale destruction of kelp forests, and the creation of kina barrens.

[27] Kelp forests play a vital role in the marine environment. Charles Darwin once wrote:¹³

The number of living creatures of all orders whose existence intimately depends on kelp is wonderful. A great volume might be written describing the inhabitants of one of these beds of seaweed.... I can only compare these great aquatic forests...with terrestrial ones in the intertropical regions. Yet, if in any other country a forest was destroyed, I do not believe so many species of animals would perish as would here, from the destruction of kelp.

¹² 2022 judgment, above n 2, at [24].

¹³ Charles Darwin *The Voyage of the Beagle* (Wordsworth Editions, Herts UK, 1959) at 256.

[28] In his 2022 judgment, Churchman J observed that the loss of kelp forests is ecologically damaging for surrounding coastal systems, in fisheries production, and for biodiversity and ocean carbon sequestration.¹⁴

[29] The sequence by which overfishing of crayfish leads to the loss of kelp forests is known as trophic cascade. A trophic cascade is an ecological phenomenon that occurs when changes at one level of a food chain cause a series of effects across other levels. The process typically starts with the addition or removal of predators, which leads to significant changes in population sizes and behaviours of the species on which they prey.

[30] In the eastern part of the CRA1 fishery, overfishing of crayfish has reduced the crayfish population. With fewer crayfish to prey upon them, the population of kina increased. The increased kina population led to more intense grazing on kelp forests and other seaweeds, leading to the destruction of the kelp forests, and the creation of widespread kina barrens.

[31] Justice Churchman held the Minister had received incomplete and misleading advice about the role an increase in crayfish abundance might play in addressing the loss of kelp forests in the CRA1 fishery. Fishing New Zealand, which is part of the Ministry of Primary Industries (the Ministry), advised the Minister that the nature and magnitude of the benefit of an increase in crayfish numbers was uncertain. The Ministry had advised that “trophic interactions [in this context were] complex and not well understood”, and that a small decrease in the TAC would address concerns about crayfish abundance and the aquatic environment. Justice Churchman found that advice — which was based on evidence that was several years out of date — was materially inaccurate.¹⁵

[32] It followed that the Minister’s decisions were unlawful. Justice Churchman held the Minister had acted in breach of s 10(a), which requires decisions to be based on the best available information. In addition, Churchman J held that because of the

¹⁴ 2022 judgment, above n 2, at [69](h).

¹⁵ At [113].

deficiencies in the information the Minister considered, his decisions did not comply with mandatory environmental principles which govern all decisions under the Act.¹⁶

[33] Justice Churchman found the evidential link between the reduction in crayfish populations and the loss of kelp forests off the east coast of Northland was strong. Indeed, he held that one of the failings in the advice the Minister received was that it misleadingly conflated the evidence about kina barrens and trophic cascade in eastern Northland with the more equivocal evidence about those effects in other parts of the country.¹⁷

[34] The first and most obvious step in correcting the error Churchman J identified was for the Minister to re-make his decision in light of the best available information. The central issue in this proceeding is whether the new decision paper, which supported the current decision, met that requirement. ELI submits it did not. The Minister says it did, or at least that it was good enough.

The two halves of the fishery

[35] The distribution of crayfish and the prevalence of kina barrens differs significantly between the eastern and western parts of the fishery. The eastern half, particularly the northeast coast, is characterised by extensive shallow rocky reefs and kelp forests. It is an attractive area for recreational fishers, and has been significantly affected by kina barrens. There has been a substantial decline in commercial fishing effort on the east coast.¹⁸ Since 2020–21, only one or two commercial vessels have operated in the eastern part of fishery, and more than 90 per cent of the commercial catch comes from the western side.

[36] Environmental conditions differ significantly between the two halves of the fishery as well. There are differences in currents, fishing conditions and history. The western side of the fishery does not have the same problems with kina barrens, and conditions in general are more favourable for commercial fishing.

¹⁶ At [118].

¹⁷ At [115].

¹⁸ Decision paper, above n 6 at [95].

[37] By contrast there is no dispute that the recreational crayfish catch is predominantly concentrated on the east coast. There is significantly less recreational fishing pressure in the west.

The new decision paper

[38] The Ministry produced a new decision paper in March 2023. It was, in many respects, a substantial improvement on its predecessor. It emphasised the vital role of kelp forests in the marine environment. For example, the paper advised the Minister:

[153] As outlined in the Aquatic Environment and Biodiversity Annual Review 2021 (AEBAR), kelp provides a wide and diverse range of ecosystem services, including:

- (a) Providing important settlement, nursery, shelter and refuge habitats for a wide range of coastal and inshore shellfish and finfish species, including for spiny rock lobster;
- (b) Providing food for invertebrates, shellfish, finfish, and sea bird species, which in turn supports a variety of important commercial and non-commercial fisheries resources;
- (c) Modifying wave and tidal action and influencing coastal physical processes such as erosion, sedimentation, and turbidity;
- (d) Driving primary production and energy and nutrient recycling that contribute to other near-shore systems including sandy beaches and deepwater ecosystems.

[39] The paper explained the creation of kina barrens in straightforward terms:

[157] It is important to note that kelp is indirectly affected by fishing for spiny rock lobster. Removal of spiny rock lobster reduces predatory control of kina abundance, who subsequently graze on kelp. An over-abundance of kina and the over grazing of kelp systems can result in kina barrens. Kelp forests are an important habitat and food sources for many rock reef dwelling species. Therefore, in making your decision, consideration must be given to the indirect impacts of spiny rock lobster fishing on species who directly rely on kelp (this is also relevant to section 9(a) of the Act).

[40] The new decision paper explained the role of crayfish as predators of kina and observed that a sufficient abundance of crayfish can “have a significant role in mitigating” kina barrens.¹⁹ It also explained the distressed state of the kelp habitat in

¹⁹ At [198].

the eastern part of the CRA1 fishery. It noted that mapping on the eastern side of the fishery “suggests kina barrens are present throughout much of the shallow reef habitats, except those inside marine reserves”, and advised that while kina barrens are not confined to eastern Northland, “there is particular concern regarding their nature and extent in this area”.²⁰

[41] The paper noted that evidence from marine reserves in the neighbouring CRA2 fishery had shown a reduction in fishing pressure on reef predators such as crayfish and snapper can increase predation of kina, reducing kina populations.

[42] The critical question for the Minister was how he should address the kina barrens in the eastern part of the fishery when setting the CRA1 TAC. The decision paper advised that crayfish abundance “is below a level that enables them to meaningfully contribute to the control of kina populations whether alone or in combination with other factors.”²¹

[43] The paper proposed four options for the Minister. The first was to leave the TAC unchanged at 193 tonnes, and to hold TACC at 105 tonnes. It noted that at that level, the population (or biomass) of crayfish would increase over four years, though not by as much as the other three options, all of which proposed cuts to TAC and TACC.

[44] The paper suggested three other options. Option two proposed TAC and TACC cuts of 5.7 per cent. Option three proposed a cut in TAC to 172 tonnes (a decrease of 10.8 per cent) and a reduction in TACC to 89 tonnes (a 15.2 per cent cut). Option four suggested cuts to TAC and TACC of 21.8 and 32.4 per cent respectively.

[45] The Minister selected option three. The cut to the recreational component involved a halving of the daily recreational catch limit from six crayfish per person per

²⁰ At [4]. The paper went on to describe the extent of kina barrens in CRA1. For example, it noted (at [208]) that one recent study in Maitai Bay on the Karikari Peninsula in the Far North that kina barrens covered around 40 per cent of the estimated historic areas of high productivity kelp forests in 2019, while a 2016 study estimated that from Ahipara on the west coast to the entrance to the Hauraki Gulf on the east coast, 17 per cent, or 5,528 hectares, of the available rocky reef ecosystem was covered in kina barrens.

²¹ At [3].

day to three. Notably, the Minister was advised that halving the daily catch limit was likely to reduce the overall recreational take by 15 to 19 per cent.²² A daily limit of two would have reduced the harvest by 29 to 36 per cent, and a limit of one would reduce it by 54 to 61 per cent. The Ministry estimated cutting the daily bag limit from six crayfish to three would reduce the recreational take from 27 tonnes to 22.

[46] The Minister set out his decision in an undated letter to stakeholders in March 2023. The summary attached to the decision letter included the following passages:²³

Spiny rock lobsters are also ecologically important predators in New Zealand's rocky reef ecosystems, feeding on a wide range of prey. In the Northland area, evidence indicates that **spiny rock lobster abundance is below a level that enables them to meaningfully contribute to the control of kina populations** (whether alone or in combination with other factors). This is important because there is evidence that suggests where kina populations are not sufficiently controlled, it can lead to the proliferation of 'kina barrens', which are less biologically diverse environments than the kelp forest habitats they replace.

In making my decision, I have considered the available science and information set out in the Decision Document, including the results of full quantitative stock assessments, rapid updates to the stock assessment, and information regarding the role of spiny rock lobster in the wider ecosystem (particularly within the CRA 1 area).

...

In light of this evidence and my obligation under the Act to provide for utilisation while ensuring sustainability (of both the stock and the aquatic environment), I have decided on a precautionary approach to provide more certainty of increasing the vulnerable biomass and improve the rate at which that increase occurs while still allowing for a level of utilisation.

Under the option I have chosen, vulnerable biomass is expected to have increased to 41 percent above the current biomass by 2026. This increase will benefit users through an improvement in availability and catch rates, and is intended to move the stock to an as yet unknown level, that in combination with other measures, **will allow rock lobster to play their part in controlling kina populations and delivering other ecosystem functions in CRA 1.**

[47] The Minister acknowledged that the new TAC, TACC and recreational allowance were unlikely to be sufficient, by themselves, to address the issue of kina barrens. The summary continued:

²² At [327]. A large majority of recreational fishers catch fewer than six crayfish per day; the Minister was presented with evidence showing that most catch only one or two.

²³ Decision letter, above n 3 (emphasis added).

Therefore, I have directed Fisheries New Zealand to provide me with additional advice by July 2023 on addressing kina barrens within CRA 1, including consideration of further measures such as a maximum legal size for rock lobster, splitting the Quota Management Area, spatial restrictions and targeted culling of kina.

[48] As I discuss in more detail below, the principal ground of ELI's challenge is that the reduction in TAC will make no material difference to the destruction of kelp forests on the eastern side of the fishery. In other words, ELI contends the Ministry was wrong to advise that option three, or any of the options included in the decision paper, was capable of permitting crayfish to play their part in addressing the kina barrens off the east coast of Northland. It argued it was unlawful for the Minister to opt for an ineffectual reduction in TAC in reliance on the possibility that more effective, and more tightly targeted, measures may be available in the future.

[49] Mr Salmon KC, on behalf of ELI, described the Minister's decision as a "continuing affront to the environment". He acknowledged that a radical cut in TAC was not the only option available to the Minister, but submitted it was mandatory for the Minister at least to take advice about the scientifically effective methods available to him at the time he made his decision, and that a zero TAC was one measure which would move the needle.

[50] Notably, in late 2023 the incoming Minister, the Hon Shane Jones, sought advice about the steps he could take to address the problem of kina barrens on the eastern side of the Northland fishery. That advice, in which officials summarised the evidence available in late 2023 and promised ongoing research in 2024, would have gone a long way towards addressing the shortcomings in the advice Minister Nash had received eight months earlier. The paper noted a range of available steps, such as the targeted removal of kina from the most distressed parts of the fishery and the identification of measures to increase crayfish abundance in areas with kina barrens. The latter included the targeted closure of parts of the fishery and splitting the fishery in light of the "different abundance and environmental factors affecting each coast", and the fact "kina barrens are largely unknown on the West Coast".

[51] The Minister indicated his assent to the various proposals, including his agreement the Ministry should commence pre-engagement on possible voluntary

and/or regulatory measures to increase rock lobster abundance in areas with kina barrens.

[52] In late 2024, counsel for the Minister filed a copy of a comprehensive discussion paper entitled “Discussion of proposed measures for the Northland spiny rock lobster fishery”.²⁴ ELI dismissed it as irrelevant and urged me not to read it. While it substantially post-dated Minister Nash’s decision, it broadly supports ELI’s position. The conclusions the paper draws are consistent with those advanced by ELI in this proceeding, and it is impossible to read the evidence the paper assembled and conclude the Minister’s 2023 TAC decision could have made a meaningful difference to the abundance of crayfish in the eastern part of the fishery.

[53] The new paper concluded the problem of kina barrens cannot be managed without significant additional regulatory intervention. One of its key recommendations is subdivision of the fishery, which would allow the very different ecosystems in the eastern and western parts of CRA1 to be managed separately. The paper also sought feedback on an increase to the minimum legal size of crayfish which could be taken in the eastern part of the fishery, and on possible spatial closures. Those measures broadly reflect the scientific consensus which emerged in evidence; they represent the principal steps which will need to be taken if genuine progress is to be made.

[54] It follows that while this judgment canvasses the factors which, based on the evidence before the Court, constitute the “best available information” when the Minister made his 2023 decision, it appears the Ministry is, in any event, in the process of preparing advice that is far more comprehensive than the briefing it presented to Minister Nash.

Consultation with Māori

[55] The second applicant, Ms Dallas Williams, pursued a separate ground of review. Ms Williams brought review proceedings on behalf of two Northland hapū.

²⁴ *Discussion of proposed measures for the Northland spiny rock lobster fishery (CRA 1)* (Fisheries New Zealand, Decision Paper 2024/30, November 2024).

Ngāti Hau and Ngāti Kaharau Hapū ki Hokianga submit the Ministry’s consultation with both hapū before the 2023 TAC decision fell well short both of the requirements of tikanga, and of s 12(1)(b) of the Act. Section 12 relevantly provides:

12 Consultation

(1) Before doing anything under any of sections ... 13(1) [and] 13(4) ... the Minister shall—

- (a) consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Māori, environmental, commercial, and recreational interests; and
- (b) provide for the input and participation of tangata whenua having—
 - (i) a non-commercial interest in the stock concerned; or
 - (ii) an interest in the effects of fishing on the aquatic environment in the area concerned—and have particular regard to kaitiakitanga.

[56] It was common ground that “input and participation” requires greater involvement than simple consultation. But Mr Hikaka, who argued this part of the case on behalf of Ms Williams, submitted that in any event the actual consultation in which the Ministry engaged was cursory and hopelessly inadequate.

[57] Consultation under s 12 was conducted through two Iwi Fisheries Fora (IFFs). The Ministry set up the IFFs to meet its obligations under s 12. In effect, an IFF is a grouping of hapū representatives and Ministry officials who meet for regular hui to discuss the management and kaitiakitanga of local fisheries, and to obtain input from tāngata whenua into forthcoming fisheries decisions which may affect their interests.

[58] In late 2022 and early 2023, there were two IFFs operating in Northland — the Te Hiku o Te Ika forum and the Mid-North forum. The Te Hiku o Te Ika forum represents hapū of the Far North (Muriwhenua) rohe, while the Mid-North forum represented hapū from the rest of Northland. In late 2023, the Mid-North forum was divided in two, meaning there are now three IFFs in Northland.

[59] Ms Williams advanced a number of complaints about the adequacy of the consultation prior to the Minister’s CRA1 decision. Most fundamentally, she sought to challenge the role of IFFs as a whole. Mr Hikaka submitted that the “one size fits all” model fails to take account of the variations in tikanga between individual hapū. That model, which was imposed by the Ministry because it is administratively convenient, may work well for some hapū, but is an affront to tikanga for others. Ms Williams gave evidence that, in the case of her hapū, tikanga required officials to travel to marae to have an in-depth discussion with tāngata whenua who have detailed expertise on the state of the marine environment in their coastal waters.

[60] Mr Hikaka submitted the need for detailed local consultation was all the greater in the case of the CRA1 decision. There are, as already noted, considerable differences, both in crayfish abundance and the health of the kelp forests, across the fishery. Kina barrens are an acutely localised issue. One of the Ministry’s principal grounds for declining to consider closing part of the fishery was an absence of sufficient local information. Mr Hikaka submitted that in each part of the fishery, tāngata whenua retain a rich store of local knowledge. He submitted the Act contemplates localised issues, like kina barrens, being the subject of proper and detailed discussion with those who can help craft a local solution.

[61] Ms Williams’ affidavit recorded that, at least in Northland, the Ministry effectively dismisses the deep understanding Māori have of their waters. As she put it in her affidavit:

[44] At every meeting ... I have consistently sought to represent our views, find solutions, present options and facilitate opportunities to provide insight into the ways that we know our tūpuna mātauranga based approach can help to provide better, more accurate, localised and relational information that ultimately will add immense value to our seas and our economy. It was extremely frustrating. We know what the Fisheries Act says and so we expected to be able to participate and have input but our views were not considered within the scope/paradigm of operation and ultimately they were empathetically [*sic*] ignored or dismissed. Because of this we want to make it clear that all of the available options when making this decision with regard to setting quota for CRA1 were not on the table. And this particular quota is just one example of the same process that is followed for every “sustainability round”.

[62] Mr Hikaka said IFFs are always given a pre-curated set of options. The feedback the Ministry seeks is always confined to the options the Ministry itself presents. Māori are not invited to participate at an earlier stage, where problems are identified and solutions devised. Mr Hikaka noted the Ministry's own policies require considerably more. For example, internal guidance from 2006 provided that:

Input and participation should involve tangata whenua identifying issues and helping develop proposals, rather than just responding to the proposals of [the Ministry] and others.

[63] Mr Hikaka submitted that passage describes the bare minimum of what s 12(1)(b) requires. He acknowledged hapū by hapū consultation would be a more drawn out and resource-intensive exercise than the IFF process in place at present. Mr Hikaka agreed hapū cannot impose unreasonably upon officials and accepted that there will be situations of urgency where a lengthy process will be impractical. That said, and at least in the absence of urgency, he submitted that input and participation consistent with each hapū's tikanga, which in some cases may consist of a visit from officials to local marae, with an open mind and without a pre-determined set of options, is no more than the Act demands.

[64] Ms Williams' second principal complaint is that, in any event, the Mid-North forum hui which discussed the upcoming CRA1 decision barely touched on the issues the Minister was considering. The minutes of the hui do not record any consultation about the CRA1 TAC, let alone the problem of kina barrens and their relevance to the Minister's decision. Rather, participants were briefed informally over lunch. There was no genuine consultation, let alone an opportunity for "input and participation" as required by the Act.

[65] The brevity of the discussion about the CRA1 TAC is not in dispute. Mr Nore Martin, the Ministry's senior customary adviser for the Te Tai Tokerau / Northland area, gave evidence that he and four other Ministry officials attended the 9 December 2022 Mid-North IFF hui. The Parliamentary Under-Secretary to the then-Minister also attended. In his affidavit, Mr Martin observed:

[65] Due to the Under-Secretary visit being the priority of the hui, and due to the length of discussions, the decision was made to go to lunch before Mr Tirikatene left. This meant the topic of the High Court decision and new

CRA1 decision was not formally discussed as other agenda items were prioritised by the forum. It was advised that [Inshore Fisheries Northern Regional Manager] Jacob Hore would continue with an update on April stocks and CRA1 during lunch. There were not any TAC options proposed at that stage, although this is where input from forum on that what they would like to see would have been considered.

[66] Finally, Mr Hikaka and Ms Williams stressed that s 12 places emphasises kaitiakitanga. Mr Hikaka submitted the reversal of kina barrens and the preservation of east coast kelp forests is exactly the kind of problem where localised guardianship and sustainable management, drawing on mātauranga Māori, can offer solutions.

[67] The Crown acknowledged the consultation process, both with Māori and other stakeholders, was constrained due to the timing of Churchman J's decision and the start of the new fishing year on 1 April 2023. The decision paper acknowledged the condensed timeframe had affected the time available for input and participation from tāngata whenua, but recorded the Ministry's understanding that the mid-North forum had "stressed the importance of local area management for northern crayfish stocks", and noted the forum's concern that "the large scale of the CRA1 QMA does not support addressing localised concerns", particularly in light of the wide range of different local environments in the fishery.²⁵

[68] The Crown submitted the division of the Mid-North forum into two smaller fora would allow for more localised engagement in the future, but it submitted the Ministry addressed s 12(1)(b) as well as it could in light of the time constraints.

Evidential consensus

[69] The parties filed a considerable volume of expert evidence about kina barrens and the mechanisms that were available to address them at the time the Minister made his CRA1 decision. ELI, while it filed several expert affidavits of its own, submitted I need not look much further than the affidavit of Dr Jean Win, which was tendered on behalf of the Minister. Dr Win broadly accepted the evidence of ELI's experts. She did not suggest a modest reduction in TAC might meaningfully address the problem of kina barrens, accepted the Ministry is under a duty to act on the best available

²⁵ Decision paper, above n 6, at [117].

information and concluded it did not require much more information to make the necessary decisions.

[70] ELI produced affidavits from three experts in marine biology, Professor Andrew Jeffs and Associate Professor Nicholas Shears of the University of Auckland, and Mr Vincent Kerr, an environmental consultant with a focus on marine ecology monitoring, habitat mapping and marine protected area design and planning.

Professor Jeffs

[71] Professor Jeffs listed numerous scientific papers which discuss the vital role played by spatial closures in the management of kina barrens. That literature was barely mentioned in the decision paper. Among his conclusions, he observed:²⁶

- (c) The advice to the Minister in the Decision Paper does not contain any options that are supported by substantive evidence that if implemented they would avoid, remedy or mitigate the adverse effects of rock lobster fishing on the aquatic environment. As a consequence, I am doubtful the Minister’s decision will have that desired effect.
- (d) In contrast to the options presented to the Minister in the Decision Paper, there is overwhelming scientific evidence, including for northeastern New Zealand, that the closure of areas to fishing, especially the fishing of the natural predators [of] urchins, is effective in restoring kelp habitat. This management option and the extensive evidence in support of this measure, was actively withheld from the Minister.
- (e) Given the scientific evidence, implementing spatial closures to fishing, especially the fishing of the natural predators [of] urchins, would be the most effective management measure for avoiding, remedying, or mitigating the adverse effects of rock lobster fishing on the aquatic environment. Interestingly, this approach is entirely consistent with rāhui commonly implemented under Māori tikanga in the event of resource depletion.

Associate Professor Shears

[72] Associate Professor Shears was more direct. He bluntly said the 11 per cent reduction selected by the Minister represented a continuation of the status quo “and will have no impact on the extent of kina barrens in Northland”.²⁷ He set out what he

²⁶ Affidavit of Andrew Greig Jeffs, 18 April 2024 at [47].

²⁷ Affidavit of Nicholas Tony Shears, 18 April 2024 at [11].

described as “clear ecological reasons why making small reductions in TAC will not influence kina barrens that are not explained in the Decision Paper”.²⁸

[73] Associate Professor Shears gave evidence that spatial closures and protections have been shown to be the only long-term and effective approach to kina barrens. He strongly recommended subdividing the fishery so the areas where barrens are extensive can be managed separately. He recommended full closure of at least half of the northeastern area of the fishery, a large reduction in TAC to account for the areas now closed, and, as an additional measure, an increase in the maximum size limit to protect larger lobster. He also recommended targeted removal of kina to help accelerate the recovery kelp forests.

[74] Associate Professor Shears’ overall conclusion was that the decision paper offered the Minister no credible or effective options to begin the process of reversing the barrens on the eastern side of the fishery. The decision paper accepted that TAC reductions on their own would not be enough to address the problem, but offered modest TAC reductions as the only options for the Minister to consider.

Mr Kerr

[75] Mr Kerr noted his concerns about the Ministry’s stock assessment model. He recorded his opinion that the abundance of crayfish in the eastern part of the fishery may be even lower than the Ministry’s model indicated.

[76] The decision paper stressed the fact commercial operators have largely abandoned the eastern part of the fishery, and that it is now almost exclusively the preserve of recreational fishers. The decision paper also emphasised the prevalence of kina barrens in the east, and noted that crayfish numbers have fallen below a level at which they can play their part in maintaining a healthy marine ecosystem. In light of my overall conclusion, I am satisfied it is not necessary for me to examine the adequacy of the model. The Minister recognised the need to increase the abundance of crayfish in the eastern part of the fishery in order address the proliferation of kina barrens. The issue is whether his decision was capable of doing so.

²⁸ At [14].

[77] On that question, Mr Kerr echoed the conclusions of the other ELI experts about the inadequacy of the options presented to the Minister. He observed:²⁹

[62] Spatial closures are necessary to mitigate or remedy the adverse effects of fishing for crayfish on the stock itself, its habitats and related species. ... Making small changes to our existing quota and talking about incremental progress towards a future unclear sustainable goal, has little value and, as we can currently see, has created a significant east coast kelp forest decline at a regional scale with serious implications for the sustainability of our shallow coast. While I paint a dire picture of our current state, we are fortunate that marine systems have good restoration potential.

Professor Schiel

[78] The fourth non-Ministry expert to file an affidavit was Distinguished Professor David Schiel of the University of Canterbury. He described himself as one of New Zealand's pre-eminent marine scientists, especially in the area of kelp forest ecology, the functioning of near-shore ecosystems, disturbance recovery dynamics of rocky reef systems, fish ecology and the impact of human and natural stressors on coastal ecosystems.

[79] Professor Schiel's evidence was tendered by the second and third respondents, the New Zealand Rock Lobster Industry Council Inc and Seafood New Zealand. The second and third respondents were broadly supportive of the Minister's approach. Professor Schiel took a very different position to the ELI witnesses, contesting many of the assumptions underpinning their affidavits. He gave evidence that the link between the decline in crayfish numbers and the formation of kina barrens is overly simplistic and that there are several other factors at play. He argued the same can be said for the link between a theoretical increase in crayfish biomass and the recovery of kelp forests.

[80] On the other hand, Professor Schiel and the other non-Ministry experts agreed wholeheartedly that the 11 per cent reduction in the CRA1 TAC will do nothing to contribute to the recovery of the east coast's kelp forests. Among his conclusions, he noted he did not "presently consider that the evidence demonstrates that rock lobster have a pervasive effect on sea urchin populations".³⁰ He added that, at very least, the

²⁹ Affidavit of Vincent Carlyle Kerr, 19 April 2023.

³⁰ Affidavit of David Schiel, 21 June 2024 at [52.3].

role of snapper and other predators had to be considered, and his evidence listed a number of other factors which may also contribute to changes in kina populations and the loss of kelp.

[81] Associate Professor Shears tendered evidence in reply to Professor Schiel, noting the latter's own research has been a key part of the evidence supporting the theory that the loss of crayfish has been the principal cause of kina barrens in Northland. As Churchman J found, while the evidence linking the decline in crayfish with the loss of kelp is not as strong in other parts of New Zealand (and other parts of the world), it is very strong in the eastern part of the CRA1 fishery.³¹

Dr Win

[82] Dr Win did not criticise the Ministry's decision paper. Nonetheless, she noted that her team had not been responsible for developing the options presented to the Minister, and that she agreed with much of the analysis in Professor Jeffs' and Associate Professor Shears' affidavits.³² She described the TAC cuts in the decision paper as "precautionary (though not strongly precautionary)", but acknowledged the TAC decision alone was not going to resolve issues with kina barrens "and that further discussions with managers and experts was required to put together a cohesive package of options."³³

[83] Dr Win sought to suggest there were, at the time the paper was prepared, still some shortages of information. She said there was no "scientific information to define the specific ecological targets required to address the issue of kina barrens."³⁴ Nonetheless, she acknowledged the Ministry knew enough to conclude "more region-specific measures are required for the east coast of CRA1",³⁵ and that for a TAC decision to resolve kina barrens on its own, "the target biomass of rock lobsters would need to be closer to historical levels pre-kina barrens".³⁶

³¹ 2022 judgment, above n 2, at [69](i) and [115].

³² Affidavit of Dr Jean Pepper Win, 7 June 2024.

³³ At [72].

³⁴ At [73].

³⁵ At [95].

³⁶ At [96].

[84] Dr Win agreed there will “need to be a substantial increase in rock lobster biomass to address kina barrens, whether through TAC or other measures”,³⁷ and she acknowledged that although the significance of the issue was “appropriately conveyed, the urgency to act was not specifically emphasised in the Decision Paper”.³⁸ She agreed the evidence shows that closing fisheries will “likely result in the reversal of kina barrens over time”,³⁹ that “some form of closure is part of the solution ... and that the 2023/24 TAC Decision alone will not be enough”.⁴⁰ She agreed a regional approach is required, which will involve “splitting CRA1 between east and west coast”.⁴¹

[85] Despite her concerns that there is no information that might allow the Ministry to fix specific ecological targets, Dr Win concluded by agreeing the Ministry does “not require substantially more information to make decisions on how to address the issues now.”⁴²

[86] The tenor of Dr Win’s evidence, read as a whole, is that the decision paper did not adequately convey the scale or urgency of the issue, and that a TAC reduction alone could not address the problem. While the exact target for crayfish abundance may not yet be known, Dr Win confirmed it is urgent that the Minister adopt measures which will result in a substantial increase in biomass on the eastern side of the fishery, and that subdivision of the fishery, which would permit the eastern and western parts of the fishery to be managed separately, is an obvious step. She also regarded spatial closures as essential.

The Minister’s decision

[87] The (former) Minister swore an affidavit outlining his decision-making process. It is immensely helpful, though it highlights the extent to which the advice he received fell short of what he required. The Minister read the decision paper’s summary of Churchman J’s judgment and noted the need to make his decision in light

³⁷ At [100].

³⁸ At [104].

³⁹ At [107].

⁴⁰ At [111].

⁴¹ At [112].

⁴² At [123].

of “the best available information about the effects of rock lobster fishing on the aquatic environment, particularly with regard to the formation of kina barrens in CRA1”.⁴³

[88] The Minister said that while the Ministry’s estimates already put crayfish biomass in CRA1 above BMSY, he wanted “to begin moving it to a level that would, in combination with other measures, allow it to contribute to the kina barren problem without unfairly punishing fishers (who had already modified their behaviour by moving to other areas).”⁴⁴ He said while his decision was “primarily driven by concerns about the impact the low abundance of rock lobster was having on the aquatic environment, it was never intended to be a stand-alone solution to kina barrens”.⁴⁵

The Crown’s position

[89] Mr Anderson, on behalf of the Minister, acknowledged the causative link between fishing for rock lobster and the creation of kina barrens; he did not endorse Professor Schiel’s opinion that the scientific link remains unproven, at least in the eastern half of CRA1. Mr Anderson also acknowledged that the vast majority of Northland’s commercial rock lobster fishing has moved to the west coast.

[90] Mr Anderson said the former Minister retained (and the current Minister retains) an open mind on the question of closures, but that there was no need to look beyond a reduction in TAC at the time of the March 2023 decision. He noted the Ministry has engaged Associate Professor Shears to map the areas where spatial closures are likely to be the most effective, but that that is a process which will take time.

[91] Mr Anderson rejected ELI’s characterisation of the proceeding as an *Air Nelson* case, where inadequate official advice led the Minister to make an unlawful decision.⁴⁶ Rather, he contended ELI is seeking to impose its own view of the way the Minister should have exercised his discretion, namely that without other measures, such as

⁴³ Affidavit of Hon Stuart Alexander Nash, 6 June 2024, at [50].

⁴⁴ At [62].

⁴⁵ At [67].

⁴⁶ *Air Nelson*, above n 5.

targeted closures, the Minister was obliged to select a far more radical reduction in TAC. That analysis does fairly reflect ELI's position. Mr Anderson also noted that a radical reduction in TACC would have verged on irrational, as it would have closed both halves of the fishery, including the west coast where kina barrens are not a significant problem, and where most commercial fishers operate.

[92] Mr Anderson argued officials were not obliged to present the Minister with a wider range of options, and that it was clear from the decision paper that a TAC reduction was only the first step in seeking to reverse the kina barrens in eastern Northland. He argued the Minister was not trying to "solve" the problem with his decision, and that there was nothing objectionable about an interim TAC reduction while the Minister awaited further advice about other options.

[93] Mr Anderson argued ELI is, in substance, attacking the sufficiency and urgency of the Minister's response, in circumstances where it was plain a suite of measures will be required, but where it was not possible to obtain more nuanced and comprehensive advice in the time available. Mr Anderson submitted, notwithstanding the criticism of the experts including Dr Win, that the Minister was presented with a fair and adequate decision paper. He argued the urgency of the situation did not need to be emphasised expressly, as urgency effectively went without saying, but that the information required to make use of other measures, such as spatial closures, was not available in March 2023.

[94] Ms Ranchod addressed Mr Hikaka's submissions about s 12, which requires the Minister to provide for the input and participation of tāngata whenua who have an interest in the effects of fishing on the aquatic environment in the area concerned. She acknowledged the diversity of hapū in Northland, and agreed it is appropriate for the level of engagement with Māori to be dictated by the nature of the decision under consideration. She submitted that while intensely local consultation will plainly be required where decisions will affect only a small part of the fishery, IFFs are the appropriate bodies for engagement when the decision affects the whole region.

[95] Ms Ranchod acknowledged the Mid-North IFF Ms Williams attended barely mentioned the question of kina barrens, but submitted the IFFs are iwi led, and that

this may simply have meant it was not a topic the forum wished to discuss. She suggested the recent split of the Mid-North IFF, at the request of tāngata whenua, underlined the Ministry's responsiveness to Māori concerns. She submitted the requirements of kaitiakitanga can be met by ensuring kaitiaki have an opportunity for input, with appropriate weight and respect accorded to suggestions that emerge from that process.

[96] Most importantly, Ms Ranchod submitted there can be no suggestion the summary of Mid-North IFF's position failed to reflect the position of local hapū, nor is there any inconsistency between the forum's plea for greater local involvement, given the environmental diversity of the fishery, and the suggestions Ms Williams offers on behalf of the hapū she represents.

The Industry's position

[97] Mr Scott, for the second and third respondents, placed particular emphasis on Professor Schiel's evidence, and argued, given the distribution of fishing in CRA1, that a significant reduction in TACC would have been an entirely ineffective response. Commercial fishing is concentrated in the west. A drastic reduction in TACC would cripple the livelihoods of fishing operators in that part of the fishery, while making no difference to crayfish biomass, or kina barrens, in the east. He noted that crayfish biomass is increasing across the fishery; in terms of sustainability of rock lobster, considered in isolation, there were no grounds for any reduction, and there are no wider environmental reasons to curtail fishing in the west.

[98] While Professor Schiel was more cautious than the other experts about the link between crayfish numbers and the recovery of kelp forests, Mr Scott acknowledged the Minister was attempting to address the problem of kina barrens with his TAC decision. He argued it was unobjectionable for the Minister to decide on a small reduction, while seeking further information about tailored solutions that would inform the next TAC decision in two years' time.

[99] Mr Scott submitted the case turns on a simple factual question, namely whether sufficient information was available in March 2023 to allow the Minister to consider other options alongside his TAC decision. Mr Scott submitted the Ministry had neither

the time nor the information that would have allowed it to advise the Minister on options such as subdivision and spatial closures. As a result, the Minister was obliged to consider TAC (and TACC) in isolation.

[100] Mr Scott acknowledged there was no rational link between the reduction in TACC the Minister chose and the problem he was trying to address. Given there are only a few tonnes of commercial fishing effort in the eastern part of the fishery, Mr Scott agreed the 16 tonne reduction in TACC would do virtually nothing to protect the marine environment while harming commercial operators in the west. He submitted that the most important thing the Minister did was to reduce the bag limit for recreational fishers from six crayfish to three although, as noted above, that cut was likely to result in only a modest reduction in the recreational take.

Discussion

[101] The Minister's starting point, in light of Churchman J's decision, was that he could not ignore the overwhelming evidence showing the depletion of crayfish biomass off the east coast of Northland has led to the widespread destruction of kelp forests in that part of the fishery. As the Supreme Court recently confirmed, utilisation may not jeopardise sustainability.⁴⁷ Put another way, if fishing cannot occur in an environmentally sustainable manner, it cannot occur at all.

[102] Section 9 of the Act required the Minister, among other things, to exercise his power in a way which ensured biological diversity of the aquatic environment would be maintained, and habitats of particular significance for fisheries management would be protected. Justice Churchman held the Minister's 2021 decision did not comply with the mandatory environmental principles enshrined in s 9.⁴⁸

[103] In effect, the decision paper advised the Minister that, following Churchman J's decision, he was obliged to do *something* about the problem of kina barrens, and the Minister couched his TAC decision as a first step towards addressing the problem. He was advised, and believed, that the reductions he selected would "meaningfully

⁴⁷ *Seafood New Zealand Ltd*, above n 10 at [83].

⁴⁸ 2022 judgment, above n 2 at [118].

contribute” to the control of kina populations and would begin the process of restoring the distressed kelp forests on the eastern side of the fishery. The problem, which in the end is fatal to the validity of the Minister’s decision, is that the evidence shows none of the options presented to the Minister was capable of achieving that outcome.

[104] Put another way, the Minister was advised the option he selected was likely to allow crayfish to “play their part in controlling kina populations and delivering other ecosystem functions in CRA 1”. All the experts, from Associate Professor Shears to Professor Schiel, agree it will not.

[105] I asked Mr Smith, who argued this part of the case on behalf of the Minister, to direct me to evidence indicating that any of the options presented to the Minister would make a material difference to the east coast’s kina barrens. He acknowledged there is none.

[106] That point, without more, is sufficient to dispose of the judicial review. To constitute a rational and legally defensible decision, it was, at a minimum, essential there was a tenable connection between the Minister’s decision and the outcome he was seeking to achieve. Justice Churchman’s 2022 decision turned on the fact the Minister was misled about the problem of kina barrens. In this case the Minister was presented with four options, all of them ineffective.

[107] The Minister was advised (and publicly stated) that the option he had selected would make a meaningful contribution to control of the kina populations preying on the kelp forests, when it would not. He was led into error by his officials, who did not base their advice on the best available information.

[108] In addition, I agree with Mr Scott that the evidence shows the reduction in TACC was unnecessary. Commercial fishing is not, at present, contributing materially to the kina barrens in the eastern part of the fishery. The 16 tonne reduction in TACC will be felt almost entirely in the west, well away from the affected areas.

[109] It is true the Minister acknowledged that TAC reductions alone would not be sufficient to solve the problem, and that additional steps would be required.

Throughout the argument, counsel for the Minister urged me, in effect, to look ahead to the next TAC decision, at which they suggested a more integrated and targeted series of steps are likely.

[110] I accept that additional steps, such as subdivision of the fishery and spatial closure would have taken too long to formulate to consider as part of the 2023 decision. Subdividing a fishery, while it sounds straightforward, requires a series of time-consuming steps. In the absence of a request from at least 75 per cent of quota holders, the Minister can recommend an order in council altering the boundary of a quota management area only after approving a plan which includes both the new boundaries and the manner in which quota will be apportioned.⁴⁹ The order in council must be made no fewer than 90 days before it comes into force.⁵⁰ There was nowhere near enough time to subdivide the fishery between Churchman J's 2022 judgment and the Minister's decision in March 2023.

[111] The same comment applies with respect to spatial closures. The Ministry has been researching that question in depth over the last two years, but the contours of the areas which require protection were unknown when the Minister made his 2023 decision.

[112] That did not leave the Minister without options. His starting point should have been the type of fishing in CRA1 that was causing the greatest ongoing damage to kelp forests. The decision paper starkly illustrates the imbalance between recreational fishing effort on the east and west coasts. While there is little commercial activity in the eastern part of CRA1, the most up to date information available shows more than 94 per cent of recreational fishing takes place off the east coast, which is also the area most starkly affected by kina barrens.⁵¹

[113] The close correlation between the areas affected by kina barrens and the areas of greatest recreational fishing activity meant the Minister was obliged consider the

⁴⁹ Fisheries Act, s 25B.

⁵⁰ Section 25(5)(b).

⁵¹ Decision paper, above n 6, at [95]. That information is now several years old, dating from the 2017-18 fishing year, but that was the information presented to the Minister, and there is no evidence which suggests recreational fishing patterns have altered materially in the years since.

recreational and commercial catches separately. In particular, he was required to consider the effect reductions in each type of catch would have on the problem he was trying to address. Instead, the Minister chose to reduce the commercial and recreational catches by roughly the same amount — between 15 and 20 per cent in each case. The Minister gave no obvious consideration to a larger cut to the recreational allowance, and did not closely examine the respective effects of the small reductions he selected.

[114] The Minister intended to exercise his s 13 power in a way which would allow catch levels to “play their part” in curbing kina barrens. The option he chose fell well short of doing so. On the other hand, the evidence shows a short-term closure of the recreational fishery (or a marked reduction, for example by reducing the daily bag limit to one) may well have done so. While recreational fishers would not have welcomed the move, there is no dispute the problem of kina barrens needed to be addressed urgently, and it is likely the need for a blanket reduction would only have been temporary, while better targeted measures were developed.

Input and participation of tāngata whenua

[115] In light of my conclusion that the Minister’s decision was unlawful, it is not necessary for me to express a final view on the adequacy of the IFF consultation the Ministry offered. That said, the actual discussion about the forthcoming TAC and TACC decisions at the Mid-North forum, which all participants acknowledge consisted of little more than an informal briefing over lunch, fell well short of the requirement for “input and participation” under s 12(1)(b).

[116] In addition, the fact the Ministry did not canvass one obvious mechanism for targeting the kina barrens in the east — a steep reduction in recreational catch — highlights the risks of presenting tāngata whenua with a series of pre-curated options devised within the Ministry. If there had been time for longer discussions with local hapū, familiar with their own coastal environments, they may well have drawn attention to the type of fishing causing the greatest damage in their rohe.

[117] Without indicating a final conclusion on the point, I broadly agree with Mr Hikaka that s 12(1)(b) will often require something more than the IFF model,

especially if the Ministry is advised that for some hapū tikanga dictates a different approach. The Minister's s 12(1)(b) duty extends further than the usual administrative law requirements of consultation with affected parties. There is a clear distinction between the "consultation" with interested persons and organisations required by s 12(1)(a) and the "input and participation" of tāngata whenua required by s 12(1)(b). Input and participation implies active collaboration.

[118] I agree with Mr Hikaka that hapū cannot insist on a process which is unduly burdensome for the Ministry, and lengthy kōrero with individual hapū may be impossible if a decision needs to be taken urgently. In some cases, convening an IFF hui will be the best the Ministry can do. That said, there will be many instances where openminded discussion with local Māori will greatly improve the quality of the information available to the Minister and may offer solutions the Ministry has not considered. This case may well have been one of them.

Conclusion

[119] The Minister's advisers offered him four options, none of them based on the best available information, and none of them capable of achieving the objective he had set for himself. The option he chose damaged the interests of commercial operators without delivering any environmental benefit.

[120] It follows the Minister's decision was an unlawful exercise of his s 13 power. That conclusion would usually be sufficient to require the decision to be quashed, but Mr Salmon urged me not to do so, noting that would cause TAC and TACC to revert to their 2021/22 levels.

[121] This case is a sequel. It is important it does not become the second part of a trilogy. A new decision about catch levels for CRA1 will be made shortly. The Ministry has assured me it has been working tirelessly to gather information which will allow the Minister to make this year's TAC decision with access to superior information and a range of complementary options.

[122] Subdivision of the CRA1 into two or more new fisheries appears an obvious step which is fully supported by the experts. In addition, the Ministry has been

working diligently to map the kina barrens, making it viable for the Minister to consider closing particular areas within the fishery entirely. Other steps, such as the targeted removal of kina, are also under consideration. In 2023 the former Minister correctly recorded that a suite of measures will be required to address the problem of kina barrens, and it appears there is every reason to be confident the Minister will adopt a more effective and nuanced approach this year.

Costs

[123] ELI has been successful and is entitled to costs. I will be happy to receive memoranda if the parties cannot agree, but my preliminary view is that the Minister should pay ELI's costs on a 3C basis. The proceeding, while compressed into a two-day hearing, was technical and complex, and I have little doubt each of the relevant steps required a comparatively large amount of time to complete.⁵²

[124] My current inclination is that no award either in favour of or against the second and third respondents is required; while they broadly supported the Minister, I have concluded his decision unfairly affected the industry too.

[125] If the parties require a ruling as to costs, I direct ELI, as the successful party, is to file a memorandum of no more than ten pages within ten working days of the release of this judgment. The respondents are to file memoranda in response, also of no longer than ten pages, within a further ten working days.

Result

[126] ELI's application for judicial review is successful. The third of the various declarations ELI suggested most closely reflects my overall decision, though I have modified its wording slightly.

[127] I declare the Minister's decision was unlawful because:

⁵² High Court Rules 2016, r 14.5(2)(c).

- (a) There was no evidence the reductions he selected would allow rock lobster to play their part in controlling kina populations or delivering ecosystem functions;
- (b) The Minister did not take account of the best available information;
- (c) The Minister did not turn his mind to the possibility of a greater reduction in the recreational catch, which would have addressed the problem of kina barrens in the northeastern part of the fishery more closely than any of the options be considered.

[128] At Mr Salmon's request I make no other order.

[129] Costs are reserved.

Boldt J

Solicitors:
Mills Lane Chambers, Auckland for Applicant
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Hawkestone Chambers, Wellington for Second and Third Respondents