SUPREME COURT OF VICTORIA

Port Phillip Scallops Pty Ltd v Minister for Agriculture and Another

[2018] VSC 589

Cavanough J

31 August, 1, 4, 5 September 2017, 5 October 2018

Administrative Law — Administrative process — Power to make regulations setting "catch limit" as condition on licence giving access to fishery — Initial quota order in place — Fisheries Act 1995 (Vic), s 64, 64A.

Administrative Law — Wednesbury unreasonableness — Declaration made as to "catch limit" by initial quota order attached to fishery licence — Decision of Minister to revoke initial quota order as condition of licence — Whether decision made for impermissible purpose — Whether irrelevant considerations taken into account — Whether failure to take into account mandatory relevant considerations — Fisheries Act 1995 (Vic), s 64, 64A.

The first defendant (the Minister) was responsible for the administration of the *Fisheries Act 1995* (Vic) (the Act), which governed all relevant fishing in Victoria.

From the 1960s to the mid-1990s there was a commercial dredge fishery for scallops in Port Phillip Bay under the legislation then in force. In about 1997, commercial fishing for scallops in Port Phillip Bay was banned and the dredge fishery came to an end.

In 2013, steps were taken to allow for the commencement of a new commercial fishery for scallops in Port Phillip Bay, but restricted to the taking of scallops by hand by human divers.

A Scallop Dive (Port Phillip Bay) Fishery (the Fishery) was established by regulations made under the Act, with a single licensee. The Fishery was to be managed by the allocation of quota under ss 64 and 64A of the Act.

The plaintiff, the holder of the single licence for the Fishery. A quota was allocated to that licence.

Sections 64 and 64A of the Act provided for the making, amendment and revocation by the Minister (or a delegate) of statutory instruments known as initial quota orders (IQOs) and further quota orders (FQOs) respectively.

In early 2017, the Minister purported to revoke the relevant IQO and regulations were purportedly made under the Act imposing, on every licence in the class of licence which the plaintiff held, a condition that no more than 60 tonnes of (unshucked) scallop might be taken each year under the licence.

The plaintiff wished the Fishery to remain or be reinstated as a quota-managed fishery. In particular, the plaintiff claimed inter alia that, as a matter of

construction of the Act and the relevant statutory instruments, there was no power to revoke the relevant IQO in the circumstances which obtained at the relevant time.

Sections 64 and 64A of the Act provided as follows:

> 64. Initial quota order
>
> (1) The Minister may, by order published in the Government Gazette—
>
> (a) declare that the whole, or a specified zone or zones, of a fishery is to be managed by the allocation of quotas;
>
> (b) determine the method for setting the number of individual quota units for the quota fishery;
>
> (c) determine the method for allocating individual quotas to each access licence issued in respect of the quota fishery;
>
> (d) declare that individual quota units in the quota fishery may be transferred—
>
> (i) permanently; or
>
> (ii) for a quota period only;
>
> (e) set the minimum and maximum number of individual quota units that may be acquired or held by each licence holder;
>
> (f) determine the circumstances, if any, in which the individual quotas can be exceeded or carried over (other than by transfer).
>
> (2) The Minister may revoke or amend an order at any time by order published in the Government Gazette.
>
> (3) However, if the Minister makes a declaration under subsection (1)(d)(i), the Minister may only amend that declaration or anything under subsection (1)(a), (b) or (c) if the amendment is required—
>
> (a) to give effect to the management plan for the quota fishery declared under section 28, or to any change to that plan; or
>
> (b) to correct—
>
> (i) a clerical mistake; or
>
> (ii) an error arising from an accidental slip or omission; or
>
> (iii) a miscalculation of figures.
>
> (4) If the Minister makes a declaration under subsection (1)(d)(i), the holders of access licences may also transfer individual quota units for a quota period only.
>
> 64A. Further quota order
>
> (1) The Minister may, by further order published in the Government Gazette—
>
> (a) set the total allowable catch (by number, volume, weight or value) for a specified period for a quota fishery;
>
> (b) determine the quantity of fish (by number, volume, weight or value) comprising an individual quota unit in a quota fishery in a specified period.
>
> (2) The Minister may revoke or amend an order at any time by an order published in the Government Gazette.
>
> (3) Without intending to limit the generality of subsection (2), the Minister may reduce the total allowable catch, or reduce the

quantity of fish comprising an individual quota unit before the end of the period to which the total allowable catch or unit applies.

Held: (1) The private statutory rights conferred by the subject licence may be described as rights to take a limited public natural resource in limited quantities from identified areas.

Alcock v Commonwealth (2013) 210 FCR 454, applied.

(2) Statutory rights to fish are inherently defeasible.

Harper v Minister for Sea Fisheries (1989) 168 CLR 314, applied.

(3) Section 64(2) of the Act confers two distinct powers, to revoke and to amend.

(4) There is power under the Act to impose, by regulations, on an access licence for a fishery that is quota-managed, a condition limiting the quantity of fish that may be taken by the holder of the licence during any particular period.

(5) The power in s 64(2) of the Act is not a purposive power.

(6) The plaintiff must establish, firstly, that the allegedly vitiating "purpose" upon which it relies was in fact the purpose (or the true or dominant purpose, among a number of purposes), and, secondly, that that allegedly vitiating purpose is forbidden.

(7) Improper purpose must be assessed subjectively.

(8) The relevant power, being conferred on a Minister, is a power that the Minister is entitled to exercise in accordance with government policy (including a change from previous policy).

Minister for Immigration and Multicultural Affairs v Jia Legeng (2001) 205 CLR 507; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231, applied.

(9) The Minister was entitled to make the decision he did.

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564.

Alcoa of Australia Ltd v Edwards [2016] VSC 630.

Alcock v Commonwealth (2013) 210 FCR 454.

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1.

AS v Minister for Immigration and Border Protection (2016) 312 FLR 67.

Attorney-General (NT) v Olney (unreported, Federal Court of Australia, Commonwealth, NG1439 of 1988, 28 June 1989).

Australian Retailers Association v Reserve Bank of Australia (2005) 148 FCR 446.

Balog v Independent Commission Against Corruption (1990) 169 CLR 625.

East Melbourne Group Inc v Minister for Planning (2008) 23 VR 605; 166 LGERA 1.

Gibb v Federal Commissioner of Taxation (1966) 118 CLR 628.

Grass v Minister for Immigration and Border Protection (2015) 231 FCR 128.

Harbour Radio Pty Ltd v Australian Communications and Media Authority (2015) 231 FCR 329.

Harburg Investments Pty Ltd v Mackenroth [2005] 2 Qd R 433.

Harper v Minister for Sea Fisheries (1989) 168 CLR 314.

Hot Holdings Pty Ltd v Creasy (2002) 210 CLR 438.

Humphries v Allianz Australia Workers Compensation (Vic) Ltd [2016] VSC 761.

ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140; 170 LGERA 373.

Immigration and Border Protection, Minister for v SZVFW (2018) 92 ALJR 713.

Immigration and Ethnic Affairs, Minister for v Taveli (1990) 23 FCR 162.

Immigration and Multicultural Affairs, Minister for v Jia (2001) 205 CLR 507.

Immigration and Multicultural and Indigenous Affairs, Minister for v Nystrom (2006) 228 CLR 566.

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586.

Johnson v Appeal Costs Board [2014] VSC 313.

Kelly v The Queen (2004) 218 CLR 216.

Lee v New South Wales Crime Commission (2013) 251 CLR 196.

Legal Services Commission (NSW) v Stephens [1981] 2 NSWLR 697.

Love v Victoria [2009] VSC 215.

Lyster v Camberwell City Council (1989) 69 LGRA 250.

Macedon Ranges Shire Council v Romsey Hotel Pty Ltd (2008) 19 VR 422.

Matthews v SPI Electricity Pty Ltd (No 9) [2012] VSC 340.

Mirboo Ridge v Minister for Resources (2018) 12 ARLR 180.

New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544.

Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144.

Plaintiff S297/2013 v Minister for Immigration and Border Protection (2015) 255 CLR 231.

Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic) [2015] VSC 179.

Primary Industries and Energy, Minister for v Austral Fisheries Pty Ltd (1993) 40 FCR 381.

R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170.

R v Wallis; Ex parte Employers Association of Wool Selling Brokers (1949) 78 CLR 529.

River Fishery Association (SA) Inc v South Australia (2003) 85 SASR 373.

Salvation Army Southern Territory v Jarvis [2016] VSC 34.

Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2) (2014) 225 FCR 97; 200 LGERA 297.

Sullivan v Department of Transport (1978) 20 ALR 323.

SZTXE v Minister for Immigration and Border Protection (2015) 232 FCR 433.

Taylor v Owners – Strata Plan No 11564 (2014) 253 CLR 531.

Western Bank Ltd v Schindler [1977] Ch 1.

Application

These proceedings concerned whether there was power to revoke the relevant initial quota order from a single licence for a Scallop Dive Fishery in the applicable circumstances under the *Fisheries Act 1995* (Vic). The facts of the case are set out in the judgment.

KL Walker QC with *MP Costello*, for the applicant.

CJ Horan QC with *L De Ferrari*, for the defendants.

Cur adv vult

5 October 2018

Cavanough J.

Overview

1 The plaintiff is a company that was set up in or about 2014 by a Mr Bruce Collis to fish for scallops commercially in Port Phillip Bay. The first defendant is the Minister for Agriculture for the State of Victoria. The second defendant is the State of Victoria itself. The Minister is responsible for the administration of the *Fisheries Act 1995* (Vic) (the Act), which governs all relevant fishing in Victoria.

2 By an amended originating motion for judicial review, the plaintiff seeks relief in relation to three things that occurred in March 2017 which affected its scallop fishing operations in Port Phillip Bay.

3 Most of the relevant facts are not in dispute.

4 From the 1960s to the mid-1990s there was a commercial dredge fishery for scallops in Port Phillip Bay under the legislation then in force. Concern emerged that the scallop dredge fishery was doing significant damage to the ecology of the Bay, to other commercial fishing and to recreational fishing opportunities. In about 1997, by legislative and other governmental action, commercial fishing for scallops in Port Phillip Bay was, in effect, banned and the dredge fishery came to an end.

5 In 2013, under the then Liberal government, steps were taken to allow for the commencement of a new commercial fishery for scallops in Port Phillip Bay, but restricted to the taking of scallops by hand by human divers. It was determined that there would be a Scallop Dive (Port Phillip Bay) Fishery ("the Fishery"), established by regulations made under the Act, with a single licensee, and that the Fishery would be managed by the allocation of quota under ss 64 and 64A of the Act. Those sections provide for the making, amendment and revocation, by the Minister (or a delegate of the Minister), of statutory instruments known as initial quota orders ("IQOs") and further quota orders ("FQOs") respectively. In due course the plaintiff became the holder of the single licence for the Fishery, and quota was allocated to that licence. Accordingly, the plaintiff commenced and continued fishing for scallop in Port Philip Bay, although it encountered a range of vicissitudes along the way.[1]

6 In early 2017, under the present Labor Government, measures were taken to render the Fishery no longer a quota-managed fishery. The Minister purported to revoke the IQO; and regulations were purportedly made under the Act

1 For an account of some of the relevant events up until May 2015, see *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179 (Rush J).

imposing, on every licence in the class of licence which the plaintiff held, a condition that no more than 60 tonnes of (unshucked) scallop may be taken each year under the licence.

7 The plaintiff wishes to be legally free to take more than 60 tonnes of scallop per year. It desires that the Fishery remain, or be reinstated as, a quota-managed fishery. It considers, apparently, that under quota management of the kind which was in place until at least 1 April 2017, it would be likely to be permitted to take considerably greater quantities of scallop than 60 tonnes, at least in most years.

8 In very short summary, the plaintiff says that, as a matter of construction of the Act and the relevant statutory instruments, there was no power to revoke the IQO in the circumstances which obtained at the relevant time.

9 Further or alternatively, the plaintiff says that the purported revocation of the IQO was an invalid exercise of power on various other administrative law grounds.

10 Next, the plaintiff says that if, in law, the IQO remained in force, then there was no statutory power to make the regulations imposing the 60 tonne cap. Again, that claim turns on the proper construction of the relevant legislation.

11 Further or alternatively, the plaintiff claims that the regulations imposing the cap, themselves, were and are invalid on various other administrative law grounds.

12 Finally, the plaintiff challenges a certain FQO for the Fishery that was made by a delegate of the Minister pursuant to an order in the nature of mandamus issued by this Court (constituted by me) on 17 March 2017. That FQO set a quota of 60 tonnes.

13 For the reasons set out below, I consider that the plaintiff's various challenges must fail and that the proceeding should be dismissed.

The evidence

14 All of the evidence in this case is documentary. Almost all of it is in the form of affidavits and exhibits to those affidavits. There was no request by either side that any of the deponents to the affidavits be available for cross-examination. Nearly all of the evidentiary material is contained in the court book.

15 In addition to the material in the court book, I received without objection an affidavit of the sole director of the plaintiff, Mr Collis, dated 8 March 2017 which had been filed in the proceeding in this Court in which I made the order against the Minister in the nature of mandamus mentioned above. Together with the affidavit, I received as part of the same tender certain email correspondence which indicated that the affidavit had been served on the legal representatives of the Minister on 9 March 2017 in the course of the then current mandamus proceeding. That affidavit was relied upon by the plaintiff to support a claim, to which I will come in due course, that the economic or commercial information in Mr Collis' affidavit had not been duly dealt with by the defendants in relation to the actions now complained of in this proceeding.

16 Subject to two matters about to be mentioned, the parties agreed that the Court was to treat as evidence in this case all of the affidavits (except certain specified paragraphs of certain affidavits[2]) and all of the exhibits and every other document contained in the court book, except pleadings and submissions.

2 The exceptions are para 25 of the affidavit of Mr Hamley of 15 May 2017 and paras 7 and 8 of Mr Hamley's affidavit of 18 July 2017.

17 The first of the two qualifications to the parties' agreement about the material in the court book was as follows. On the first day of the hearing the defendants objected to the reliance by the plaintiff on certain public statements made by the Minister after the events complained of. The statements were deposed to by a representative of the plaintiff. There was no dispute about authenticity. In my view those statements were of relevance to the plaintiff's claims as to what the actual reasons of the Minister were for the steps which she took and were admissible accordingly.[3] I so ruled.

18 The second matter in issue arose from an objection by the defendants to the affidavit of Dr David Gwyther of 14 July 2017. The defendants objected to the whole of Dr Gwyther's affidavit and to some, but not all, of the exhibits to that affidavit. The exhibits to which no objection was taken (Exhibits DG1, DG2 and parts of Exhibit DG3) were already otherwise in evidence before the Court. During the hearing, with the agreement of the parties, I decided to treat Dr Gwyther's affidavit as provisionally received and to reserve my ultimate ruling on the objections until final judgment. I now turn to that ruling.

19 Dr Gwyther is an acknowledged scientific expert on fisheries, and scallop fisheries in particular. He deposes to factual matters relating to the history of scallop fishing, especially in Port Phillip Bay, and he expresses certain opinions, mainly to the effect that fishing for scallops in Port Phillip Bay in the manner and to the extent proposed by the plaintiff would be unlikely to affect the sustainability of the resource.[4] He also expresses criticism, from a fisheries management point of view, of the measures taken by the defendants in 2017, and disputes some of the justifications advanced by the defendants for those measures. There is no challenge to the nature or the level of his expertise in these respects.

20 However, the defendants contend, first, that Dr Gwyther is not an *independent* expert, because his interests, including his pecuniary interests, are aligned with the interests of the plaintiff. It is common ground that the plaintiff paid Dr Gwyther's company for certain survey reports that were done in 2015 and 2016 in relation to applications by the plaintiff for increased quota that were on foot in those years. It may be accepted that Dr Gwyther's company has, or may have, an interest in retaining such work for the future, if the Fishery were to remain quota-managed. Further, the defendants point to a submission that was put in by Dr Gwyther, personally, to a certain committee that was considering issues relating to the Fishery in 2015, which submissions were supportive of the claims then being made by the plaintiff.

21 The defendants also point out that Dr Gwyther's affidavit does not contain any indication that the deponent had complied with, or was even aware of, O 44 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic), which includes a code of conduct for expert witnesses. On the other hand, that deficiency was wholly or substantially rectified by statements subsequently made by Dr Gwyther, as reported in the affidavit of the plaintiff's solicitor, David Fitzpatrick, affirmed on 30 August 2017. Mr Fitzpatrick's affidavit and its exhibits, though not in the court book, were received in evidence without

3 Transcript of proceedings, *Port Phillip Scallops Pty Ltd v Minister for Agriculture* (Supreme Court of Victoria, S CI 2017 01807, Cavanough J, 31 August 2017, 1, 4, 5 September 2017) (Transcript of proceedings), 9. See, further, my judgment in *Love v Victoria* [2009] VSC 215 at [46].

4 Paragraph [46] (CB 765).

objection. The defendants now seem to acknowledge that the deficiencies relating to O 44 have in substance been rectified or nearly so,[5] and that, in any event, Dr Gwyther's evidence is not rendered inadmissible merely because he may not be independent, or fully independent, of the plaintiff.[6] As the defendants now virtually invite me to do,[7] I dispense with compliance with the requirements of O 44 in relation to Dr Gwyther's affidavit, insofar as it may be still necessary to grant such dispensation.

22 The defendants further contend that the evidence of Dr Gwyther is not relevant, either as to opinion or as to fact.

23 The defendants submit that it is not a fact in issue in this proceeding (ie it is not a matter which this Court, in its supervisory role, has jurisdiction to decide) what is the correct, or even the preferable, management arrangement for the Fishery. Further, the defendants submit that the evidence in Dr Gwyther's affidavit, whether opinion or not, was not before the Minister when she made her decision (on 17 March 2017) to revoke the IQO. The defendants acknowledge that some of the factual material (for example, the documentary exhibits to the affidavit to which no objection is taken, being documents relating to surveys of scallop abundance in Port Phillip Bay) were before the Department when it prepared relevant briefs to the Minister. However, the defendants submit, that does not make Dr Gwyther's affidavit or the opinions expressed in it relevant to assessment of the legality of the decision made by the Minister.

24 In addition, the defendants submit that, ordinarily, material not before the decision-maker at the time of the making of an administrative decision is not admissible in proceedings for judicial review of the decision.[8]

25 The defendants submit that the evidence would not be relevant to the review ground of failing to take into account mandatory relevant considerations, because the determination of mandatory relevant considerations is to be determined as a matter of construction of the statute.[9] They submit that evidence directed to what matters should have been considered and/or how the matters that should have been considered ought to have been evaluated is plainly irrelevant.

---

5 Defendant's written submissions dated 4 September 2017 on the Gwyther affidavit, [4].

6 Defendant's written submissions dated 4 September 2017 on the Gwyther affidavit, [4], citing *Matthews v SPI Electricity Pty Ltd (No 9)* [2012] VSC 340 at [26], [31], [47] (J Forrest J).

7 Defendant's written submissions dated 4 September 2017 on the Gwyther affidavit, [4], citing *Matthews v SPI Electricity Pty Ltd (No 9)* [2012] VSC 340.

8 Citing *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [454] (Weinberg J). On the other hand, the defendants themselves adduced in evidence (as Exhibit D1 – not in the court book) an affidavit of their solicitor, Priscilla Wong, affirmed 4 September 2017 exhibiting press releases which were not themselves said to have been before any relevant decision-maker but which were said to show that, both before and after the 2014 election, it was the policy of the Labor Party and the Labor Government to make Port Phillip Bay a prime destination for recreational fishers. Apparently, this evidence was adduced (see transcript of proceedings, 337-338, 343) to counteract the plaintiff's earlier contention (see para 2 of the plaintiff's written submissions in reply dated 28 August 2017) to the effect that there was no evidence of any governmental policy in relation to the Fishery. The plaintiff did not object to receipt of the affidavit of Ms Wong and the exhibits. However, it foreshadowed (transcript of proceedings, 344) and later made (transcript of proceedings, 595-600) submissions as to the relevance or significance of the material.

9 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

26 The defendants accept that evidence that was not before the decision-maker might be relevant when the ground of review is legal unreasonableness, but submit that this is exceptional and only arises in cases where the decision-maker itself is required to decide the matter (or an aspect of it) as an expert. The defendants cite in this respect *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd*[10] and *Australian Retailers Association v Reserve Bank of Australia*.[11] In addition, the defendants say that in each of those two cases the evidence that was admitted was that of a truly independent expert.

27 Further, the defendants say that the Minister was considering whether to continue to have the Fishery quota-managed, or to regulate it in some other manner, and was doing so by reference to a broad range of considerations identified in the materials before the Court. They submit that the Minister was not making a decision about whether a particular management approach for the Fishery was more aligned with the biology of scallops than another; and that there was nothing which obliged her to make her decision in such a way. Accordingly, they submit, the evidence of Dr Gwyther is not relevant, and hence not admissible to prove what should have been taken into account by the Minister, nor what decision she ought to have made.

28 In my view, the whole of the affidavit of Dr Gwyther is admissible. It is common ground that where legal unreasonableness (amounting to claimed jurisdictional error) is alleged as a ground of review, evidence that was not before the decision-maker may be admitted. I accept the plaintiff's submission[12] that whether such evidence should be admitted will turn on the circumstances of the case.[13] I do not consider that such evidence is only admissible where the decision-maker itself is required to decide a matter (or an aspect of a matter) as an expert. In my view, neither of the two cases relied upon by the defendants for that proposition establishes it.

29 I accept the plaintiff's submission that Dr Gwyther's affidavit is admissible as going to support the plaintiff's contention that the impugned decisions were taken in disregard of, or contrary to, fundamental scientific knowledge and principles concerning the sustainability of scallop fishing in Port Phillip Bay, and as going to the plaintiff's case on legal unreasonableness generally. Whether, in the end, the evidence establishes any such thing is another matter. However, in my opinion, the evidence is not irrelevant. I note that the affidavit of Dr Gwyther does not travel very far beyond other material written by him and others which is already in evidence before the Court without objection. I do accept the defendants' submission that the Court may take into account, in assessing the weight to be given to the opinions expressed by Dr Gwyther, those features of Dr Gwyther's position which may bear on the extent of his independence. However, in my view, the entirety of the affidavit of 14 July 2017 is admissible and I so rule.

The scheme of the Act

30 In its initial written submissions, the plaintiff outlined – sometimes with comments – those provisions of the Act which it said were of particular

10 *Minister for Primary Industries & Energy v Austral Fisheries Pty Ltd* (1993) 40 FCR 381.

11 *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446.

12 See plaintiff's written submissions dated 1 September 2017 on Gwyther affidavit, [1].

13 *Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 at [458]-[460] (Weinberg J).

relevance to the proceeding.[14] The outline is helpful and largely uncontroversial, and I will in substance reproduce it now, although, as will appear, certain other provisions of the legislation will also need to be mentioned in due course.

31 Section 3 of the Act sets out the objectives of the Act. They include "to provide for the management, development and use of Victoria's fisheries … in an efficient, effective and ecologically sustainable manner" (s 3(a)), "to promote sustainable commercial fishing" (s 3(c)), "to facilitate access to fisheries resources for commercial, recreational, traditional and non-consumptive uses" (s 3(d)) and "to promote the commercial fishing industry" (s 3(e)).

32 Part 4 of the Act is entitled "Regulation of fisheries". The Part begins by making it a criminal offence to undertake commercial fishing unless authorised by the Act (s 36). Section 38 provides that classes of access licence may be created by regulation allowing, among other things, the licence holder to take specified fish for sale. Section 38(2) empowers the Secretary to issue an access licence of a particular class to a particular person.

33 The plaintiff describes the rights conferred by the grant of a licence as "valuable". It points out that some licences are transferable and says that such licences "thus have a proprietary nature (s 50B)".[15] A licence held by an individual becomes an asset of the person's estate upon death (s 38(7)). Security may be taken over a licence (s 59). A licence cancelled by a court is transferable by the licence holder within six months of the cancellation (s 60).

34 A licence cannot be cancelled except in accordance with ss 58,[16] 61(1)(c)[17] or 148(9).[18] Sections 58 and 148(9) concern cancellation for cause, and no compensation for cancellation is payable under those sections. In contrast, the only "no fault" power of cancellation (s 61(1)(c)) triggers a right in the licence holder to be paid compensation (s 63).

35 Division 2 of Pt 4 relevantly concerns the issue, variation and conditions attached to licences. Fishery licences – which may be a sub-species of various forms of licence, including access licences[19] – may be granted by the Secretary (s 51). Where, as in the present case (see below), the licence has been publicly sold,[20] the Secretary must issue a s 51 licence to the successful party under the sale process (s 51(4A)).

36 Section 52 provides that, in addition to any conditions imposed by the Act, the fishery licence is subject to any conditions that the Secretary thinks appropriate and that are expressed or referred to in the licence and any conditions set out in the regulations.

37 Under s 54, there are certain controls on the power of the Secretary to vary or revoke conditions attached to fishery licences. The plaintiff's description of s 54 was corrected and supplemented in certain respects by the defendants'

14 Plaintiff's written submissions dated 11 August 2017, [49]-[61].

15 Under s 50B, transferability depends on whether the regulations permit the transfer of licences of the particular category or class.

16 Licence holder has ceased to be a fit and proper person to hold the licence, or to satisfy any relevant eligibility criteria, or to be actively, substantially and regularly engaged in the activities authorised by the licence; or has failed to make a payment.

17 Cancellation directed by the Minister, without cause.

18 Cancellation following proved offence of giving false or misleading information.

19 See the definition of "fishery licence" (s 4).

20 Pursuant to a Ministerial determination made under s 51A.

submissions. As a result, the parties would accept, I believe, that the effect of s 54 may be summarised as follows. The Secretary may only vary a class of fishery licence or vary or revoke a condition imposed by the Secretary or impose a new condition on a class of fishery licence where the change is made in order to give effect to a management plan declared under s 28 of the Act, or to any change to such a plan. Further, the Secretary must not vary a fishery licence or a condition on a fishery licence or a class of fishery licence or a condition on a class of fishery licence if the variation would be inconsistent with any regulations, management plan or Ministerial direction. (The defendants contrast these express limitations with what they contend to be an absence of any corresponding express limitations on the power of the Governor-in-Council to make regulations imposing conditions on licences or varying or deleting such conditions: see s 153, read with Sch 3 and s 55.)

38 In the present case, the plaintiff points out, its licence is transferable (subject to s 56) and renewable (subject to s 57).

39 Division 3, Pt 4 of the Act contains what the plaintiff describes as the key provisions that regulated the plaintiff's commercial rights in respect of the Fishery before the revocation decision was made. At least until that time, the Fishery was managed by the allocation of quota units. Section 64 provides the statutory basis for quota-managed fisheries. Section 64(1) provides:

> (1) The Minister may, by order published in the Government Gazette—
>
> (a) declare that the whole, or a specified zone or zones, of a fishery is to be managed by the allocation of quotas;
>
> (b) determine the method for setting the number of individual quota units for the quota fishery;
>
> (c) determine the method for allocating individual quotas to each access licence issued in respect of the quota fishery;
>
> (d) declare that individual quota units in the quota fishery may be transferred—
>
> (i) permanently; or
>
> (ii) for a quota period only;
>
> (e) set the minimum and maximum number of individual quota units that may be acquired or held by each licence holder;
>
> (f) determine the circumstances, if any, in which the individual quotas can be exceeded or carried over (other than by transfer).

40 Subsections (2) and (3) of s 64 are described by the plaintiff as being critical to the revocation decision. They provide:

> (2) The Minister may revoke or amend an order at any time by order published in the Government Gazette.
>
> (3) However, if the Minister makes a declaration under subsection (1)(d)(i), the Minister may only amend that declaration or anything under subsection (1)(a), (b) or (c) if the amendment is required—
>
> (a) to give effect to the management plan for the quota fishery declared under section 28, or to any change to that plan; or
>
> (b) to correct—
>
> (i) a clerical mistake; or
>
> (ii) an error arising from an accidental slip or omission; or
>
> (iii) a miscalculation of figures.

41 While s 64 speaks of "quota periods", that term is not defined. Instead, both the quantity of the quota and the quota period are provided for by way of FQO.[21] The power to make FQOs is contained in s 64A of the Act. It relevantly provides:

> (1) The Minister may, by further order published in the Government Gazette—
>
> (a) set the total allowable catch (by number, volume, weight or value) for a specified period for a quota fishery;
>
> (b) determine the quantity of fish (by number, volume, weight or value) comprising an individual quota unit in a quota fishery in a specified period.
>
> (2) The Minister may revoke or amend an order at any time by an order published in the Government Gazette.
>
> (3) Without intending to limit the generality of subsection (2), the Minister may reduce the total allowable catch, or reduce the quantity of fish comprising an individual quota unit before the end of the period to which the total allowable catch or unit applies.

42 Section 153 empowers the Governor in Council to make regulations for or with respect to any matter or thing required or permitted by the Act.[22]

Was the revocation power available?

43 Departing a little, it seems, from the relevant paragraphs of the amended originating motion,[23] the plaintiff, in its written and oral submissions, contended principally that the Minister had no power to revoke the IQO at all. The plaintiff's alternative submission was that the power to revoke was not at large and was not available in circumstances where commercial fishing was to continue in the relevant fishery. That is, the alternative submission was that the revocation power is only available to close commercial fishing in a fishery.

44 Relying particularly on the provisions of the Act referred to above, the plaintiff submits that the scheme of the Act is carefully calibrated to protect valuable rights from unreasonable interference and to ensure a degree of constancy is provided to rights holders. It says that, in the case of an access licence granted in respect of a quota-managed fishery, protections are afforded both in respect of the access licence and the rights conferred by the IQO. The plaintiff develops this argument in the following terms.

45 The licence is transferable and must be renewed, subject to compliance with various requirements. It may be cancelled for cause without compensation. A cancellation for a reason other than those set out in ss 58 and 148(9) – that is, without cause – entitles the licence holder to compensation.

46 Turning to quota-managed fisheries, the plaintiff submits that in the case of an IQO that confers a valuable, saleable right (the (permanent) transfer right), the Minister's power to interfere with the right holder's entitlement is heavily circumscribed by s 64(3), the evident purpose of which is to ensure that the legal architecture that supports the holder's rights is not unexpectedly altered once erected. The rationale for such a circumscription is clear, the plaintiff says:

---

21 It seems that it has been common in Victoria to specify quota periods by reference to periods of 12 months' duration, although there is nothing in the Act to require this. Indeed the first quota period specified in relation to the Fishery was a period that exceeded 12 months.

22 Section 153 contains additional provisions to which I will come.

23 Paragraphs [26A] and [27].

rights holders act on the faith of the legal architecture. They structure their affairs, develop their businesses, employ staff, expend money – such as undertaking biomass surveys[24] – and take on debt on the basis of a state of affairs that is not subject to radical change at the whim of the Executive without compensation.[25] (The plaintiff here acknowledges that the situation may be subject to change by reason of legislative amendment.[26]) The plaintiff points to the uncontested evidence in the present case that it has spent more than $1.2 million developing the Fishery.

47 The plaintiff submits that, in combination, the renewable and difficult to cancel licence, coupled with the fixed architecture of the IQO, provide a firm foundation upon which a rights holder may act. Any infirmity in either component element of the legal structure necessarily operates to the disadvantage of the holder and impairs the value of the rights conferred, the plaintiff submits.

48 Dealing more specifically with the present matter, the plaintiff emphasises that the quota units in this Fishery may be *permanently* transferred, because the Minister made a declaration to that effect within the IQO, pursuant to s 64(1)(d)(i). (The full terms of the IQO are set out below.) Usually an IQO is subject to a general power to amend or revoke, under s 64(2). But, the plaintiff submits, the consequence of a s 64(1)(d)(i) declaration is that s 64(3) is engaged to limit the Minister's powers in relation to the IQO. So, the plaintiff submits, the general power in s 64(2) is displaced, and the *only* power to deal with the matters set out in s 64(1)(a)-(d) is found in s 64(3).

49 The plaintiff further submits that, bearing in mind the features of the statutory scheme, and the place of s 64(3) within it, s 64(3) is to be understood as not only circumscribing the power to amend certain features of an IQO, but also removing any power to revoke an IQO that includes a permanent transfer right. Pursuant to s 64(3), where a declaration has been made under s 64(1)(d)(i) the *only* power the Minister has in relation to the matters in s 64(1)(a)-(d) is a power to amend, and even that power can only be exercised in limited circumstances. According to the plaintiff, there is no power to revoke an IQO in those circumstances. That is, in cases where a s 64(1)(d)(i) declaration had been made, an abolition of the legal architecture of a quota-managed fishery can only be achieved by legislation (noting that it remains open for the Minister to cancel a licence without cause under s 61(1)(c), but such cancellation triggers an obligation to pay compensation). According to the plaintiff, a construction that acknowledged that the lesser right of amendment was circumscribed, but that conceded an unfettered power to revoke would, necessarily, undermine the effect of the limited amendment power by allowing amendments to be achieved by a process that included an exercise of the revocation powers. Such a construction would, the plaintiff submits, undermine the scheme of the Act and void a key protection afforded to rights holders. For that reason, the plaintiff submits, it should not be preferred.

---

24 In this case, the plaintiff commissioned and paid for three biomass surveys of the Fishery after the issue of the relevant IQO.

25 Noting that Executive cancellation of a licence without cause is permissible, but compensation is payable (s 61(1)(c)).

26 Citing, in the context of Commonwealth fisheries, *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2014) 225 FCR 97; 200 LGERA 297.

50 The plaintiff's alternative argument, to the effect that the revocation power is only available to close commercial fishing in a fishery, was advanced in some detail in its written submissions,[27] but, during the course of the hearing, senior counsel for the plaintiff acknowledged that it involved "reading in" words to a significant degree, and said that this was not the plaintiff's "first argument". She declined to develop it orally.[28] Nevertheless, the alternative argument was not actually abandoned, and so I will reproduce it in accordance with the plaintiff's initial written submissions.[29]

51 It is argued in the written submissions that, even if there is a power of revocation of an IQO that carries a transfer right, the power is not at large and must be understood in the context of the object, scope and purpose of the Act.

52 Referring to s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), the submissions continue to the effect that Victorian legislation must be construed in a manner that would promote the purpose or object underlying the Act or the statutory rule. In the present case, it is submitted, the object, scope and purpose of the Act include:

(a) the objectives of the Act referred to above (most relevantly, the promotion of sustainable commercial fishing);
(b) the various protections afforded to proprietary rights created by the Act;
(c) the detailed processes prescribed for the making of a management plan;[30] and
(d) the limitation on the Minister's power in s 64(3).

53 In combination, those factors, and the matters concerning the need for permanency already mentioned, powerfully indicate, according to the submissions, that the revocation power is not at large. Rather, on a proper construction the power is not available in circumstances where commercial fishing is to continue in the relevant fishery. That is, the revocation power is only available to close commercial fishing in a fishery. One concomitant of such a decision would be the cancellation under s 61(1)(c) of any licences issued for the fishery. Such cancellation would result in compensation being payable to the licence holder.

54 In one part of these particular written submissions,[31] the plaintiff anticipated that the Minister would contend that none of the factors that the plaintiff had identified, including the constraint on amending, bore upon the power to revoke. That is, the plaintiff anticipated that the Minister would say that, while the power to amend an IQO is tightly controlled, there is no limitation on the power to revoke, even in circumstances where the prime indicator of permanence – the transfer right – is present.

55 So, the plaintiff anticipated, the Minister would have to contend that the revocation power was available in circumstances where:

(a) a transfer right exists; and
(b) the Fishery is to remain open; and

---

27 Submissions dated 11 August 2017, [70]-[78].

28 Transcript of proceedings, 249.

29 Submissions dated 11 August 2017, [70]-[78].

30 Promulgation of such a plan provides one basis for amendment of an IQO. In the present case, the company made attempts to have a management plan made by the Minister, but was unsuccessful, notwithstanding that a settled draft was submitted for approval.

31 At [72]-[78].

(c) the licence is to remain on foot; and

(d) the Fishery is to be fished subject to a permanent catch limit set by regulation.

56 According to the submissions, it is highly relevant that the practical effect of the Minister's decision was to:

(a) abolish the requirement for FQOs and, in so doing, deprive the plaintiff of the prospect of a higher allowable catch if the scientific biomass surveys justified it; and

(b) impair valuable rights.

57 The Minister would have to contend, the submissions continued, that the power is available to serve those ends.

58 According to the submissions, a revocation power capable of authorising the decisions taken here would serve entirely to undermine the limitations on the amendment power. That is, it would allow what are in substance amendments to the quota regime to be dressed up as a revocation. For example, an IQO could be revoked and then a new, varied, IQO declared. Or, as here, the IQO could be revoked but arrangements that are practically similar, but legally different, put into place. Such a construction sets the protection afforded by s 64(3) at naught, the submissions asserted. There is nothing arising from the object, scope and purpose of the Act to support such a reading, it was submitted.

59 Moreover, the submissions continued, just as when the "text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms",[32] so should such a choice be made where one construction would impair a valuable right and the other will not.

60 These submissions ended with a contention that, in substance, what had occurred here was an amendment to a quota regime, through the mechanism of a purported revocation and the substitution of a quota through the regulations. To put it another way, the revocation was simply a device to avoid the "rigours" of the FQO process. It was submitted that a purported "revocation" of that kind was beyond power and invalid.

61 For a time, I thought that there may be considerable force in the plaintiff's principal argument to the effect that there was a lack of statutory power to revoke the IQO, particularly insofar as it was based on s 64(3) of the Act. However, on further reflection, I am persuaded by the defendants' rebuttal of the plaintiff's arguments. Much of what follows next represents an acceptance of submissions made either in writing[33] or orally on behalf of the defendants.

62 The definition of "fishery" is contained in s 7 of the Act. Relevantly, s 7(1) provides that "a fishery" means "a fishery as defined … in any … regulation", and s 7(2) provides, without limitation, that "a fishery" may be defined by reference to any one or more of a range of matters including a species of fish, an area of land or waters, a method of fishing, and so on.

63 The making of an order under s 64(1) of the Act does not define or create a fishery.

64 On 18 December 2013, by certain regulations made under s 153 of the Act ("the 2013 amending regulations"), the Fishery in question was defined. Hence,

32 Citing *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [3] (French CJ).

33 Defendants' principal written submissions dated 25 August 2017 2017, esp [7]-[49] and [84]-[97].

the plaintiff's submission that the Fishery has been quota-managed since its "establishment" is not correct, in that the initial quota order under s 64 of the Act was made after and separate to the regulations which created the Fishery. There were also substantial regulatory mechanisms, including conditions, imposed by regulation. The Fishery, which came into existence on 18 December 2013, has continued to be in existence, with no changes to its definition since that day.[34]

65 Also on 18 December 2013, by regulations made under s 153 of the Act for the purposes of s 38(1), a new class of access licence was created. It was entitled the "Scallop Dive (Port Phillip Bay) Fishery Access Licence". This class of licence is to be distinguished from the specific licence held by the plaintiff.

66 By force of s 38(3) of the Act, any access licence issued (under s 38(2), read with s 51) in the newly created class of Scallop Dive Access Licence would continue in force for the period specified by the Secretary in that Licence as issued.

67 Any access licence issued in the newly created class of Scallop Dive Access Licence would be subject to any conditions imposed by the Secretary and expressed or referred to in the licence itself, and any conditions in the regulations (in addition to any conditions imposed by the Act): see s 52. With respect to conditions prescribed by regulations, s 55 of the Act provided (and still provides) that, if the regulations add or vary a licence condition with respect to an existing class of licence, the addition or variation applies to every licence of that class in existence (unless the regulations state otherwise).[35] The term "condition" is defined in s 4(1) of the Act to include, in relation to a licence, "any restriction that applies to the licence".

68 Other regulations in the 2013 amending regulations provided for various other matters in relation to an access licence in the newly created class of Scallop Dive Access Licence.[36]

69 At all relevant times, including as at 18 December 2013, a "catch limit" (as defined in s 4(1) of the Act) was prescribed by reg 405(1) of the *Fisheries Regulations 2009* (Vic) (the 2009 Regulations), for the purposes of the Act, with respect to "the taking of scallops from Victorian waters" (a daily limit of 100 scallop), and "the possession of scallop in, on or next to any Victorian waters" (a limit of 100 scallop). Prior to 18 December 2013, reg 405(2) provided that subreg (1) did not apply to the holder of an Access Licence in the class "Scallop (Ocean) Fishery Access Licence". Regulation 14 of the 2013 amending regulations amended reg 405(2) so that the catch limit in subreg (1) would also not apply to the holder of an access licence in the newly created class of Scallop Dive Access Licence who takes or possesses scallop in accordance with the licence, the Act and the regulations.

70 Regulation 13 of the 2013 amending regulations also inserted new reg 404A into the 2009 Regulations. Regulation 404A provided, specifically in respect of scallops taken under an access licence in the newly created class of Scallop

34 Further details of the amending regulations creating the Fishery are set out in paras 9 and 10 of the defendants' principal written submissions dated 25 August 2017. For the result, see *Fisheries Regulations 2009* (Vic) (as amended) reg 7, Sch 4 (Item 20A).

35 The defendants point out in their written submissions that the plaintiff's written submissions contain no reference to s 55 of the *Fisheries Act 1995* (Vic).

36 See para 14 of the plaintiff's principal written submissions dated 25 August 2017.

Dive Access Licence, that the minimum size of a scallop (other than doughboy scallop) was 90mm. As mentioned in the note to the new regulation, ss 68A and 68B of the Act create offences relating to the taking or possession of fish less than the minimum size prescribed by regulations.

71 Regulation 18 of the 2013 amending regulations inserted new Item 18A in Sch 5 of the 2009 Regulations, the effect of which, when read with reg 21, is that the maximum number of access licences that could be issued in the newly created class of Scallop Dive Access Licence was one.

72 A large number of regulations (numbered 413A to 413ZA), inserted by reg 15 of the 2013 amending regulations, addressed many aspects of an access licence in the newly created class of Scallop Dive Access Licence. Regulation 19 of the 2013 amending regulations amended Sch 14 of the 2009 Regulations, with the effect that new regs 413D to 413I and 413N to 413W would be "designated licence conditions" (an expression which is defined in s 4(1) of the Act).

73 As mentioned in the note to the new reg 413B, any access licence in the newly created class of Scallop Dive Access Licence would have to comply with:

(a) every condition in new Div 3B, namely regs 413C to 413X (see s 52(1)(b) of the Act);

(b) any condition expressed or referred to in the access licence itself (see s 52(1)(a)); and

(c) all the conditions in Div 3 of Pt 2 of the 2009 Regulations, being general conditions applying to all commercial fishing licences.

Under s 53 of the Act, a failure to comply with any such conditions would be an offence with a maximum penalty of 50 penalty units and, in the case of breach of a designated licence condition, a maximum penalty of 100 penalty units or 6 months' imprisonment or both.

74 Thus, in their principal written submissions,[37] the defendants summarise the situation as at 18 December 2013, in a fashion with which I agree, as follows:

> a. the Scallop Dive Fishery had been defined by regulations, separately from providing for a new class of access licences;
>
> b. any access licence to be issued in the newly created class of Scallop Dive Access Licence would be subject to many conditions, some of which were "designated licence conditions";
>
> c. there was nothing in the Act or in the 2009 Regulations that would have prevented the imposition, by regulation (empowered by s 153 of the Act), of further conditions for any access licence in the class of Scallop Dive Access Licence;
>
> d. more specifically, there was nothing that would have prevented the imposition of a condition that, in any one year, no more than a specified quantity of scallops could be taken under an access licence;
>
> e. the 2009 Regulations as amended provided that only one access licence would be issued in the newly created class of Scallop Dive Access Licence;

37 Dated 25 August 2017, [20].

f. there was nothing in the Act that would have prevented an amendment of the 2009 Regulations, so that more than one access licence in the newly created class of Scallop Dive Access Licence could be issued;[38]

g. there was no "*catch limit*" prescribed for the Scallop Dive Fishery – rather, there was a "*catch limit*" defined by reference to Victorian waters and imposed with respect to taking in one day, or processing, more than a specified quantity of scallop, which did not apply to the holder of a Scallop Dive Access Licence;

h. there was nothing in the Act that would have prevented the repeal of reg 405(2), with the effect that the "catch limit" in respect of the amount of scallops that could be taken in one day would apply to everyone.

75 The Act provides for a number of ways in which a Fishery may be managed and/or regulated. These include:

(a) management plans (see Pt 3 of the Act);

(b) regulating the classes and number of licences in each class that may be issued in respect of a fishery;

(c) imposing conditions on licences, either generally (by reference to the whole class or otherwise) or in respect of a particular licence (see ss 52, 54, 55 and 153);

(d) Ministerial directions (see s 61);

(e) quota management (see ss 64 to 66R);

(f) fishing closures (see s 67);

(g) creating of particular offences in respect of certain conduct in a fishery (see eg s 68A);

(h) creating fisheries reserves (see ss 88 and 89); and

(i) fisheries notices (see s 152).

Making a fishery (including an abalone fishery), or only some specified zone or zones of such a fishery, quota-managed is only one of the ways in which the Act provides for regulation of a fishery.

76 Contrary to the submissions made by the plaintiff, the defendants submit, and I accept, that the ways of managing fisheries listed above are not mutually exclusive or inconsistent with one another. While s 152(3) of the Act expressly provides that a fisheries notice is intended to prevail to the extent of any inconsistency, this does not detract from the fact that a number of different regulatory mechanisms may apply at any one time, or from time to time, in respect of any particular fishery. Indeed, s 152(3) tends rather to confirm this.

77 The defendants point out that the plaintiff's written submissions relating to the objectives of the Act omitted reference to a number of important statutory objectives, such as the protection and conservation of fisheries, resources, habitats and eco-systems (s 3(b)) and the promotion of quality recreational fishing opportunities as well as commercial fishing and viable aquaculture industries (s 3(c)).

78 The fact that there are multiple ways of regulating reflects the fact that the objectives of the Act are diverse and that, to give effect to them, different and flexible mechanisms may need to be deployed. In that regard, I note that what is listed in s 3 is a set of objectives "of this Act". No doubt the list of objectives is

38 As mentioned above, in 2013 the then Government announced publicly that there would be only one licence issued for the Fishery, and that it would be auctioned. In fact, only one licence was issued and it was duly auctioned. It was bought for $180,000 and subsequently transferred to the plaintiff.

meant to be taken into account where it may be relevant to the construction of other provisions of the Act. However, the list is not stated as a list of principles or precepts to be observed in the making of decisions (whether administrative or legislative) under the Act. Even if that had been done, decision-makers would have been confronted with conflicting objectives. In such a situation, as long as the decision-maker has regard to the entire list of objectives, or those that might conceivably be relevant, it would usually be open to the decision-maker to put one or other of the objectives or purposes aside in order to achieve another of the objectives or purposes to which such a provision refers.[39] In the present situation, by virtue of the manner in which s 3 of the Act is drafted, the repositories of otherwise broadly expressed discretionary powers conferred by the Act are even less constrained by any such considerations.

79 On 19 December 2013, the then Minister for Agriculture and Food Security made a determination pursuant to s 51A of the Act that an access licence in the Class Scallop Dive Access Licence would be publicly sold by way of auction.

80 Also on 19 December 2013, the then Minister for Agriculture and Food Security made an IQO under s 64(1) of the Act in respect of the Fishery.[40] It provided as follows:

> INITIAL QUOTA ORDER UNDER SECTION 64 – SCALLOP DIVE (PORT PHILLIP BAY) FISHERY
>
> I, Peter Walsh, Minister for Agriculture and Food Security, having undertaken consultation in accordance with section 3A of the *Fisheries Act 1995* (the Act), make the following Initial Quota Order under section 64 for the Scallop Dive (Port Phillip Bay Fishery).
>
> 1. The Scallop Dive (Port Phillip Bay) Fishery will be managed by the allocation of quota to a Scallop Dive (Port Phillip Bay) Fishery Access Licence.
> 2. The total number of individual scallop quota units (excluding doughboy scallops) allocated per access licence will be 1 quota unit per scallop commercial fishing management zone. These quota units will attach to the Scallop Dive (Port Phillip Bay) Fishery Access Licence, which will be sold via auction.
> 3. The total number of individual doughboy scallop quota units allocated to the access licence will be 1 quota unit per scallop commercial fishing management zone. These quota units will attach to the Scallop Dive (Port Phillip Bay) Fishery Access Licence, which will be sold via auction.
> 4. The individual quota units for the Scallop Dive (Port Phillip Bay) Fishery may be transferred permanently if the Scallop Dive (Port Phillip Bay) Fishery Access Licence is transferred to another individual, corporation or co-operative.
> 5. Individual quota units that are not taken during a quota period cannot be carried over in the next quota period.
> 6. If the holder of a Scallop (Dive) Fishery Access Licence has caught or landed in excess of his or her quota allocation by 20 kilograms or less at the end of a quota period, the amount by which the access holder is in

39 *Legal Services Commission (NSW) v Stephens* [1981] 2 NSWLR 697 at 699 (Street CJ), 704-705 (Hope JA). Compare *AS v Minister for Immigration and Border Protection* (2016) 312 FLR 67 at [1], [35]. Compare also s 5(5) of the *Disability Act 2006* (Vic) and s 4(2) of the *Guardianship and Administration Act 1986* (Vic).

40 An IQO, made under s 64(1) of the *Fisheries Act 1995* (Vic), is a "quota order" as defined in s 4(1).

excess will be deducted from his or her quota allocation for the next quota period. At no time can an access licence holder catch or land more than 20 kilograms in excess of his or her quota allocation.

Notes:

1. One Scallop Dive (Port Phillip Bay) Fishery Access Licence only has been issued.
2. There are six scallop commercial fishing management zones in the Scallop Dive (Port Phillip Bay) Fishery.

This order commences on the day on which it was published in the Government Gazette.[41]

Dated: 19 December 2013

81 Upon the making of the IQO, the Fishery satisfied the definition of "quota fishery" in s 4(1) of the Act.

82 So, relevantly, the IQO provided that:

(a) the Fishery would be managed by the allocation of quota (plural), separately with regards to doughboy dcallop and with regards to other scallop;

(b) with regards to each of the two kinds of scallop, there would be one individual quota unit for each scallop commercial fishing management zone, meaning that (as the Fishery had been defined with six such zones) there would be a total of six individual quota units for each kind of scallop (hence 12 units in total);

(c) individual quota units (not necessarily all 12) could be transferred permanently (and, by reason of s 64(4) of the Act, could also be transferred for a quota period only) if the Scallop Dive Access Licence were transferred to another individual, corporation or co-operative.[42]

83 The transfer of individual quota units, whether permanently or not, is regulated by s 65A of the Act. It is clear from that provision that there can be a transfer to another holder of an access licence in the particular quota fishery of just some individual quota units, with no requirement that there be a transfer of the actual access licence. The fact that in this case there is only one access licence, so that any transfer of individual quota units would require another person to acquire the access licence itself, ought not distort the proper construction of relevant provisions of the Act.

84 As at 19 December 2013, no access licence in the class Scallop Dive Access Licence had been issued. The issuing of the licence did not occur until 5 November 2014.[43]

85 The making of the IQO did not have the effect of invalidating, or rendering inoperative, any conditions imposed by the Act or the 2009 Regulations (as amended with effect from 18 December 2013) on an access licence in the class Scallop Dive Access Licence.

86 Contrary to the plaintiff's submissions, I accept that, if the 2013 amending regulations had, with effect from 18 December 2013, imposed a condition in respect of any access licence in the class Scallop Dive Access Licence that, in

41 The Order was published on 19 December 2013.

42 As the defendants point out, s 64(1)(d)(i) does not expressly envisage a conditional declaration that individual quota units may be transferred only if an access licence is transferred; and that it is somewhat difficult to apply such a condition to s 64(4), which permits transfer of individual quota units for a quota period only.

43 Subsequently, on 14 November 2014, the licence was transferred to the plaintiff.

any one year, no more than a specified quantity of scallop could be taken, that condition would not have been invalidated or rendered inoperative by the subsequent making of the IQO on 19 December 2013. Correspondingly, I do not accept the plaintiff's submission that it would have been necessary to repeal any regulation imposing any such condition before any IQO could validly have been made in respect of the Fishery.

87 Also on 19 December 2013, the then Minister for Agriculture and Food Security made a FQO under s 64A(1) of the Act in respect of the Fishery, for the period from that date until 31 March 2015 (the first FQO).[44] It provided as follows:

> FURTHER QUOTA ORDER UNDER SECTION 64A – SCALLOP DIVE (PORT PHILLIP BAY) FISHERY
>
> I, Peter Walsh, Minister for Agriculture and Food Security, having undertaken consultation in accordance with s 3A of the *Fisheries Act 1995* (the Act), make the following Further Quota Order under section 64A for the Scallop Dive (Port Phillip Bay) Fishery.
>
> 1. The total allowable catch for scallop (excluding doughboy scallop) for each scallop commercial fishing management zone is 2000 kilograms of unshucked scallop.
> 2. The total allowable catch for doughboy scallop for each scallop commercial fishing management zone is 100 kilograms of unshucked doughboy scallop.
> 3. The quantity of scallop (excluding doughboy scallop) comprising a quota unit for the quota period in each scallop commercial fishing management zone of the Scallop Dive (Port Phillip Bay) Fishery is 2000 kilograms.
> 4. The quantity of doughboy scallop comprising a quota unit for the quota period in each scallop commercial fishing management zone of the Scallop Dive (Port Phillip Bay) Fishery is 100 kilograms.
>
> Notes:
>
> 1. There are six scallop commercial fishing management zones in the Scallop Dive (Port Phillip Bay) Fishery.
> 2. There is one quota unit for scallop (excluding doughboy scallop) in each scallop commercial fishing management zone in the Scallop Dive (Port Phillip Bay) Fishery.
> 3. There is one quota unit for doughboy scallop in each scallop commercial fishing management zone in the Scallop Dive (Port Phillip Bay) Fishery.
>
> This Order commences on the day on which it is published in the Government Gazette[45] and remains in force until 31 March 2015.
>
> Dated: 19 December 2013.

88 Given that no access licence had been issued (and as it turned out would not be issued for another 11 months), there was no duty to make the first FQO by the date on which it was made.[46]

89 The making of the first FQO did not have the effect of invalidating, or rendering inoperative, any conditions imposed by the Act or the 2009 Regulations (as amended with effect from 18 December 2013) on an access licence in the class Scallop Dive Access Licence.

---

44 A FQO, made under s 64A(1) of the *Fisheries Act 1995* (Vic) is also a "quota order" as defined in s 4(1).

45 The Order was published on 19 December 2013.

46 However, compare *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179.

90 More specifically, and, once again, contrary to the plaintiff's case, I accept the defendants' submission that if the 2013 amending regulations had, with effect from 18 December 2013, imposed a condition in respect of any access licence in the class Scallop Dive Access Licence that no more than a specified quantity of scallops could be taken in any one year, that condition would not have been invalidated or rendered inoperative by the making of the first FQO on 19 December 2013. Similarly, the presence of such a condition would not have prevented the making of the first FQO on 19 December 2013 or at all.

91 While the IQO was in force, further FQOs were made as follows:

(a) on 25 May 2015, for the period ending 31 March 2016;

(b) on 16 February 2016, for the period ending 31 March 2017;

(c) on 30 March 2017, for the period ending 31 March 2018.

92 As indicated above, the plaintiff challenges the validity of the decision of the Executive Director (Mr Dowling), as a delegate of the Minister, to make the last of the above-identified FQOs (the challenged FQOs). I will come to that challenge in due course, but, as will appear, in the events which have happened, the challenge really goes nowhere.

93 As already mentioned, the Scallop Dive Access Licence was auctioned. The auction was held on 20 February 2014. A company controlled by Mr Collis was the winning bidder. On 5 November 2014, pursuant to s 38(2) of the Act (read with s 51(1) and (4A)), an access licence in the class Scallop Dive Access Licence was issued to another company controlled by Mr Collis. It was issued with an expiry date of 31 March 2015, and it was subject to the provisions of the Act, to the conditions specified in it, and to any conditions that may be prescribed by regulation (see s 55) or added to the licence in accordance with ss 52 and 54 of the Act. Hence, I accept the defendants' submission that the licence was taken subject to an express condition that it may be varied, whether by an exercise of statutory power under the Act or by subsequent regulation.[47] On 14 November 2014, pursuant to s 56 of the Act, the licence was transferred to the plaintiff, being a third company controlled by Mr Collis.

94 Pursuant to s 57 of the Act, the licence has been renewed yearly, on the application of the plaintiff. On 1 April 2017, it was renewed for the period ending 31 March 2018.

95 The defendants accept, as do I, that when an access licence in a particular class is issued to a person, the Act confers private statutory rights that are "a species of property".[48]

96 However, as the above analysis shows, the creation of a new class of access licence and the issuing of any licence in that class are matters entirely independent of whether the fishery is quota-managed. As the defendants submit, the property "is represented by the rights given by the licence from year to year and from time to time" – "[n]o property comes into existence which is independent of the licence or is free of any conditions or restrictions which apply to the licence".[49] The private statutory rights conferred by the licence may be described as rights to take a limited public natural resource (here, scallops) in

47 Compare *Alcock v Commonwealth* (2013) 210 FCR 454 at [37], [39] (Rares, Buchanan and Foster JJ) in relation to access licences to take abalone in a quota fishery under the Act.

48 See *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 170 LGERA 373 at [147] (Hayne, Kiefel and Bell JJ), in respect of statutory bore licences.

49 *Alcock v Commonwealth* (2013) 210 FCR 454 at [47].

limited quantities from identified areas.[50] Those rights were from their inception "always subject to any statutory restrictions which might apply to modify or displace those rights", including power to revoke or amend the conditions of the licence and to prohibit how much scallop could be taken.[51]

97 It is true that the Act provides for a compensatory scheme when an access licence is cancelled as a result of a Ministerial direction under s 61(1)(c) of the Act, but there has been no cancellation of the relevant licence in this case.

98 I accept the defendants' submission that the rights conferred on the plaintiff by the licence are "freely amenable to abrogation or regulation by a competent legislature".[52] As they submit, statutory rights to fish are inherently defeasible.[53] Parliament may choose to, but need not, provide for some form of compensation when any of the statutory rights conferred under the Act are affected.

99 As the defendants submit, the Parliament of Victoria, within its constitutional powers, has provided:

(a) for defeasibility (in the sense of possible detrimental effect on the value of an access licence in a fishery that had been, up to that point, quota-managed), among other things by giving a power to revoke an IQO "at any time" – see s 64(2); and

(b) that any diminution in the value of an access licence, as may be caused by a decision to revoke an IQO, is not compensable – see s 64C.

100 I agree with the defendants that there is nothing that puts the plaintiff's licence in any special position under the Act. The fact that only one Access Licence has been issued in the relevant class of Scallop Dive Access Licence cannot affect the proper construction of the relevant statutory provisions under which the rights conferred by a licence arise.

101 I turn now to the proper construction of s 64 of the Act, which is at the heart of the plaintiff's contention that there was no power to revoke the IQO.

102 I accept that general statements to the effect that statutory rights to fish are "inherently defeasible" do not, of themselves, supply a complete and universal answer to problems of the present kind.[54] I accept that the true question here is whether there was an express or implied statutory prohibition on the exercise of the power to revoke an IQO in the circumstances.

103 However, it is relevant, as the defendants submit, that the character of an access licence is quite independent of the fact that the relevant fishery is quota-managed. Further, I agree with the defendants that s 64C, as to which the plaintiff has said very little, is an important guide to the proper construction of s 64 itself. Section 64C is as follows:

> 64C No compensation payable for losses resulting from quota orders
>
> No compensation is payable by the Crown to any person for any loss or damage that results from an order made by the Minister under section 64, 64A, 64AB, 66C, 66D or 66E.

---

50 *Alcock v Commonwealth* (2013) 210 FCR 454 at [46].

51 *Alcock v Commonwealth* (2013) 210 FCR 454 at [75]-[76].

52 *Alcock v Commonwealth* (2013) 210 FCR 454 at [46]. See also *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314 at 330 (Brennan J).

53 *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314.

54 Compare the plaintiff's written submissions in reply dated 28 August 2017, [3]-[5].

104 As the defendants comment, in that section Parliament has provided in unequivocal terms that no compensation is payable for any loss or damage (eg, any alleged diminution in the potential value of an access licence in a transfer under s 56 of the Act) in respect of any order made by the Minister under, among other sections, s 64.

105 Turning to s 64 itself, I agree with the defendants that the evident purpose of providing for the possibility of declaring that individual quota units may be transferred, either permanently or for a quota period only, is to facilitate a form of market in the entitlement associated with an access licence whilst there is in effect a form of regulation of the fishery by way of quota order (ie while the fishery is a quota fishery). As the defendants point out, that market is still constrained by the requirement of approval by the Secretary in respect of any proposed transfer – see s 65A. Further, in the case of a quota fishery which has more than one access licence, an intended transaction between two licence holders for the transfer of a number of individual quota units (whether permanently or for a quota period only) may be prevented by the values set under s 64(1)(e). The potential value of any initially allocated quota units – noting the realisation of any value is subject to the Secretary's approval – is also able to be detrimentally affected by a determination by the Minister to sell new quota units: see s 65B.

106 I agree with the defendants that, against that statutory background, s 64(2) means what it says: "The Minister may revoke … at any time" an order made under s 64(1). As the defendants say, such an order would not bring to an end any existing access licences in respect of the relevant fishery. Such an order would not entitle any person (which extends to any person holding a security interest) to compensation.

107 Again, I agree with the defendants that the plaintiff's construction entails the proposition that, once there is a quota order for fishery A (and, as well, other quota orders for fisheries B, C, D etc.) and, for that fishery, there has been a declaration under s 64(1)(d)(i), the only mechanism for removing what is only a management arrangement in respect of fishery A is "abolition … by legislation". As the defendants submit, it is not clear what form of legislation the plaintiff was contemplating, whether directed explicitly to fishery A or whether involving wholesale repeal of ss 64 to 66A (or, on one view, of ss 64 to 66R). I further agree with the defendants that the case cited by the plaintiff in support of its submissions in this regard, namely *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2)*,[55] does not help it. Indeed, if anything, that case assists only the defendants on the present point. In any event, I agree with the defendants that there is no reason why the Act should be construed to mean that, after a declaration under s 64(1)(d)(i), quota management can only be removed by primary legislation, when Parliament has provided in s 64(2) for a power which, at least so far as that subsection goes, is unconditional, "to revoke … at any time" an IQO. It is also noteworthy that s 64A(2) confers an unconditional power to revoke an FQO at any time. That is accompanied by the power

55 *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2014) 225 FCR 97; 200 LGERA 297.

conferred by s 64A(3) to reduce the total allowable catch, or reduce the quantity of fish comprising an individual quota unit, before the end of the period to which the total allowable catch or unit applies.

108 I agree with the defendants that s 64(2) confers two distinct powers, to revoke and to amend. As the defendants observe, necessarily the power to amend extends to amending only some aspect of an order made under s 64(1). In those circumstances, I agree that s 64(3) also means what it says – the restriction on the power to "amend … at any time" any part of an order made under subs (1) only applies to:

(a) a declaration made under subs (1)(d)(i); or

(b) anything under subs (1)(a) (eg which specified zones of a fishery, but not the whole, are to be managed by the allocation of quotas);

(c) anything under subs (1)(b) (any part of the method for setting the number of individual quota units); or

(d) anything under subs (1)(c) (any part of the method for allocating individual quotas to each access licence),

when the amendment is required for either one of the reasons set out in para (a), or one of the reasons set in para (b). Notably, as the defendants comment, there is no restriction on the power to amend with respect to anything under subss (1)(e) or (1)(f).

109 I would add that this reading of s 64(3) is supported by the explanatory memorandum to the Fisheries (Amendment) Bill which led to the substitution of s 64 by s 9 of Act no 80 of 2000. In the explanatory memorandum, the following was said:

> Clause 9 amends the *Fisheries Act 1995* to enable the Minister to allow quota units to be permanently transferred. Proposed new section 64 allows the Minister, by order, to declare a zone or zones of a fishery to be managed by quota, to determine the method for setting and allocating individual quota units and to declare if quota units can be transferred permanently or only during a quota period (temporary). If permanent transfer or quota is allowed, the Minister cannot vary the zones or method of setting or allocating quota unless the variation gives effect to a management plan or to a change to management plan or if there is an error in the order.

110 As the defendants say, s 64(2) confers a power to revoke an order and a power to amend an order. Section 64(3) imposes restrictions on the exercise of the power to amend certain aspects of an order. Section 64(3) does not in terms address or restrict the power to revoke an order.

111 I further agree that, in those circumstances, and having regard to the fact that Parliament has used two very different terms in subs (2) of s 64 ("revoke" and "amend"), and to the fact that it also used those same two terms in a consistent manner in s 64A(2), it is an impermissible construction to read the general power in s 64(2) as displaced, as the plaintiff would have it.

112 Again, I agree with the defendants that the plaintiff is wrong in its contention that "amendments [are] achieved" by an exercise of the power to revoke. As the defendants submit, in the ordinary English meaning of "to amend", the thing in question remains in existence.[56] By contrast, in their ordinary English

56 *Shorter Oxford English Dictionary* (6th ed). The noun "amendment" means removal of a fault or error, and the transitive verb "to amend" means to free a thing from faults, to correct what is faulty, to rectify something.

meanings, the noun "revocation" relevantly means annulling something, the cancellation of a decree or similar matter, and the transitive verb "to revoke" means to annul, repeal or cancel.[57]

113 During the oral argument on this issue, senior counsel for the plaintiff acknowledged that for her argument to succeed the word "only" in s 64(3) had to be given "double work". It had to be accorded an operation such that s 64(3) was to be read as if it provided:

> However, if the Minister makes a declaration under subsection (1)(d)(i), the Minister may only amend that declaration or anything under subsection (1)(a), (b) or (c), and may only do so if the amendment is required —
>
> (a) to give effect to the management plan etc;
>
> (b) to correct etc.

This would involve notionally inserting words into s 64(3). In my view, it would be to make an insertion which is "too big, or too much at variance with the language in fact used by the legislature".[58]

114 That last observation applies all the more strongly to the plaintiff's alternative submission to the effect that the power to revoke an IQO is only available to close commercial fishing in a fishery. As mentioned above, senior counsel for the plaintiff declined to develop this submission orally. It is a submission which, as the defendants say, flies in the face of the clear words used by Parliament – "at any time".

115 As the defendants further submit, in circumstances where the Act provides a specific power to close a fishery to all fishing, including commercial fishing, whilst leaving in place all existing licences (see ss 67 and 152), it is impossible to construe the power in s 64(2) as limited in the way in which the plaintiff contends.

116 Further, again, the defendant is correct to note that, as part of the plaintiff's (written) submission to the effect that what has been done amounts "in substance [to] amendments to the quota regime," the plaintiff has moved to consideration of "decisions" (plural). However, as the defendants submit, the fact that a new regulation was made under an entirely separate power (and, for the purposes of this part of the plaintiff's argument, validly) can have no bearing on the issue of the proper construction of the power in s 64(2) of the Act, and/or whether s 64(3) in its "amendment" limb affords any protection. In passing from this point, I would also indicate my agreement with the defendants' submission that the observations made by French CJ in *Lee v New South Wales Crime Commission*,[59] to which the plaintiff's written submissions refer, are inapposite because, instead of the rights in question being "common law rights", an access licence is a creature of statute.

117 In my view, the Minister did have power to revoke the IQO. Accordingly, I do not uphold the plaintiff's contentions in respect of grounds 26A and 27 of the amended originating motion.

---

57 *Shorter Oxford English Dictionary* (6th ed).

58 *Western Bank Ltd v Schindler* [1977] Ch 1 at 18 per Scarman LJ, cited by Lord Nichols of Birkenhead in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592, and adopted by French CJ, Crennan and Bell JJ in *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [38]. The acknowledgement by senior counsel for the plaintiff that, on her argument, "double work" would be involved for the word "only" is at transcript of proceedings, 246-247.

59 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at [3].

Is there statutory power to impose by regulations, on an access licence for a fishery that is quota-managed, a condition limiting the quantity of fish that may be taken under the licence?

118 The issues dealt with under the previous heading were pure issues of law. Another, related pure issue of law is involved in the plaintiff's submissions. It is the question of statutory power set out in the heading immediately above. It turns on the proper construction of the Act and the Regulations. Because I have just been dealing with most of the relevant provisions, it is convenient to turn to this question now, even though, if I be correct in certain of my other conclusions in this case, the present question would not, strictly speaking, need to be decided.

119 The present point is the subject of the plaintiff's contentions in [36] and [37] of the amended originating motion, which are as follows (explanations of defined terms added in square brackets):

> By reason of the matters set out in paragraphs 27 to 33 above, the Revocation Decision [defined to mean the Minister's decision to revoke the IQO] was void, invalid and of no legal effect, and as a result the Initial Quota Order:
>
> (a) was valid at the time the Regulation [defined to mean the *Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017*, which inserted Regulation 413BA, being the regulation principally in question] was made; and
>
> (b) remains valid.
>
> On a proper construction of the Act, in circumstances where the Fishery was subject to the Initial Quota Order, a regulation in the nature of the Regulation was ultra vires.

120 This point was the subject of only relatively brief mention in the plaintiff's original written submissions.[60] Indeed, only four paragraphs were devoted to it, as follows:

> Invalid *in limine*
>
> If, as submitted by the [plaintiff], the Revocation Decision was invalid and the IQO remains on foot, it necessarily follows that the Regulation was invalid at the time that it was made. That is so because the IQO set the "individual quota unit" for the licence holder, as permitted by s 64(1)(e), and the circumstances in which the individual quota could be exceeded or carried over as permitted by s 64(1)(f).
>
> Where an IQO has so provided, the "total allowable catch" or "quantity of fish (by number, volume, weight or value) comprising an individual quota unit" is to be set by FQO: s 64(1)(a) [*sic*, *scil* s 64A(1)].
>
> By contrast, the Regulation sets a "catch limit". That term is relevantly defined to include various types of limit on the quantity or type of fish, "*but does not include any limit relating to total allowable catches set under a quota order or to individual quotas or individual quota units*": s 4.
>
> The scheme of the Act is that quota managed fisheries are not managed by catch limits but rather by quotas. The two concepts do not run together. There is no power under the Act for a catch limit to be set by regulation in respect of a quota managed fishery. The Regulation is thus invalid and of no effect.

60 Dated 11 August 2017, [139]-[142].

121 The defendants, in their initial written submissions, responded to the plaintiff's "*in limine*" contentions in the following terms:[61]

> Power to make reg 413BA
>
> On 1 April 2017, the *Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017* amended the 2009 Regulations by inserting new reg 413BA, which provides:
>
> > 413BA Annual catch limit for scallop under Scallop Dive (Port Phillip Bay) Fishery Access Licence
> >
> > In the period from 1 April in any year to 31 March of the following year inclusive, no more than 60 tonnes of scallop may be taken under the licence.
>
> The power to make that regulation is found in s 153(1) of the Act.[62] Relevantly, s 153(1) provides that "*The Governor in Council may make regulations for or with respect to any matter or thing … permitted by this Act to be prescribed*". Section 55 of the Act permits the making of regulations that add a condition to a class of licence.
>
> Further, without derogation from s 153(1) (or any other provision of the Act), subs 153(2) provides that regulations may be made for or with respect to the matters listed in Schedule 3. Item 3.13 provides that the regulations may prescribe conditions to which licences are subject.
>
> Finally, as noted above, Access Licence SDP1 [being the plaintiff's licence] was itself issued subject to an express condition that it may be varied, such that new conditions could attach to it as prescribed by regulation.
>
> Even if an initial quota order is in effect for a fishery (and there are access licences issued for that quota fishery), there is power to impose by regulation a condition on every access licence in a specified class to the effect that, in any one year, no more than a specified quantity of fish can be taken by the holder of such a licence.[63] Accordingly, reg 413BA was within power irrespective of whether or not the Plaintiff can establish a ground of review in relation to the Revocation Decision.[64]
>
> The Plaintiff appears to argue that, if a fishery satisfies the definition of a quota fishery, there is no longer any power to impose a condition on a class of access licences which limits the quantity of fish that may be taken (a power which otherwise undoubtedly exists under the Act). It would follow from this argument that:
>
> a. if reg 413BA had been in force on 18 December 2013, then it would have ceased to be valid as soon as the IQO was made on 19 December 2013; and
> b. if reg 413BA had provided, in any one year period, for a limit of 10,000 tonnes, or for a limit of no more than $10,000,000 landed value, it would have been invalid.

---

61 Defendant's initial written submissions dated 25 August 2017, [50]-[66]. Footnotes as in original except for renumbering. Self-explanatory modifications or corrections added in square brackets.

62 The broad scope of the power in s 153(1) is clear, having regard to the terms of subss (3) and (4).

63 Just as there would be power to impose additional licence conditions which restricted the manner in which fishing could be carried out.

64 The submission is in response to the "in limine" invalidity submissions by the Plaintiff. Alleged improper purpose and denial of procedural fairness are addressed separately.

There is nothing in the Act that supports such a contention. Imposing a condition on a class of access licences to the effect that no more than a certain quantity of fish may be taken in a given period is capable of operation consistently with the fishery being quota managed. The construction and operation of the Act should not be distorted by reference to the fact that there happens to be only one access licence of this particular class in this particular fishery.

The Plaintiff's argument appears to depend, crucially, on the definition of "*catch limit*" in s 4(1) of the Act, which provides:

> *catch limit* means any limit imposed under this Act on the quantity or type of fish or fishing bait that may be taken, possessed or controlled in any specified circumstances, regardless of—
>
> (a) whether the limit is expressed in terms of numbers, volume, weight, size or value;
>
> (b) how the fish are specified:
>
> (c) whether the circumstances refer to how, when, where or by whom the taking, possessing or controlling occurs;
>
> (d) whether the limit applies to the whole, or only a part, of Victoria—
>
> and includes trip, possession and bag limits, but does not include any limit relating to total allowable catches set under a quota order or to individual quotas or individual quota units;

The expression "*total allowable catch*" is not defined, but it is used in ss 64A(1)(a) and (3), 64AB, 66D(1)(a) and (3), 66E, 66K and 153E, and in the definitions of "*individual quota*" and "*quota period*" in s 4(1).

The expression "*individual quota*" is defined as "*the number of quota units (including a portion of a quota unit) allocated to an access licence by a quota order, whether as part of a total allowable catch or otherwise*", and the expression "*individual quota units*" is defined as "*a quantity of a species of fish (by number, volume, weight or value) declared under s 64A(1)(b) or 66D(1)(b) to be the individual quota unit for that species*". The expression "*quota period*" is defined as "*any period specified in a quota order as the period over which a total allowable catch or an individual quota is to apply*".[65]

Section 4(2) provides that a reference to "*under this Act*" includes a reference to any regulation or other document or instrument made or issued under this Act. Accordingly, the expression "*catch limit*" extends to a limit prescribed by regulations, as well as to a condition imposed by regulation upon a class of access licences. It would also extend to any limit imposed by a further quota order under s 64A(1) on the quantity of fish that may be taken.

A definition cannot be the source of a limitation upon the powers conferred by the Act. A definition only has the function of indicating that, when the word or the expression appears in the substantive provisions of the Act, it is to be understood in the defined sense.[66] The expression "*catch limit*" appears in the following provisions of the Act:

a. the definition of "*commercial quantity*" in s 4(1), in respect of the Murray cod;

b. ss 37(1), 49(2)(j), 68A, 68B and 152(1)(a); and

c. Item 1.4 of Schedule 3.

Section 153(2), read with Item 1.4 of Schedule 3, uses the expression "*catch limit*" in the context of a power to set a limit on the quantity or type of fish or fishing bait. The power is to set such a limit for the purposes of the other

65 Cf Plaintiff's Submissions at [60].

66 *Kelly v The Queen* (2004) 218 CLR 216 at [84] and [102]-[103] (McHugh J). See also *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635.

> provisions of the Act where the expression is used – the definition of "*commercial quantity*" in respect of the Murray cod, and each of ss 37(1), 49(2)(j), 68A, 68B and 152(1)(a)).
>
> The fact that a condition imposed on a class of access licence falls within the broad definition of "*catch limit*" is irrelevant. The power to impose that condition is found in s 153(1), by reference to what is permitted by s 55.
>
> The only purpose and effect of the exclusion or carving out from the definition of "*catch limit*" [of] those limits relating to total allowable catches, individual quotas or individual quota units is simply to ensure that substantive provisions of the Act which refer to a "catch limit" do not apply to the total allowable catch, individual quotas or individual quota units which are set or determined for a quota fishery. For example, but for this carve out, the offence provisions in s 68A could be contravened by an access licence holder in a quota fishery who exceeds the applicable quota or quota units.
>
> For the reasons set out above, the Plaintiff's "*in limine*" challenge to reg 413BA fails.
>
> The challenge also fails because, for the reasons set out below, there is no invalidity of the decision of the First Defendant to revoke the IQO.

122 These submissions of the defendants provoked a response, within the plaintiff's reply submissions,[67] that was somewhat lengthier and more detailed than the plaintiff's original submissions on the topic. What the plaintiff said in reply was as follows:[68]

> Catch limits in quota fisheries
>
> On the [plaintiff's] construction of the Act, a quota managed fishery cannot be subject to a catch limit. Regulation by catch limit is distinct from and inconsistent with management by quota. By contrast, the defendants contend that a fishery managed by quota may also be subject to a catch limit (at [54]-[64]).
>
> The relevance of the argument is that should the [plaintiff] succeed in impugning the Revocation Decision, on its construction of the *Fisheries Act*, the Regulation would necessarily fail. By contrast, the defendants contend for the Regulation's validity even if the IQO remains on foot.
>
> The [plaintiff] contends that the scheme of the Act is such that the two concepts are necessarily inconsistent. They are alternative means of regulating a fishery that do not and cannot sit side by side. The proposition emerges most directly from the text of ss 64(1) and 64A(1) and from the definition of "catch limit" in s 4.
>
> The entirety of s 64(1) is devoted to matters concerning quotas: the ability to declare zones to be quota managed (s 64(1)(a)), the method for setting and allocating quotas (s 64(1)(b) and (c)), the transferability of quotas (s 64(1)(d)), the minimum and maximum quota units that an individual can hold (s 64(1)(e)) and the consequences of exceeding a quota (s 64(1)(f)). Similarly, s 64A(1) is directed to the periodic setting of quotas, including "*the quantity of fish (by number, volume, weight or value)*": s 64A(1)(b).
>
> The comprehensive grant of powers in respect of quotas and their allocation then sits harmoniously with the plain words of the definition of "catch limit" which is expressed not to include "*any limit relating to total allowable catch set under a quota order or to individual quotas or individual quota units*": s 4. A quota limit is not a catch limit and a catch limit is not a quota limit. Moreover, the two concepts do not sit together.

---

67 Reply submissions dated 28 August 2017, [6]-[13].

68 Reply submissions dated 28 August 2017, [6]-[13]. Footnotes as in original except for renumbering. Self-explanatory modifications in square brackets.

> Further, the comprehensive grant and regulation of powers in respect of quotas and their allocation in s 64 is such that, where an IQO had been made, that specific provision operates to the exclusion of the more general provision concerning the making of Regulations to specify a catch limit. As Gavan Duffy CJ and Dixon J said in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia*:[69]
>
> > When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.
>
> In the light of the above, the scheme of the Act is readily discernible. There are various methods by which a fishery can be managed. Quota managed fisheries are managed by quotas set by further quota orders. Other fisheries, or zones, may be managed by the grant of a licence subject to a catch limit. By contrast, the defendants seek to ignore ss 64(1) and 64A(1) and, by a strained reading, limit the effect of the express carve out in the definition of "catch limit" such that "*substantive provisions of the Act which refer to a* '*catch limit*' *do not apply to the*" TACC. But the words of the definition are well capable of achieving both ends, and to do so would be entirely consistent with the dichotomy advanced by the [plaintiff].
>
> It follows that a catch limit set in respect of a quota managed fishery would be repugnant to the scheme of the *Fisheries Act* and, in particular, to ss 64(1) and 64A(1) and therefore void. (Or, to deal with the defendants' hypothetical arguments, if a catch limit was in place for a fishery through regulations, the regulations would need to be amended before an IQO could be made to subject the fishery to quota management).

123 This burgeoning debate burgeoned even further during oral submissions. In particular, debate circled around the plaintiff's reliance on the *Anthony Hordern* case. Because that case and the principles associated with it were only raised for the first time in the plaintiff's reply, which was filed shortly prior to the commencement of the oral hearing, the defendants sought and, without objection, were granted leave to file written submissions on the *Anthony Hordern* principle. Those submissions were in the following terms:[70]

> The passage usually cited from *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 is from the judgment of Gavan Duffy CJ and Dixon J (at 7):
>
> > When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.
>
> In *Harbour Radio Pty Ltd v Australian Communications and Media Authority* (2015) 231 FCR 329 at 344 [76], Buchanan J said that a number of important principles must be noted:

---

69 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7. See also *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [50]-[54] (French CJ), [84]-[87], [95] (Gummow, Hayne, Crennan and Bell JJ).

70 Defendants' submissions on the *Anthony Hordern* principle dated 3 September 2017. Footnotes as in original except for renumbering. Correction in square brackets.

> First, the particular provision must be a source of power. Secondly, it must appoint a particular mode of exercise of the power. In such a case a less restricted operation of the power will not be available. The principle embodied in this passage rests upon an implication that prescribed statutory restrictions upon a particular power cannot be avoided by resort to a more general one.

It follows that, as Buchanan J also observed (at 344-5 [77]):

> The question for examination usually concerns the statutory limitations which accompany the exercise of a power and whether those limitations, qualifications, conditions or restrictions would be avoided (*Anthony Hordern* at 7) or some statutory precaution or safeguard might be disregarded or rendered ineffective (*Anthony Hordern* at 8).

The sphere of operation of the principle concerns two legislative provisions dealing with the "*same matter*" (or "*same subject matter*"): *R v Wallis; Ex pate Employers Association of Wool Selling Brokers* (1949) 78 CLR 529 at 550 (Dixon J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*Malaysian Declaration Case*) at 589 [59] (Gummow and Hayne JJ); *Grass v Minister for Immigration and Border Protection* (2015) 231 FCR 128 at 146 [73] (Perram, Yates and Mortimer JJ). If the two provisions do not deal with the same subject matter, the principle is of no operation whatsoever: *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 590 [61] (Gummow and Hayne JJ).

By "*same subject matter*", the principle requires consideration of whether it is the same *in law*. Thus, in *Nystrom*, the Court found that the subject matter of the power was not in law the same as between the two provisions in issue, *even if the relevant consequences (or the ultimate result) of the exercise of each of the powers were the same*: at 589-90 [60]-[61] (Gummow and Hayne JJ); 615-6 [162]-[166] (Heydon and Crennan JJ, Gleeson CJ agreeing at 571 [1]).

In *Nystrom*, Gleeson CJ said (at 571-572 [2]), in respect of two provisions of the *Migration Act 1958*:

> The provisions of s 501(2), on the one hand, and ss 200 and 201 on the other, are not repugnant, in the sense that they contain conflicting commands which cannot both be obeyed, or produce irreconcilable legal rights or obligations. *They create two sources of power, by which a person in the position of the respondent may be exposed, by different processes, and in different circumstances, to similar practical consequences. There is nothing novel, or even particularly unusual, about that. It does not of itself mean that only one source of power is available.* If, however, by reason of the apparent exhaustiveness with which one provision, or group of provisions, dealt with the position of a person such as the respondent, there were an incompatibility of a kind that required a conclusion that only one provision or group of provisions was intended to apply, then that would be a reason for accepting the respondent's contention. Again, if one provision, or group of provisions, were directed with particularity to the case of a person such as the respondent, and the other were merely of general application, the same could be said. … In the result, the respondent's contention amounts to an assertion; a statement of an outcome that would be supportive of his freedom to remain in Australia, and in that sense protective of his interests, but without a convincing argument of statutory construction which sustains that outcome. Therefore, it fails.

(emphasis added, footnotes omitted)

Similarly, Gummow and Hayne JJ said (at 591 [67]), that the differences between the powers could not "*be ignored by an ellipsis which regards ss 200 and 501 as directed to the same practical outcome*".

It can be seen that the Plaintiff makes the same error as was made by the Respondent in *Nystrom* – it elides the practical outcomes achieved by the imposition of a catch limit on a licence with the setting of total allowable catch for a quota fishery, and argues backwards from a desired outcome that would be "*supportive*" or "*protective*" of its interest in the potential of being able to fish to a greater extent "*without a convincing argument of statutory construction which sustains that outcome*".

In *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 632, the Court said, in relation to the maxim *expressum facit cessare tacitum* (the wider principle of which *Anthony Hordern* is a specific example):

> However, that maxim, whilst a valuable servant, is apt to be a dangerous master and it is necessary to seek confirmation in the broader context of the whole Act.

The principle is to be applied with caution: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575. It is no more than a guide to ascertaining the intention of the legislature: *Launceston CC v Taswater (No 2)* 2015 LGERA 281 at 287 [11] (Pearce J).

In the *Malaysian Declaration Case*, French CJ stressed (at 177 [50]) that the *Anthony Hordern* principle, like *expressum facit cessare tacitum*, "*must be applied subject to the particular text, context and purpose of the statute to be construed*". The *Malaysian Declaration Case* dealt with a very specific statutory scheme under which the relevant statutory provisions had to be read harmoniously so as to give effect to Australia's international obligations of *non refoulement*. In that context, the central question was identified by Gummow, Hayne, Crennan and Bell JJ (at [84]) as whether the statute "*confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power*". Nothing can be derived from the fact that the principle from *Anthony Hordern* was found to apply in that particular statutory context. In particular, nothing said in the *Malaysian Declaration Case* detracts from the analysis of the *Anthony Hordern* principle previously set out in *Nystrom*.

It is clear from both *Nystrom* and the *Malaysian Declaration Case* that the principle is one of statutory construction, by which a determination is to be made as to whether or not a specific statutory power that is subject to prescribed restrictions is taken to exclude a more general power which may be exercised without those restrictions. It follows that there is no scope for any notion of "operational inconsistency" between the respective sources of power, by which one of the powers is only excluded only once the other power has been exercised, and still less is it possible to argue (as the Plaintiff seeks to do) that such operational inconsistency should depend on whichever of the two powers happens to have been exercised first. The Plaintiff cites no authority to support such a novel approach to statutory construction, by which the existence or availability of a statutory power would depend upon looking at what may be, from time to time, the consequences of that exercise of power.[71] In fact, Nystrom is directly against

71 The concept of operational inconsistency has been employed in a completely different context, in determining whether there is inconsistency between a law of the Commonwealth and a law of a State for the purposes of s 109 of the *Commonwealth of Constitution* (Cth). However, just as it is necessary to distinguish the *Anthony Hordern* principle from the doctrine of implied repeal (see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [47] per Gummow and Hayne JJ), the principles relating to s 109 inconsistency do not provide any useful comparison in the present case.

the concept of "operational inconsistency" advanced by the Plaintiff: see passages cited above, and see also at 584 [46] (Gummow and Hayne JJ).

The subject-matter of the power in s 64A(1) is a discretionary[72] power to set a total allowable catch for a specified period for a quota fishery (para (a)), and to determine the quantity of fish comprising an individual quota unit in a quota fishery in a specified period (para (b)). If a total allowable catch is set, and a determination of the quantity of fish comprising an individual quota unit is made (with the effect that a quantity of fish will also be able to be calculated for each individual quota), those values are not "*catch limits*" as defined in s 4(1) of the Act. The effect is that other provisions of the Act which operate by reference to "*catch limits*" ([eg], s 37(1)) do not treat the values set under s 64A(1)(b) (or the values calculated for each individual quota) as if they were "*catch limits*". The effect is also that the power in s 153(1) and (2) of the Act, read with Item 1.4 of Schedule 3, cannot be used to set a total allowable catch or the quantity of fish comprising an individual quota unit.

However, those effects say nothing about whether there is power under s 153 to impose a licence condition limiting the quantity of fish that may be caught by the holder of a licence in a particular class. Such a condition would be a "*catch limit*", which is something substantively different from an individual quota (or any determination of the quantity of fish comprising an individual quota unit, etc.), and which would attract different consequences under different provisions of the Act.

The power in s 64A(1) is in aid of management of a fishery that is a quota fishery. There is a different power to make regulations prescribing conditions to which access licences (including by class) will be subject. That different power is s 153(1) and (2), which extends to providing for a condition on a class of licences by reason of, *inter alia*, subs 153(3)(a) and (b)(i). The power to impose licence conditions plainly extends to conditions that would limit the quantity of fish that might be caught under a licence (eg restrictions on minimum size, restrictions on the days or times on which fishing may be carried out, restrictions on equipment, etc.), and which might render it difficult for a licence holder to reach the allocated quota. Some such conditions would fall within the definition of "*catch limit*" in s 4(1) of the Act – which encompasses, for example, limits "*on the quantity or type of fish that may be taken, possessed or controlled in any specified circumstances, regardless of … whether the circumstances refer to how, when, where or by whom the taking, possessing or controlling occurs*". There is no "bright line" distinction under which a condition that limits the quantity of fish that may be taken should be deemed to be repugnant to management of a fishery by quota orders, but such other licence conditions could continue to apply.

There are no restrictions in the power to make a further quota order that necessitate confinement of the power to prescribe conditions on classes of licences. On the contrary, a consideration of s 64A(1) shows that an order may be made for any period whatsoever; it may be revoked or varied at any time; it may have a total allowable catch set at zero – all without attracting any right to payment of compensation. Far from being a power subject to restriction that is not to be avoided by recourse to a more general power, s 64A(1) plainly contemplates wide freedom as to its possible exercise.

The two powers (s 64A(1), read against existence of an order under s 64(1); and s 153) deal with different subject matters. On the one hand, management of a

72 To the extent that Rush J decided otherwise in *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179, it is respectfully submitted that the decision is clearly wrong. Section 45(1) and (3) of the *Interpretation of Legislation Act 1984* (Vic) mandate that, in all cases, the term "may" be construed as meaning that "the power so conferred may be exercised, or not, at discretion". See also *Johnson v Appeal Costs Board* [2014] VSC 313 at [30]-[32] (Warren CJ); *The Salvation Army Southern Territory v Jarvis* [2016] VSC 34 at [58] (Riordan J).

> quota fishery and the creation and allocation of (transferable) quota entitlements; on the other hand, the imposition of conditions on licences or classes of licences. It is not to the point that the exercise of each of the powers may (but need not) result in a similar consequence or outcome in some respects – ie a limitation on the amount of fish that may be caught by a licence holder.
>
> The fact that there can be two limits does not engage the principle in *Anthony Hordern*. The limits serve different purposes and operate in different ways. Nor is the principle engaged by the fact that there can be two sets of consequences in respect of breach of the two limits.[73] If there are two limits, the licence holder will need to comply with both. There are no "*conflicting commands which cannot both be obeyed*".
>
> On the proper construction of the Act, irrespective of existence of an order under s 64(1), there is power to prescribe, by way of a condition on a class of licences, a limit on the quantity of fish that can be caught by the holder of a licence in that class.

124 In my opinion the defendants' submissions on the *Anthony Hordern* principle supply a compelling rebuttal of all of the plaintiff's arguments on the present topic. Indeed, I accept everything in the defendants' two sets of submissions on this topic, save for the following relatively minor and ultimately inconsequential qualifications:

(a) In the second paragraph above extracted from the defendants' initial submissions, it would be more correct to say that s 55 of the Act recognises, rather than permits, the making of regulations that add a condition to a class of licence. See also s 52(1)(b), as well as s 153 itself.

(b) In relation to the eleventh paragraph extracted above from those initial written submissions of the defendants, it should be noted that s 4(2) includes, at the end, the words "unless inconsistent with the context or subject matter".

(c) In the very next paragraph extracted from the same document, it may be too wide to say that a definition "cannot" be the source of a limitation upon powers conferred by the Act. Likewise, it may be too wide to say that a definition "only" has the function referred to in the paragraph. In *Kelly v The Queen*,[74] in the first of the paragraphs from the judgment of McHugh J to which the defendants refer, his Honour said, among other things:

> > However, a legislative definition is not or, at all events, should not be framed as a substantive enactment.
>
> His Honour left open the possibility that a legislative drafter might, in particular case, albeit undesirably, frame a definition clause in such a way as to cause it to go beyond the proper function of a definition clause. However, I agree with the defendants that the definition of "catch limit" in the Act is to be read in the conventional way as a definition only, and that the defendants' submissions about the true operation and effect of the definition of "catch limit" in the Act are to be accepted.

---

73 In the case of fishing above quota, ss 66 and 66A; in the case of a limit that applies as a licence condition, s 53 and also ss 128 and 129.

74 *Kelly v The Queen* (2004) 218 CLR 216 at [84].

(d) In relation to the eleventh paragraph extracted above from the second set of the defendants' submissions (ie the defendants' submissions on the *Anthony Hordern* principle), and as to the footnote to that paragraph, I express no view on the question whether, in *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179, Rush J decided otherwise than that the power in s 64A(1) of the Act is discretionary. Nor do I express any view as to whether, if his Honour did so decide, his Honour's decision was wrong (or clearly wrong). It is simply unnecessary to form a view about those matters for present purposes. It is enough to recognise, that, as the defendants themselves point out in the fourteenth paragraph of the same set of submissions, and as Rush J himself noted,[75] a total allowable catch may (at least in theory) be set at zero.

125 It follows that, in my opinion, there is power under the Act to impose, by regulations, on an access licence for a fishery that is quota-managed, a condition limiting the quantity of fish that may be taken by the holder of the licence during any particular period. In my view, the position is the same whether the cap be above or below the level of the total allowable commercial catch which may happen to be provided for, from time to time, in any FQO made under s 64A in relation to the fishery.

126 It follows that I do not accept the contentions advanced by the plaintiff under paras 36 and 37 of the amended originating motion.

Was the Minister's decision to revoke the IQO invalid because of the manner of her exercise of the power to revoke?

127 It is convenient, next, to deal with the plaintiff's contentions under paras 28 to 33 of the amended originating motion, to the effect that the manner in which the Minister exercised the power to revoke the IQO invalidated the revocation order that was made on 17 March 2017 and published in the Government Gazette on 24 March 2017.

128 In order to explain the grounds relied upon by the plaintiff, it is necessary to set out some more detail about the history of the plaintiff's involvement in the Fishery and about the management arrangements for the Fishery over the relevant years.

129 In April 2013, the Minister's Department released a document entitled "Proposal to establish a commercial dive fishery for scallops in Port Phillip Bay" ("the Proposal").[76] As the very first sentence of the Proposal, under the heading "Overview", the following appeared:

> This paper describes the proposed management arrangements to establish a small "niche" commercial fishery for scallops, *Pecten fumatus* and *Chlamys asperriumus*, in Port Phillip Bay

The Proposal stated that feedback was sought from recreational and commercial fishers and other interested people on the development of the proposed fishery.

130 The Proposal suggested that because of the highly variable abundance and distribution of scallops over time, ensuring sustainable harvest of the resource

75 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179 at [28].

76 Department of Primary Industries, "Proposal to establish a commercial dive fishery for scallops in Port Phillip Bay" (April 2013) (Exhibit BWC1 to the affidavit of Bruce William Collis sworn 15 May 2017, 14-39) (CB 55-80).

would mean either setting a conservative initial catch level or undertaking significant and recurring investment in data collection and assessment to justify the setting of a higher catch level.[77]

131 It was stated that the development of the proposed fishery would follow a two stage process. In stage 1, a public auction would be held to offer a single entitlement for the proposed fishery. The single commercial entitlement would then be fished under a set of precautionary "baseline" management standards. These baseline management standards would include a number of restrictions and conditions including an initial total allowable commercial catch ("TACC") set at a conservative level and exclusion from commercial harvesting in the two major recreational scallop fishing areas. In stage 2, the entitlement holder would need to organise for the collection of data on the abundance and distribution of scallops and for that data to be analysed and used to develop a stock assessment. The entitlement holder could then use that stock assessment to request government approval for an increase in the TACC, subject to independent verification. It would be for the entitlement holder to decide whether or not the additional costs incurred in providing the required information would be justified by the benefits from a potential increase in TACC.[78]

132 An eight week public comment period followed the release of the Proposal. Submissions received were collated and used to inform the establishment of the Fishery.

133 In November 2013, the Department released a document entitled "Invitation to submit an Expression of Interest to Participate in the Auction of a Scallop Dive (Port Phillip Bay) Access Licence (and Quota)" ("the Invitation").[79] The Invitation set out the process by which the single licence for the proposed fishery would be awarded.[80]

134 Also in November 2013, the Department released a document called "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" ("the BMA").[81] The BMA was referred to in the Invitation and the "EOI Application Form and Declaration" required applicants to declare that they had read and understood the BMA. The stated purposes of the BMA were "to specify the baseline management arrangements that will apply to the proposed Commercial Scallop Dive Fishery at the commencement of fishing and outline the process for potentially developing the fishery".[82]

---

77 Department of Primary Industries, "Proposal to establish a commercial dive fishery for scallops in Port Phillip Bay" (April 2013), 6.

78 Department of Primary Industries, "Proposal to establish a commercial dive fishery for scallops in Port Phillip Bay" (April 2013), 2.

79 Department of Environment and Primary Industries, "Invitation to submit an Expression of Interest to Participate in the Auction of a Scallop Dive (Port Phillip Bay) Access Licence (and Quota)" (November 2013) (Exhibit BWC1 to the affidavit of Bruce William Collis sworn 15 May 2017, 42-74) (CB 81-113).

80 Department of Environment and Primary Industries, "Invitation to submit an Expression of Interest to Participate in the Auction of a Scallop Dive (Port Phillip Bay) Access Licence (and Quota)" (November 2013), 3.

81 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013) (Exhibit BWC1 to the affidavit of Bruce William Collis sworn 15 May 2017, 75-104) (CB 114-143).

82 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 2.

135 The overview section of the BMA relevantly included the following:[83]

> This document builds on the "Proposal to establish a commercial dive fishery in Port Phillip Bay" which was released for public comment in April 2013. Submissions on the proposal were collated and are being used to inform the establishment of the proposed fishery.
>
> Section 1 of this document describes a set of baseline management arrangements, which have been developed to achieve compliance with relevant legislation and to meet fishery management objectives. These arrangements will apply to the proposed Commercial Scallop Dive Fishery at the commencement of fishing.
>
> Existing knowledge of the scallop resource in Port Phillip Bay is limited. The baseline management arrangements are, therefore, conservative. Note that the term "conservative" here equates to exercising additional caution in favour of conservation when information on stock status is absent or uncertain (Dowling et al 2008).
>
> There may be an opportunity for catch limits to be increased if this is supported by data collected by the licence holder. Section 2 of this document outlines the requirements for data collection, analysis and assessment for each stage of the fishery's development. For instance, from Level 1 (data-limited, no reliable information on current biomass or exploitation rate) when only mandatory, fishery-dependent data are collected, to Level 3 (highest quality data, robust quantitative assessment and least uncertainty regarding stock status) where the fishery is fully developed.
>
> The [Department] acknowledges that the collection and interpretation of fishery information will incur costs. All such costs shall be borne by the licence holder. The licence holder will, therefore, decide if, when and how much to progress the fishery (as described in Section 2). There will be no requirement to develop the fishery beyond Level 1.
>
> The Department makes no representation as to whether the fishery is capable of being further developed. For instance, while additional information may support less conservative management (ie a higher catch limit), it may also indicate that initial catch limits should be decreased to ensure the sustainability of the stock.
>
> The proposed Commercial Scallop Dive Fishery will continue to be managed under the baseline management arrangements set out in this document until a draft "Commercial Fishery Plan" is approved by the Department. The licence holder will be required to develop the Commercial Fishery Plan within 12 months from the commencement of fishing.
>
> …
>
> It is important to note that the economic viability of this fishery is unknown, and that the Department gives no guarantee about its profitability.

136 The introduction to "s 1: Baseline management arrangements" relevantly included the following:[84]

> A set of precautionary baseline arrangements for the fishery have been developed to achieve fishery management objectives (see Management objectives). These arrangements will be specified via *Fisheries Regulations 2009* and as conditions on the Scallop Dive (Port Phillip Bay) Fishery Access Licence.
>
> While the arrangements themselves cannot be altered (ie the fishery will be managed with a Total Allowable Commercial Catch (TACC), the parameters of the

83 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 2.

84 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 3.

> arrangements may be adjusted as part of the future development of the fishery (ie the amount of the TACC may be changed as more information becomes available – see Section 2) if the appropriate data collection, analysis and assessment supports a change.
>
> The fishery would develop primarily through changes to catch limits, which can be effected annually. Other management arrangements (ie the size limit) may be adjusted, but these changes would involve amendments to regulations so would occur over a longer time scale.
>
> The proposed Commercial Scallop Dive Fishery will be managed through a TACC which is administered by the established Quota Management System (QMS) and by a series of input controls including limited entry, gear restrictions, a size limit and spatial closures.

137 Thus the BMA explained that access to the proposed fishery would be authorised by a single access licence and that the proposed fishery would be subject to a TACC managed under a quota management system. The entire quota for the proposed fishery would be linked to the single access licence. Quota units would be allocated across six spatial zones of Port Phillip Bay. Two popular recreational scallop fishing areas would be excluded from the Proposed Fishery. An initial TACC of 12 tonnes whole weight of *Pecten fumatus* ("commercial scallop"), representing the cumulative total of 2 tonne from each of the six zones, and 600kg whole weight of *Chlamys asperrimus* ("doughboy scallop"), representing the cumulative total of 100kg from each of the six zones, would be allocated for the fishing year. The fishing year for the proposed fishery would be from 1 April each year to 31 March the following year ("the fishing year").[85]

138 The BMA indicated that the licence holder would be required to draft a "Commercial Fishery Plan", detailing the licence holder's proposed approach to developing the proposed fishery (consistently with s 2 of the BMA), within 12 months from the commencement of fishing. The Department would be responsible for developing a "Fishery Management Plan", within the meaning of Pt 3 of the Act, and the proposed fishery would be managed under the BMA until a Fishery Management Plan was developed.[86]

139 In light of the plaintiff's arguments, it is necessary to set out "Section 2: Guidelines for developing the fishery" of the BMA in full:[87]

> Fishing in the proposed Commercial Scallop Dive Fishery will begin under a set of baseline management arrangements to protect the scallop resource from overfishing, given the limited information available on stock status.
>
> There may be an opportunity, however, for the licence holder to develop the fishery beyond the baseline management arrangements if this is supported by data collected by the licence holder. As noted in Section 1, the fishery will develop primarily through changes to catch limits, which can be effected annually.
>
> The Department has specified the requirements for data collection, analysis and assessment that must be met in order to develop the fishery beyond the initial catch limits. These are described for each level of the fishery:

---

85 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 4-6.

86 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 8-9.

87 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 11-12.

- *Level 1: Mandatory fishery-dependent data.* At the first level, the fishery is data-limited and information on current biomass or exploitation rate is absent or uncertain. The only data that are collected are fishery-dependent data mandated by reporting requirements. If mandatory fishery-dependent data are the only data collected, changes to management arrangements (ie the Total Allowable Commercial Catch, TACC) would only be possible after a minimum of three years of data collection.
- *Level 2: Data collected at Level 1 plus fishery-independent survey data and additional (non-mandatory) data.* To progress the fishery to the second level, fishery-independent data are collected. The survey allows for a TACC to be set based on the empirical information about the resource.
- *Level 3: Data collected at Levels 1 and 2 plus modelling to assess stock status.* At Level 3, the fishery is well developed with high quality data (fishery-dependent and fishery-independent data), a time-series of fishery information, a robust quantitative assessment and the least uncertainty regarding stock status. At this level, the yield from the fishery would be optimised.

This multi-level approach to development allows a progressive "learning from doing" situation so that data collection, analysis and assessment evolves from the simple towards something more complex as more data are strategically acquired and the fishery can afford the costs of additional information collection. Essentially there is a progression from low cost, low yield, at Level 1 to higher cost, optimum yield, at Level 3.

This approach allows for higher potential catches as more is known about a stock but it also allows the licence holder to make decisions about how much to invest in developing the fishery.

At any level, the licence holder will be responsible for the collection and analysis of the required data. The licence holder may choose to do components of this work themselves, if they have the capacity (ie conduct the survey), or engage others to do the work (ie analysis of the data).

There will be parts of the process for data collection, analysis and assessment that must be completed by person/s independent of the licence holder. For example, the Department will specify that an independent observer must oversee the survey and the Department will also require an audit of the data. The licence holder will be required to bear these costs as well as any other costs associated with the collection and analysis of fishery information.

As a result, there will be a trade-off between the conservative arrangements that are set in the face of uncertainty against the cost associated with gaining more information that may allow less conservative arrangements to be set.

Under any level, however, there can be no changes to the baseline management arrangements until a draft Commercial Fishery Plan is approved by the Department (see Section 1).

It is important to note that the licence holder will decide if, when and how much to progress the fishery. There is no requirement to develop the Fishery beyond Level 1.

The requirements for data collection, analysis and assessment for each level of the fishery's development are described in Appendix D.

The nature of scallop fisheries

As noted above, additional information may support less conservative management (ie a higher catch limit)). It may, equally, show that the initial catch limit should not be changed or, if there is evidence to suggest that the initial catch limit is unsustainable, decreased.

This is because scallop fisheries are characterised by naturally sporadic and fluctuating abundance and irregular, episodic recruitment. Scallops aggregate in

sub-populations (scallop beds) which vary temporally in size and location. As a result, the amount of scallops that can be taken sustainably may vary considerably from year to year.

Process for decision making

The process for decision making is provided to show how the collection, analysis and assessment of fishery information can lead to change in the baseline management arrangements (ie catch limits).

1. The licence holder (or person/s engaged by the licence holder) undertakes the collection, analysis and assessment of fishery information according to the requirements described above. The Department provides guidance and oversight of this process.
2. The results of the analysis and assessment are used to formulate a request for a change in management. The request is submitted to the Department.
3. The data, analyses and assessment are audited by the Department.
4. The Department may seek independent advice on the analysis and assessment from an independent panel comprised of scientific, government and commercial fishery members, as well as representatives from environmental and recreational sectors. The panel will be asked to consider the assessment prepared by the licence holder (or person/s engaged by the licence holder) as well as catch and effort trends, risks and other relevant factors and provide advice on the proposed change.
5. The Department may convene a public stock assessment workshop in order to provide transparency of process for all sectors that access the scallop resource in Port Phillip Bay.
6. The Department will make a decision regarding licence holder's proposal to amend the management arrangements.
7. The decision is communicated to licence holder and other stakeholders.

The licence holder will be required to bear the costs associated with the process outlined above with the exception of: seeking advice from an independent panel (No 4) and convening a public workshop (No 5). The Department will bear the costs of these two items.

140 In Appendix D to the BMA, the relationship between data collected at Level 2 and the setting of a TACC is described as follows:[88]

> For the purposes of setting a TACC for the current fishery, the estimated abundance of scallops per zone, rather than per stratum, needs to be calculated. …
>
> The simplest way to then calculate biomass in each zone would be to use the scaled estimates of abundance for each zone and the mean weights from retained scallops (whole fresh weight per individual) from a range of size categories (90mm and larger) to estimate the percentiles of biomass in each category.
>
> A proportion (eg 10 to 20%) of the average estimated biomass (of scallops 90mm or larger) for each zone would be set as the TACC. Setting the proportion at a relatively conservative level of 10 to 20% ensures sustainable harvest in the event of high mortality and/or slow growth (as observed in the historical dredge fishery). It also ensures, in combination with size limits, that sufficient future reproductive potential is retained, and accounts for the vulnerability of scallops to fishing (sedentary and aggregated in beds).

141 Having been interested in the development of a scallop fishery in Port Phillip Bay for a number of years, Mr Collis obtained a copy of the Proposal and made submissions to the Department in response, in his capacity as Managing

88 Department of Environment and Primary Industries, "Commercial Scallop Dive Fishery (Port Phillip Bay) Baseline Management Arrangements" (November 2013), 24.

Director of VicFish Pty Ltd ("VicFish").[89] In his submissions, Mr Collis referred to his being a supplier of scallops to "one of Australia's premium restaurant chains" since 2010, his approaches to and discussions with the Department in relation to commercial scallop fishing in Port Phillip Bay and his preparedness, in terms of equipment and trained staff, to operate in the proposed fishery. Mr Collis strongly submitted that it would not be "appropriate or fair" to have a single licence and that, instead, at least five licences should be offered. He noted that higher value restaurant buyers would want the greater supply certainty that multiple licences would provide, and the pitfalls of creating a monopoly. Finally, Mr Collis submitted that one (of multiple) licences should be available to himself in "acknowledgement of all the research, planning, testing, infrastructure and the concept brought forward to create this ecologically sound fishery".[90]

142 In about November 2013, Mr Collis received the Invitation and the BMA from the Department. From these documents, Mr Collis claims he understood that the BMA and the regulations that would be made would form the management of the proposed fishery.[91] Mr Collis, in his capacity as a Director of VicFish, made the winning bid of $180,000 at the auction on 20 February 2014.[92] On the advice of his accountant, Mr Collis decided that a separate company should hold the licence. The plaintiff was registered on 13 May 2014 for this purpose. Mr Bruce Collis has at all times been the sole director and sole shareholder of the plaintiff.[93]

143 In the months following the auction, Mr Collis had various discussions with representatives of the Department regarding arranging for a fisheries independent survey to be carried out in accordance with the BMA. In around May 2014, Mr Collis engaged Fisheries Victoria, the relevant agency of the Department, to carry out a biomass survey in order that, if the results were supportive, an application for a higher TACC could be made in line with the BMA.[94]

144 On 28 May 2014, Ms Kylie Wohlt, Acting Manager Policy and Strategy at Fisheries Victoria, sent an email to Mr Collis which, among other things, outlined the process for applying for a TACC increase by reference to the BMA. Ms Wohlt's email attached a document entitled "Total Allowable Commercial Catch Setting Process for the Scallop Dive (Port Phillip Bay) fishery – Statutory Consultation Plan", which described a process whereby the licence holder would provide Fisheries Victoria with information to inform a TACC increase, Fisheries Victoria would prepare a recommendation to the Executive Director

89 Affidavit of Bruce William Collis sworn 15 May 2017, [5]-[6] (CB 337-338).

90 Exhibit BWC1 to the affidavit of Bruce William Collis sworn 15 May 2017, 40-41 (CB 359-360).

91 Affidavit of Bruce William Collis sworn 15 May 2017, [8]-[9] (CB 338).

92 Affidavit of Bruce William Collis sworn 15 May 2017, [16] (CB 339); Exhibit BWC1 to that affidavit, 175-178 (CB 380-383).

93 Affidavit of Bruce William Collis sworn 15 May 2017, [2] (CB 337), [17]-[18] (CB 339); Exhibit BWC1 to that affidavit, 1-7 (CB 350-356).

94 Affidavit of Bruce William Collis sworn 15 May 2017, [20] (CB 339).

Fisheries Victoria (as delegate for the Minister) regarding the TACC and then the Executive Director would release the proposed FQO for written comment by persons and organisations with relevant interests.[95]

145 On 29 November 2014 a State election was held, causing a change of government.

146 What followed next is set out in the judgment of Rush J in *Port Phillip Scallops Pty Ltd v Minister for Agriculture*.[96] The biomass survey report produced by Fisheries Victoria was completed in November 2014 and estimated a biomass of 3,629 tonnes of scallop. Following discussions with the Department, the plaintiff submitted an application to increase the TACC to 725 tonnes on 11 November 2014. At a meeting on 3 December 2014, a representative of the Department informed Ms Belinda Wilson, CEO and Corporate Counsel for the plaintiff, that he would recommend a TACC of 585 tonnes to the Executive Director of Fisheries Victoria and that he anticipated the consultation period would be completed by Christmas and, after a one week period to review submissions, a new TACC would be set. On 5 December 2014, the plaintiff confirmed it was agreeable to a TACC of 585 tonnes. However no FQO for the 2015-2016 fishing year was issued at that stage. Between January and April 2015, the plaintiff repeatedly expressed concern about the delay and stressed the urgency of the situation and the detriment it was causing to the plaintiff. The initial FQO expired on 1 April 2015 and, therefore, from that date, the Fishery was effectively closed.

147 On 22 April 2015, the plaintiff filed an originating motion in this Court seeking an order in the nature of mandamus compelling the Minister to make and publish an FQO for the Fishery for the 2015-2016 fishing year setting a total TACC of 585 tonnes of scallop. The matter was heard in the Practice Court on 27 April 2015 and Justice Rush gave judgment on 1 May 2015, making an order in the nature of mandamus compelling the Minister to make and publish an FQO for the 2015-2016 fishing year on or before 25 May 2015.[97]

148 Justice Rush held that while s 64A(1) of the Act is cast in discretionary terms, once it is determined to manage a fishery by IQO and the allocation of quotas, there is a requirement to set a TACC by FQO.[98] In light of the unexplained delay and "complete disregard" by the Minister of the plaintiff's legitimate interests demonstrated by the evidence, his Honour found that an order in the nature of mandamus should be made to compel the performance of the unperformed duty.[99] However, his Honour found that the Minister was not bound to set the TACC at 585 tonnes or at any other particular level.[100]

149 On 25 May 2015, a Further Quota Order for the 2015-2016 fishing year ("2015-2016 FQO") was gazetted. The 2015-2016 FQO allowed a TACC for scallop (excluding doughboy scallop) of between 0 and 103 tonnes of unshucked scallop per scallop commercial fishing management zone ("zone")

95 Affidavit of Bruce William Collis sworn 15 May 2017, [21] (CB 339); Exhibit BWC1 to that affidavit, 179-185 (CB 199-205).

96 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179.

97 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179.

98 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179 at [28].

99 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179 at [31]-[33].

100 *Port Phillip Scallops Pty Ltd v Minister for Agriculture (Vic)* [2015] VSC 179 at [36]-[37].

and quota unit, totalling 146 tonnes for the Fishery, and a TACC for doughboy scallop of 100kg of unshucked doughboy scallop per zone and quota unit, totalling 600kg for the Fishery.

150 In June and July 2015 discussions took place between the plaintiff and the Department regarding future management of the Fishery. A key agreement arising out of these discussions was the establishment of a steering committee to develop a management plan for the Fishery.[101]

151 The steering committee as established was composed of representatives from the Department, the plaintiff, Seafood Industry Victoria[102] and VRFish[103] and an independent chair. Three meetings took place over August and September 2015, in the course of which a draft management plan was prepared.[104]

152 The harvest strategy in the draft management plan prepared by the steering committee imposed the following restrictions on the TACC:[105]

(a) The maximum TACC that could be set for year 1 of the 5 year plan was 250 tonnes and the maximum TACC that could be set for any of the subsequent 4 years was 750 tonnes;

(b) The TACC would only be increased if the licence holder harvested at least 75% of the previous year's TACC in that year; and

(c) An increase in TACC would be subject to management decision rules applied to the available biomass, as determined by annual abundance surveys.

153 The draft management plan also provided for the TACC to be set each January.[106]

154 The Department informed the steering committee by email sent on 12 October 2015 that the draft management plan had been approved for release for statutory consultation commencing 14 October 2015.[107] The statutory consultation period for the draft management plan ended on 14 December 2015.[108]

155 A fourth meeting of the steering committee took place on 16 December 2015. At the meeting, the steering committee reviewed and discussed the submissions on the draft management plan. Following the meeting, the Department produced a report on the submissions incorporating responses by the steering committee and by the Department.[109]

---

101 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(a)]-[10(d)] (CB 462-463); Exhibit DGH1 to that affidavit, 1-32 (CB 479-511).

102 An industry body.

103 A body representing recreational fishers.

104 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(f)-(h), (j)] (CB 463-465); Exhibit DGH1 to that affidavit, 36-53 (CB 515-532), 58-70 (CB 537-549).

105 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(j)] (CB 465); Exhibit DGH1 to that affidavit, 71-98 (CB 550-577).

106 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(j)] (CB 465); Exhibit DGH1 to that affidavit, 71-98 (CB 550-577).

107 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(k)] (CB 465-466); Exhibit DGH1 to that affidavit, 99 (CB 578).

108 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(o)] (CB 466).

109 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(o)] (CB 466); Exhibit DGH1 to that affidavit, 106-121 (CB 586-601).

156 In an email to Ms Wilson sent on 9 February 2016, Mr Dowling, the Executive Director of the Department, advised that he was making "a minor amendment" to the draft management plan, namely an additional decision rule whereby the TACC for the next fishing year would be reduced by 50% of the difference between the actual catch and the TACC if less than 75% of the current TACC has been harvested. Mr Dowling noted that Fisheries Victoria hoped to finalise the draft management plan, as amended, "this week".[110] Ms Wilson responded on 11 February 2016, noting that while the plaintiff was "somewhat disappointed with the process, and the views of the steering committee being overridden in a significant area of the Harvest Plan, we will not be taking this matter further, provided the draft management plan and the draft [FQO] (as per the public consultation) are gazetted, without further amendment". Ms Wilson also raised a concern about a separate amendment and sought details in relation to the gazetting of the draft management plan and FQO, including a timeframe for same.[111]

157 On 12 February 2016, Mr Dowling replied that the amended draft management plan would be signed "very shortly".[112] On 22 February, in response to Ms Wilson seeking an update, Mr Dowling replied that the draft management plan "is currently going through the approval process and we hope for a sign off shortly".[113]

158 This did not occur. On 6 April 2016, Ms Wilson emailed Mr Dowling on the basis that she understood that the Minister had raised some questions in relation to the draft management plan.[114] According to notes taken by Ms Wilson, she and Mr Dowling had a telephone conversation the next day, in which he advised that legal advice was being sought by the Department in relation to the draft management plan (without providing particulars).[115] On 26 April 2016, Ms Wilson sought an update on whether Mr Dowling had received the requested legal advice and noted that without a 5 year plan the plaintiff's ability to develop export opportunities it had identified would be "significantly compromised". Mr Dowling replied on the same day that the Department was "working through a number of legal questions in relation to the management plan" but that this would not "prevent [the plaintiff] undertaking investment or business decisions that it feels are prudent", noting that abalone and rock lobster fisheries continued to operate and invest while their respective plans were developed.[116]

159 On 28 April 2016, a meeting took place between Mr Dowling and other members of the Department and Mr Collis and Ms Wilson. According to

110 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(p)] (CB 466); Exhibit DGH1 to that affidavit, 122-125 (CB 602-605).

111 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(p)] (CB 466); Exhibit DGH1 to that affidavit, 126 (CB 606).

112 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(r)] (CB 467); Exhibit DGH1 to that affidavit, 127 (CB 607).

113 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(t)] (CB 467); Exhibit DGH1 to that affidavit, 128 (CB 608).

114 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(u)] (CB 467); Exhibit DGH1 to that affidavit, 129 (CB 609).

115 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(v)] (CB 467); Exhibit DGH1 to that affidavit, 130-131 (CB 610-611).

116 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(w), (x)] (CB 468); Exhibit DGH1 to that affidavit, 132-134 (CB 612-613).

Ms Wilson's notes, at the meeting Mr Dowling advised that he had requested the draft management plan back from the Minister's office and that he was seeking further legal advice, which he anticipated would take two months, as he was not satisfied with preliminary advice he had received. Ms Wilson's notes also record that Mr Dowling said that he was committed to a fishery but would not say what the fishery would look like.[117]

160 On 27 May 2016, Ms Wilson met with the Minister to discuss the Fishery. An email from Ms Wilson to the Minister, sent on 31 May 2016, records that the Minister said, during that meeting, that she was not comfortable with there being only one licence and that Ms Wilson had submitted that the lack of a gazetted management plan was creating uncertainty and hindering the development of the plaintiff's business. Ms Wilson's email listed particular impacts as being the inability to engage with export opportunities in China requiring long-term commitments, the expense of conducting the annual biomass survey (without certainty on the continued staged development of the Fishery), the need for ongoing investment by the plaintiff's diving contractors and the inability to make long-term decisions on future premises, such as a processing plant/storage facility on the Bellarine Peninsula. Ms Wilson also noted the following:[118]

> Under the terms of the Baseline Management Arrangement the company was entitled to develop the fishery at its own pace provided it was scientifically established. Whilst 250 tonnes is greater than the initial 12 tonnes, this amount was in effect a notional amount, set prior to and subject to scientific data on the scallop biomass being undertaken to establish a commercially viable TACC. The company never intended to operate the fishery as a 12 tonne fishery as it is not commercially viable. The company's plan was always to develop the fishery in accordance with the Baseline Management Arrangement, which would have resulted in a conservative 585 tonnes (10% of the available biomass, being the lowest scale under the Baseline Management Arrangement) in the first year of operation.

161 On 10 June 2016, Ms Wilson sought an update from Mr Dowling regarding the gazettal of the draft management plan and again stressed the plaintiff's need for certainty.[119] Mr Dowling replied on the same day to the effect that there were "a number of areas that the Dept is still seeking to clarify" and noting that a management plan was not a legislative requirement.[120] On 19 July 2016, Ms Wilson again sought an update from Mr Dowling, noting that the situation was "disappointing". Mr Dowling again replied that the Department was "continuing to consider advice in relation to the management plan" and that a management plan was not a legislative requirement nor necessary for the fishery to operate effectively.[121]

---

117 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(y)] (CB 468-469); Exhibit DGH1 to that affidavit, 135-137 (CB 615-617).

118 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(aa), (bb)] (CB 469); Exhibit DGH1 to that affidavit, 141-142 (CB 621-623).

119 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(cc)] (CB 469); Exhibit DGH1 to that affidavit, 143-144 (CB 623-624).

120 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(dd)] (CB 469); Exhibit DGH1 to that affidavit, 145-146 (CB 625-626).

121 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(ee)] (CB 469-470); Exhibit DGH1 to that affidavit, 147-148 (CB 627-628).

162 The draft management plan was never gazetted.[122]

163 On 7 December 2016, Mr Hamley caused to be sent to the Department the results of the 2016 fishery-independent biomass survey, undertaken by Dr David Gwyther, which indicated the total available biomass in the fishable areas to be 5,510 tonnes.[123] On the basis of this result, on 20 December 2016 the plaintiff applied for a TACC of 250 tonnes for the 2017-2018 fishing year.[124] Mr Dowling acknowledged receipt by email, noting that the application would be considered as part of the TACC setting process and that he would let the plaintiff know as soon as possible about next steps.[125] Mr Dowling also sent a letter dated 21 December 2016 advising that he aimed to provide further written information regarding future management in "early 2017" and that the plaintiff should contact Dallas D'Silva, Director of Fisheries Policy and Licencing, if it required any further information.[126]

164 The plaintiff heard nothing further of a substantive nature from the Department until 10 February 2017. On that day, a meeting took place between Mr Dowling, Mr D'Silva, Mr Collis, Mr Hamley and Mr Davey from Seafood Industry Victoria. Mr Hamley's notes record that Mr Dowling introduced the meeting by saying that its purpose was to convey "decisions" regarding the management of the Fishery. These decisions included capping the quota of the Fishery permanently at 60 tonnes by regulation. Mr Hamley recorded that this decision was explained as being a response to disquiet behind the scenes as to the size of the current quota and there being only one licence and that the figure of 60 tonnes has been arrived at based on what had been caught that year and what would be considered a "niche" fishery. Mr Collis expressed a view that the process that had led to the decision lacked integrity and that the provisions of the BMA had not been honoured. Mr Hamley said that such concerns should have been dealt with at the public consultation stage before the licence was issued and that the plaintiff bought the licence in good faith based on the provisions of the BMA. Mr Hamley noted that Mr Dowling rejected a suggestion that compensation should be offered to the plaintiff. Mr Hamley also recorded that Mr Dowling acknowledged that the Fishery had the potential to be developed into a 200-300 tonne (or possibly even larger) fishery.[127]

165 As the plaintiff discovered later, the Department had prepared a briefing note for the Minister with the subject "Setting a catch limit for the Scallop Dive (Port Phillip Bay) Fishery" dated 18 January 2017.[128] The "core message" of the briefing note was:

---

122 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(gg)] (CB 470).

123 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [10(ff)] (CB 470); Exhibit DGH1 to that affidavit, 149-171 (CB 629-651).

124 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [11] (CB 470); Exhibit DGH1 to that affidavit, 172-174 (CB 652-654).

125 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [12] (CB 470); Exhibit DGH1 to that affidavit, 175-176 (CB 655-656).

126 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [13] (CB 470); Exhibit DGH1 to that affidavit, 177 (CB 657).

127 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [14]-[15] (CB 470-471); Exhibit DGH1 to that affidavit, 178-179 (CB 658-659). Confirmed as true and correct by affidavit of Johnathon Davey sworn 18 July 2017, [3] (CB 1059).

128 Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [3] (CB 684-685); Exhibit LEB2 to that affidavit, 3-7 (CB 689-693).

> The Scallop Dive (Port Phillip Bay) Fishery was established as a small scale "niche" commercial dive fishery. Recent biomass surveys have indicated that the harvest could grow beyond what could be considered a "niche" fishery. A number of community stakeholders have expressed concern with the potential that a large commercial fishery is being developed, counter to the original intention and underlying principles for the fishery. To address this concern, your permission is sought to amend the *Fisheries Regulations 2009* to permanently set a catch limit of 60 tonnes for the fishery, effective from 1 April 2017, and revoke the Quota Order which established the fishery as a quota managed fishery.

The recommendations given were that the Minister:

> (a) Agree to revoking the initial quota order and transition the fishery to a catch limited fishery.
>
> (b) Agree to setting a catch limit for the Port Phillip Bay commercial scallop dive fishery at 60 tonnes by amendment to the *Fisheries Regulations 2009*.
>
> (c) Agree to grant an exemption to the public consultation RIS process due to the pending 1 April 2017 start of the new quota season and the ability for DEDJTR to run a targeted and more timely consultation process with the single licence holder.

The "key information" provided was as follows:

> • Commercial scallop fishing using a steel dredge operated in Port Phillip Bay for 40 years up until the late 1990's. The fishery was closed by the Kennett Government due to community concern over the environmental impacts of towing a steel dredge across the floor of the Bay.
>
> • The fishery was boom and bust and believed by many recreational fishers to adversely impact the snapper fishery in the Bay.
>
> • Over the last 3 years there has been considerable concern expressed by the recreational fishing sector about the rapid growth of the Scallop Dive (Port Phillip Bay) Fishery. This follows more than a decade of no commercial scallop fishing in the Bay. (see example email – Attach 1)
>
> • The Scallop Dive (Port Phillip Bay) Fishery was established in 2013 under the former government as a small, high value "niche" commercial fishery with an initial precautionary Total Allowable Commercial Catch (TACC) of 12 tonnes. The concepts of small scale, niche and boutique commercial fishery were strong themes in public communications at the time of establishment. This led to cautious support from the recreational sector and the broader public. The Baseline Management Arrangements (BMA) documentation provided prior to the public auction of the licence also reflected this theme of small scale and conservatism, but also provided for careful staged development of the fishery, conditional on the collection of specific data about the fishery to demonstrate sustainability.
>
> • The TACC for the 2017/18 fishing year is due to be set on 1 April 2017. The licence holder has met the data collection requirements for development and, despite only catching about 58 tonnes to date this fishing year, has recently applied to maintain his TACC at 250 tonnes for the 2017/18 fishing year.
>
> • A draft Management Plan for the fishery was prepared in 2016, and was used as a basis to set the TACC at 250 tonnes in 2016/17. The draft plan underwent public consultation and the approach to development was not supported by key recreational fishing bodies. VRFish stated that the plan was "at odds with the intent by which the fishery was initially proposed". FutureFish and other recreational fishers also strongly opposed the approach to development, requesting that the fishery not be allowed to

become high volume and or limited to 50 tonnes (Refer to attached submissions). A number of submissions from the commercial sector were made in support of the draft plan.

- Consistent with the draft plan, the 2016/17 TACC was set at 250 tonnes, but controls were put in place to limit the further expansion of the fishery, and provisions for a quota reduction if the full quota was not caught. If the apprach described in the draft plan was used to set the 2017/18 TACC, a TACC of 155 tonne could be set. The draft plan has not been formally declared, and therefore may provide limited guidance.
- Recreational fishing bodies believe that the proposal to continue to operate the fishery as a 250 tonne fishery is inconsistent with the key messages given to stakeholders upon establishment of the fishery and that the growth of a large scale commercial fishery in Port Phillip Bay is inconsistent with current government policy to improve recreational fishing opportunities in Victoria. (Attachment 2)
- The $27 million investment by Government to remove netting from the Bay demonstrates Government's commitment to making the Port Phillip Bay a prime recreational fishing destination. Given this, it is proposed that management arrangements for the fishery are amended to reflect this policy, and to give effect to the "niche" intent of the establishment of the fishery. This includes setting a catch limit of 60 tonnes for the fishery by regulation amendment.
- A 60 tonne fishery would provide for a sustainable niche fishery in the bay and recognise catch landed to date by licence holder. It would also provide fresh scallops to Victorians without impacting on recreational fishing and community interests.
- The fishery is currently a quota managed fishery, established by the former Minister in 2013 by the issue of an Initial Quota Order. In order to set a catch limit in the *Fisheries Regulations 2008* [sic], the Initial Quota Order would have to be revoked and the fishery would no longer be managed by quota.[129]

The Minister was advised that there were financial implications associated with the matter, specified as:

> The actual financial implications are unknown and will be dependent on the initiation and success of any legal challenge by the licence holder. Corporate Finance have been consulted on this issue and will be further involved in managing financial implications if required.

Under the heading "Context/Consultation" the following was noted:

> Legal challenge
>
> - [Redacted]
> - Approval is sought to seek an exemption to the public consultation RIS process. The reasons are the pending 1 April 2017 start of the new quota season and 6-9 month timeline to run a RIS process; and the ability for DEDJTR to run a targeted and more timely consultation process with the single licence holder.
> - [Redacted]
> - Following your approval of this approach, a letter will to be sent to the licence holder, advising him of our intention to permanently set the TACC at 60 tonnes. Fisheries Victoria will also offer to meet with the licence holder.

---

129 As indicated above, the defendants have now successfully argued to the contrary before me.

> • It is expected that recreational fishers will welcome this change, given their ongoing concern regarding the development of the fishery. It is likely that Seafood Industries Victoria (SIV) will oppose the change. During the consultation on the 2016/2017 TACC, SIV supported the 250 tonne TACC.

Attached to the briefing note were two submissions. The first was in the form of an email and, based on the name of the sender, the period in which it was sent and the identical text, it appears to be first of the two similar sets of submissions from recreational fishers recorded in the report on submissions received in response to the draft management plan. The second, based on similar reasons, appears to be the submission made by Mr Kramer of the Futurefish Foundation in response to the draft management plan. The briefing note was approved by Dallas D'Silva, as acting Executive Director Fisheries, and endorsed by Emma Phillips, as acting "Lead Dep Sec A&R", on 18 January 2017. The Minister ticked the box next to "approved" for each of the three recommendations and signed the briefing note. The Minister appeared to date her signature 17 January 2017 but it seems that the actual date was 18 January 2018.[130]

166 On 13 February 2017, following the meeting of 10 February 2017, Mr Dowling wrote a letter to Mr Collis referring to that meeting and continuing:[131]

> As I indicated at the meeting, the fishery was established as a small scale commercial "boutique or niche" dive fishery. However, your recent TACC requests have indicated that you seek for the harvest to grow beyond what could be considered as a "boutique niche" fishery. I am concerned with the potential for a large commercial fishery to be developed, as this is counter to the original intention and underlying principles for the fishery.
>
> Through public consultation on the Draft Management Plan it is apparent that there remains a divergence of community and stakeholder views on future management of the commercial fishery. In light of the above and after considering catch levels in the fishery since 2014, I outlined the proposal to amend the *Fisheries Regulations 2009* to establish an annual 60 tonne (unshucked) catch limit, commencing 1 April 2017.
>
> Under these proposed arrangements, the fishery will no longer be managed under a quota regime and the Initial Quota Order will be revoked. A 60 tonne (unshucked) annual catch limit will be established as a condition of the Scallop Dive (Port Phillip Bay) Fishery Access licence. Current restrictions on harvest levels within each of the six commercial zones would also be removed, allowing the scallops to be harvested in any area of Port Phillip Bay where commercial scallop fishing is currently permitted.
>
> I am also proposing to list the catch limit condition as a designated licence condition under the regulations. This carries increased penalties should a licence condition be breached and allows the court to suspend or cancel the licence.
>
> We are open to discussing future cost recovery arrangements for the fishery, including the frequency and nature of stock assessments currently paid for through commercial licence fees.
>
> I invite your feedback on these proposed changes in writing by 28 February 2017.

---

130 The plaintiff submits that it is unlikely that the Minister actually signed on 17 January 2017 and invites the Court to infer that the Minister signed it on or about 18 January 2017 and that the reference to "17" was an error: Plaintiff's Outline of Submissions at [113], fn 94. I accept that submission.

131 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [16] (CB 471); Exhibit DGH1 to that affidavit, 180-182 (CB 660-662).

167 On 24 February 2017, Mr Hamley responded to Mr Dowling's letter as follows (so far as relevant):[132]

> I write concerning the meeting on 10 February 2017 held at 1 Spring St. …
>
> I confirm that you informed us of the Government's decision concerning the fishery, namely:
>
> 1. To cap the quota of the fishery permanently at 60 tonne.
> 2. This will be achieved by a change of Government regulations.
> 3. The zones will be removed.
> 4. The need for biomass surveys will be reviewed.
>
> You acknowledged that we would be disappointed with the decision and that we have been giving conflicting information about the fishery.
>
> I confirm that:
>
> i) The basis of the decision was that the original intent was to create a niche fishery even though you acknowledged that the fishery had the potential to be a 200-300 tonne fishery or possibly much more.
> ii) The decision was arrived at by the Minister as a result of disquiet that has continued to be expressed behind the scenes about the current size of the quota and the fact of it being a single licence only.
>
> In response, I pointed out the following:
>
> 1. The Baseline Management Arrangements (BMA) document set out the provisions of a single licence including the quota allocation.
> 2. The BMA document and the proposal to establish a scallop hand dive fishery have been through an exhaustive public consultation process. If there were concerns about the licence provisions this needed to be dealt with at the public consultation stage before the Government sold the licence.
> 3. Bruce's company bought the licence in good faith and on the basis of the BMA. You are advising us that you do not wish to honour the BMA.
> 4. The whole process has lacked integrity.
>
> In response to a question about compensation, you confirmed that there was no intention to offer any compensation as part of the decision.
>
> There was further discussion as to:
>
> a) What in fact was a "niche fishery" and that the previous dredge fishery, which ceased in about the mid-1990s, had in some years caught in excess of 2000 tonne (meat weight, which is equivalent to approximately 12,000 tonne shell weight).
> b) The fact that the whole Fishery Management Plan Sub Committee process had been completed and there was agreements on recommendations for a management plan which you had stated would be signed off.
>
> We acknowledge receipt of your letter to Bruce Collis dated 13 February 2017. The decision has been made by the Government for political purposes and not based on science or the BMA. We do not propose to respond save to say that a number of statements made in that letter are made without any factual basis whatsoever and we dispute the matters contained in that letter.

168 Mr Dowling acknowledged receipt of Mr Hamley's letter, by email sent 24 February, in the following terms:[133]

---

132 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [17] (CB 471); Exhibit DGH1 to that affidavit, 183-185 (CB 663-665).

133 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [18] (CB 471-472); Exhibit DGH1 to that affidavit, 186-188 (CB 666-668).

> Thanks for your submission. We will consider this and provide further feedback prior to the finalisation of our proposed intent to regulate total take from the PPB Dive fishery at 60ton.

169 Mr Hamley responded to Mr Dowling's email on 2 March 2017 as follows:[134]

> In relation to my correspondence to you on 24 February 2017, this was confirmation of the substance of our meeting on 10 February 2017. It was not a submission and we do not propose to make a submission as clearly the Government has already made a decision in relation to the future management of the Fishery.

170 Mr Dowling responded on the same day as follows:[135]

> Thanks for touching base. I do not confirm that this is an accurate reference of the statements or discussion at our meeting.
>
> As you have advised that you will not provide a formal submission in relation to our proposed regulatory change we will proceed to consider the submissions we have received.

171 At this stage, no FQO for the 2017-2018 fishing year had been gazetted and, on 9 March 2017, the plaintiff filed a further originating motion in this Court in proceeding number S CI 2017 00832 seeking an order in the nature of mandamus compelling the first defendant to make and publish an FQO for the 2017-2018 fishing year for the Fishery. The proceeding was heard by me on 16 and 17 March 2017. At the conclusion of the hearing on 17 March 2017, I ordered that by 30 March 2017 the Minister make and publish an FQO for the 2017-2018 fishing season for the Fishery and gave ex tempore reasons for decision. Relevantly, I said:

> I consider that the order is required because there is an admitted duty on the part of the Minister to have in place, at all relevant times, once an initial quota order is made, a further quota order. We are now within two weeks of the commencement of the next fishing period. There has been a clear statement on behalf of the Department, speaking effectively on behalf of the Minister at that stage, by the oral communications of 10 February 2017, and by letter of 13 February 2017, that no further quota order would be produced because of a vaguely articulated proposal to change the underlying method of management of the fishery.
>
> Subsequently, in the very hearing of this proceeding, the Minister has proffered an undertaking to issue a further quota order by 31 March 2017, if there had been, in the meantime, no revocation of the initial quota order. But, in my view, there still remains, plainly, an unperformed duty. The duty was required to be performed, in all circumstances, at least by today, and it hasn't been performed.

172 In the first week of March 2017, unbeknown to the plaintiff, the Department had prepared a briefing note for the Minister with the subject "Making of the Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017 (Vic)" with a proposed "Decision date" of 17 March 2017.[136] The "core message" of the briefing note was:

---

134 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [18] (CB 471-472); Exhibit DGH1 to that affidavit, 186-188 (CB 666-668).

135 Affidavit of Donald Grant Hamley affirmed 15 May 2015, [18] (CB 471-472); Exhibit DGH1 to that affidavit, 186-188 (CB 666-668).

136 Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [3] (CB 684-685); Exhibit LEB2 to that affidavit, 8-27 (CB 694-713). As indicated by a corresponding comment above, the defendants have now persuaded me, in effect, that the statements in the "core message"

> Your approval of the Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017 (the proposed Regulations) is sought. The proposed Regulations prescribe a 60 tonne catch limit as a condition of the Scallop Dive (Port Phillip Bay) Fishery Access Licence. Your approval to revoke the Initial Quota Order for the fishery is also sought. The Initial Quota Order must be revoked as a catch limit cannot be established for quota managed fishery.

The recommendations given were that the Minister:

> a) Exempt the proposed Regulations (*Attachment 1*) from the requirement to prepare a Regulatory Impact Statement (RIS).
> b) Approve the making of the proposed Regulations by signing the attached Governor in Council papers (*Attachment 2*).
> c) Agree to exempt the revocation of the Initial Quota Order for the Scallop Dive (Port Phillip Bay) fishery from the requirement to prepare a RIS.
> d) Approve the Order revoking the Initial Quota Order for the Scallop Dive (Port Phillip Bay) fishery by signing the attached Order and certificates under the *Subordinate Legislation Act 1994* (SL Act) (*Attachment 3*).

The "key information" given to the Minister was as follows:

> The proposed Regulations will limit the amount of scallop that can be taken under the Scallop Dive (Port Phillip Bay) Fishery Access Licence
>
> 1. You recently agreed to prescribe an annual catch limit of 60 tonnes for the Scallop Dive (Port Phillip Bay) fishery (see BMIN16006015). Your approval of the Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulations 2017 will formalise this decision.
> 2. The proposed Regulations will establish the catch limit as a condition of the Scallop Dive (Port Phillip Bay) Fishery Access Licence. The catch limit will also be listed as a designated licence condition. Breach of a designated licence condition attracts higher penalties than breaches of other conditions.
> 3. The proposed catch limit will apply from 1 April to 30 March each year.
>
> It is necessary to revoke the quota order declaring the fishery as a quota managed fishery
>
> 4. To manage the take of scallop as a fixed annual amount, rather than under a quota based regime, it is necessary to revoke the Initial Quota Order for the Scallop Dive (Port Phillip Bay) fishery, which was published in the Victorian Government Gazette on 19 December 2013 (the Initial Quota Order). The Initial Quota Order must be revoked from 1 April 2017 for the prescribed catch limit to commence on that date.
> 5. The Further Quota Order for the fishery that is currently in place does not need to be revoked as it will cease to be in force on 31 March 2017.
>
> Consultation on the proposed Regulation and Order has been conducted
>
> 6. Under the SL Act and associated Guidelines, it is necessary to undertake consultation on proposed regulatory changes to form a view as to whether they impose a significant economic or social burden on any sector of the public.
> 7. Fisheries Victoria has met with the holder of the Scallop Dive (Port Phillip Bay) Fishery Access Licence and Seafood Industry Victoria (SIV) to

(cont)

> section of the briefing note and in para 4 of the "Key Information" section to the effect that the IQO had to be revoked, because a catch limit could not be established for a quota-managed fishery, were incorrect.

discuss the proposed changes and has written to the licence holder seeking formal comments. Fisheries Victoria also wrote to VRFish and Future Fish to seek their views on the proposed changes.

8. The proposed changes are not supported by the licence holder, with no response received from SIV. A copy of the licence holders response to request for comment is provided at *Attachment 4*.
9. Both VRFish and Future Fish support the proposed changes. A copy of VRFish's and Future Fish's comments on the proposed Regulations are provided at *Attachments 5 and 6*.

It is recommended that the proposed Regulations and Order revoking the Initial Quota Order be exempt from the requirement to prepare a RIS

10. Under Section 8(1)(a) of the SL Act, you may exempt the proposed Regulations from the requirement to prepare a RIS if the proposed Regulations do not impose a significant economic or social burden on a sector of the public.
11. The Victorian Guide to Regulation provides that the indicative threshold for when a proposal is likely to impose a significant burden is when the impact is likely to be greater than $2 million per year. Where the impact is less than the indicative threshold, a RIS may still be required if there are concentrated effects on a particular group, region or industry.
12. FV has analysed the impacts of the proposed Regulations and is of the view that the estimated costs falls below the $2 million a year indicative threshold.
13. The analysis indicates that setting an annual catch limit of 60 tonnes for the Scallop Dive (Port Phillip Bay) Fishery will provide for an economically viable commercial fishery now and into the future. The total gross landed value of 60 tonnes is estimated at $900,000 - $1.2 million (based on a beach price of $15 - $20 per kg).
14. The current Further Quota Order for the fishery expires on 31 March 2017. It is highly unlikely that the total allowable catch of 250 tonnes set under that Further Quota Order for the period 1 April 2016 to 31 March 2017 would be harvested. An annual catch limit of 60 tonnes exceeds the landed catch expected to be taken from the fishery for the 2016/17 year and the landed catch taken in previous years since the Scallop Dive (Port Phillip Bay) Fishery Access Licence was issued.
15. The proposed changes to commercial scallop fishing in Port Phillip Bay may have concentrated effects on the holder of the single Scallop Dive (Port Phillip Bay) Fishery Access Licence that has been issued and associated divers. However, the relative size of these impacts are considered insufficient to warrant preparation of a RIS. The proposed Regulations will not result in restriction on entry into or out of affected industries, nor will they alter the ability or incentives for business to compete in the industry or require significant additional funds or time to ensure compliance.
16. As the Order to revoke the Initial Quota Order is considered a legislative instrument under the SL Act, a RIS exemption, consultation certificate and human rights certificate have been prepared for this instrument. The proposed RIS exemption is on the basis that the Order, when considered alone, will reduce the regulatory burden for the holder of the Scallop Dive (Port Phillip Bay) Fishery Access Licence.

> All administrative steps relevant to the making of regulations have been completed
>
> 17. The Office of Chief Parliamentary Counsel (OPC) has provided preliminary approval for the proposed Regulations and a certificate certifying that obligations under section 13 of the SL Act have been met has been requested.
> 18. The Department of Justice and Regulation has not been consulted as the proposed regulations do not create any new offence provisions and there are no human right implications arising from the proposed Regulations.
> 19. It is proposed that the Regulations be lodged with Governor in Council on Monday 20 March and that they are made by Executive Council on Tuesday 28 March, with a commencement date of 1 April 2017.

The Minister was advised that there were no financial implications associated with the matter. Attached to the briefing note were the proposed regulations and the necessary Governor in Council papers relating to them, the proposed order revoking the IQO and certificates relating to it, a copy of the letter from Mr Hamley to Mr Dowling dated 24 February 2017, a letter from Mr Robert Loats on behalf of VRFish dated 27 February 2017 supporting the proposed changes and a letter from Mr Kramer on behalf of the Futurefish Foundation dated 3 March 2017 also supporting the proposed changes. The briefing note was approved by Mr Dowling, as Executive Director on or about 2 March 2017 (the handwritten date is difficult to read), and endorsed by Ms Louise Johnson, as "Executive Director, Legal & Legislation", and Mr Richard Bolt, as Secretary to the Department, on 3 and 15 March 2017 respectively. The Minister ticked the boxes next to "agreed" for recommendations (a) and (c) and the boxes next to "approved" for recommendations (c) and (d) and signed the briefing note on 17 March 2017.

173 On 17 March 2017, the Minister purported to revoke the IQO under s 64(2) of the Act effective from 1 April 2017. The purported revocation was gazetted on 24 March 2017.

174 On 21 March 2017, Mr Dowling wrote a letter to Mr Collis advising that, "[a]s raised during the Supreme Court proceeding", the Fishery would cease to be quota-managed on 1 April 2017 "as a consequence of the revocation of the [IQO]" and that the Regulations would be amended to prescribe a 60 tonne catch limit as a condition of the plaintiff's licence, and stating that, nevertheless, "in compliance with the orders made in the Supreme Court Proceeding" he intended to make a FQO for the 2017-2018 fishing period (the terms of the proposed FQO as foreshadowed in the letter proved to be, in substance, the same as the terms in which the 2017-2018 FQO was eventually made) and he invited a written submission on that proposal from the plaintiff.[137]

175 On 23 March 2017, Mr Collis responded to Mr Dowling's letter on behalf of the plaintiff. Relevantly, Mr Collis said:[138]

> …

137 Affidavit of Bruce William Collis sworn 15 May 2017, [42] (CB 339); Exhibit BWC1 to that affidavit, 221-222 (CB 419-420). Mr Dowling's letter did not make it entirely clear that the IQO had, in fact, already been made the subject of a revocation order (which was to take effect on 1 April 2017).

138 Affidavit of Bruce William Collis sworn 15 May 2017, [43] (CB 339); Exhibit BWC1 to that affidavit, 223-226 (CB 421-424).

Background

Some of the history of this matter and the process for the setting of the TAC is set out in paragraphs 1 to 5 of the judgment of Rush J delivered on 1 May 2015: *Port Phillip Scallops Pty v Minister for Agriculture* [2015] VSC 179. In particular, his Honour confirmed that the Baseline Management Arrangements (*the BMA*) provide the basis for the operation of the fishery and establish that it is to be managed through a TAC administered by a quota management system.

Pursuant to this process, on 7 December 2016 Don Hamley of Port Phillip Scallops emailed Bill Lussier and James Andrews attaching the document entitled "*Results of the fishery independent dive survey*" prepared by the respected independent consultant Dr David Gwyther. Port Phillip Scallops then made an application for a TAC for the fishing year commencing 1 April 2017 by letter to you dated 20 December 2016. A TAC of 250 tonnes was requested in that letter. This occurred against the backdrop that the two previous TACs had been 146 tonnes and 250 tonnes.

In making this application we noted that the most recent biomass survey results demonstrated a continuing healthy scallop population in Port Phillip Bay. We also requested a meeting with you so that we could explain how the quota could be fully utilised. That meeting did not occur.

2016-2017 fishing year

In our submission, past tonnages taken, and the prospect of a given quota tonnage being utilised, are irrelevant to the setting of the TAC. If you have a different view, please advise us of your view.

Notwithstanding that submission, we make the following points in short form in relation to the 2016-2017 fishing year. As is common when trying to develop a new business, we have encountered some difficulties in our first couple of years. Once consequence is that last year we took fewer scallops than the maximum permitted under our quota. A significant reason for our comparatively low catch was that we only obtained export approval in December 2015, which is a matter beyond our control. After that date we worked on the export of scallops, especially into China, with our processor. However, transporting live scallops is a particularly complex task, which requires significant infrastructure at both ends of the transaction, not just ours. We have been working methodically through these processes. The refusal by the Government to gazette the draft Management Plan, again not a matter within our control, has also affected confidence in the fishery and the willingness of overseas buyers to invest in the infrastructure necessary for them to purchase more substantial tonnages.

Over recent months we have taken numerous steps to enable us to catch and sell, both overseas and domestically, a significantly larger tonnage in the upcoming fishing year. If you think these matters are relevant to the setting of the TAC, we would be more than happy to describe those steps to you in detail, and to meet with you to discuss them. If so, please let us know.

Proposed 60 tonne catch limit

Port Phillip Scallops is extremely concerned at the prospect of a 60 tonne catch limit being imposed, whether under s 64A(1) or otherwise. Its concerns include the following:

1. Any such position is totally inconsistent with the basis on which the licence was granted and acquired.
2. It is inconsistent with the BMA.
3. It is inconsistent with the TAC being based on survey results.
4. It lacks any rational justification, whether ecological, commercial or otherwise.

5. It is inconsistent with the commitment you made on 7 August 2016 at the Port Phillip Bay Steering Committee where you stated that you and Fisheries Victoria are committed to and supportive of a strong commercial fishery in Port Phillip Bay.

In addition to these points, and in response to your letter dated 21 March 2017, Port Phillip Scallops makes the following submissions in opposition to the setting of a 60 tonne TAC for the fishing year commencing 1 April 2017, as you have notified us you are proposing, and in favour of a 250 tonne TAC for that year.

First, 250 tonnes is the recommended starting tonnage for the fishery in the draft management plan which has been endorsed by the full steering committee and was gazetted by the Government for public comment. 60 tonnes is completely incompatible with the carefully considered contents of that document, and the reviews and work that went into it.

Secondly, as explained in our letter to you of 20 December 2016, the most recently completed biomass survey estimated an available biomass of 5,510 tonne, and this was from a smaller survey area than the previous two surveys. A scallop population of that size can more than amply support a TAC of 250 tonnes; indeed, on the principles set out in the BMA would support a TAC of more than double that. Such a population gives no possible warrant for a 60 tonne limit.

Thirdly, in your letter of 13 February 2017 you referred to your desire for a "boutique" or "niche" fishery. If by that is meant a fishery in the order of 60 tonnes, it is incompatible with the BMA and other documents propounded by the Government at the time of the tender, and the draft Management Plan, and lacks any basis. Further, on any view a fishery with a sustainable catch of 250 tonnes, and even 500 tonnes, can correctly be described as a boutique or niche fishery. That is so both by comparison to other fisheries and bearing in mind that, when the Port Phillip scallop fishery was operating as a dredge fishery, in excess of 2,000 tonne (meat weight), which is roughly equivalent to 12,000 tonne unshucked, was frequently fished annually.

In combination, those three factors demonstrate that a TAC of 250 tonnes – which is still less than we had originally anticipated at this point – is both scientifically and commercially appropriate, and that, conversely, there is no basis for a 60 tonne limit.

A TAC of 250 tonnes for the upcoming year would allow the fishery to develop in a way that recognised the legitimate expectations of Port Phillip Scallops arising from the Baseline Management Arrangements, other tender documents and prior representations from the Department. Conversely, a TAC of 60 tonnes would be commercially disastrous for our business, and for third parties such as divers who are involved in it, without any basis for such figure to have been adopted.

Further, a TAC of 250 tonnes would be entirely consistent with maintaining the sustainability of the scallop resource in Port Philip Bay and with the objective of the *Fisheries Act* as set out in s 3, including "to provide for the management, development and use of Victoria's fisheries, aquaculture industries and associated aquatic biological resources in an efficient, effective and ecologically sustainable manner" and "to promote sustainable commercial fishing and viable aquaculture industries and quality recreational fishing opportunities for the benefit of present and future generations". As the survey results and all available materials make clear, there is no need whatsoever for a 60 tonne limit in order to meet such objectives.

Your letter of 21 March 2017 does not advance any reasons as to why you are minded to set a TAC of 60 tonnes for the upcoming year. We put you on notice that we do not consider that a TAC of 60 tonnes is legally justifiable. A TAC set at that level would be subject to challenge, and review by the court. Given the resources we have invested in developing the fishery and the third parties (not

> least of whom are the divers) who have also invested money on the basis of the government's prior statements, we would be compelled to challenge any decision to set a TAC at that level.

176 Mr Collis, on behalf of the plaintiff, also wrote a letter to the Minister, dated 24 March 2017, enclosing a copy of his letter to Mr Dowling and emphasising the submissions contained in that letter.[139] On the same date, without being aware of what had occurred on 17 March 2017, the solicitors for the plaintiff sent a letter, by email, to the Minister complaining about the situation and advancing various legal arguments against what they understood to be still only proposed measures.[140]

177 The Department prepared a briefing for the Mr Dowling with the subject "Scallop Dive (Port Phillip Bay) Fishery: Setting the 2017/18 TACC" dated 28 March 2017.[141] The "core message" of the briefing note was:

> The current Further Quota Order which sets the annual TACC for the Scallop Dive (Port Phillip Bay) Fishery expires on 31 March 2017.
>
> In accordance with the orders made on 17 March 2017 by the Supreme Court, a Further Quota Order for the fishery for the period from 1 April 2017 to 31 March 2018 is required to be made and published in the Government Gazette pursuant to section 64A(1) of the Act is required [sic].

The recommendations given were that Mr Dowling:

> a) Note the submissions of Port Phillip Scallops Pty Ltd dated 23 March 2017.
> b) Approve the setting of a TACC for 2017/2018 for the Scallop Dive (Port Phillip Bay) Fishery at 60 tonnes.
> c) Sign the attached Further Quota Order, setting a TACC for 2017/2018 for the Scallop Dive (Port Phillip Bay) Fishery at 60 tonnes.

The "key information" provided was as follows:

> • The Scallop Dive (Port Phillip Bay) Fishery was established in 2013 as a quota-managed fishery. The current Further Quota Order expires on 31 March 2017.
> • On 13 February 2017 you wrote to the licence holder outlining the proposed arrangements for the Fishery, to commence on 1 April 2017 (*Attachment 2*).
> • On 17 March 2017 the Supreme Court ordered that, by 30 March 2017, the Minister for Agriculture make and publish in the Government Gazette a further quota order pursuant to s 64A(1) of the *Fisheries Act 1995* (the Act) for the Fishery, for the period 1 April 2017 to 31 March 2018.
> • On 21 March 2017 you wrote to the licence holder noting that you proposed to make a Further Quota Order for the period 1 April 2017 to 31 March 2018, setting the TACC at 60 tonnes (*Attachment 3*).
> • In response, the licence holder has stated that it is opposed to a TACC of 60 tonnes for 2017/18, and is in favour of a TACC of 250 tonnes (*Attachment 4*). The licence holder considers that a TACC of 60 tonnes is legally unjustifiable and that it would be compelled to challenge it.

---

139 Affidavit of Bruce William Collis sworn 15 May 2017, [44] (CB 339); Exhibit BWC1 to that affidavit, 227-229 (CB 425-427).

140 Affidavit of Bruce William Collis sworn 15 May 2017, [45] (CB 339); Exhibit BWC1 to that affidavit, 236-244 (CB 434-442).

141 Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [3] (CB 684-685); Exhibit LEB2 to that affidavit, 28-39 (CB 714-725).

- A Further Quota Order has been prepared for the 2017/18 quota year to set the total allowable catch of unshucked commercial scallops (*Pecten fumatus*) and to specify the quantity of commercial scallops comprising a quota unit in each commercial fishing management zone of the Fishery, and to set the total allowable catch for doughboy scallops (*Chlamys asperrimus*) for each zone at 100 kilograms of unshucked doughboy scallops (*Attachment 1*)
- Under the Further Quota Order, the TACC of unshucked commercial scallops for the Fishery for 2017/18 will be set at 60 tonnes. The TACC for each commercial fishing management zone has been set based on the same proportion as in the 2016/17 quota year.
- As Executive Director of Fisheries Victoria and delegate for the Minister for the purpose of section 64A of the Act (the power to set the TACC for a specified period), a Further Quota Order has been prepared for your signature and for publication in the Government Gazette before 30 March 2017.

The attachments to the briefing note were as described in the "key information". The briefing note was endorsed by Mr D'Silva, as Director Policy and Licencing, on 27 March 2017. Mr Dowling ticked the box next to "noted" for recommendation (a) and the box next to "approved" for recommendations (b) and (c) and signed the briefing note on 27 March 2017.

178 On 27 March 2017, a Further Quota Order for the 2017-2018 fishing year ("2017-2018 FQO") was made by Mr Dowling. It was gazetted on 30 March 2017. The 2017-2018 FQO allowed a TACC for scallop (excluding doughboy scallop) of between 0 and 48 tonnes of unshucked scallop per scallop commercial fishing management zone ("zone") and quota unit, totalling 60 tonnes for the Fishery, and a TACC for doughboy scallop of 100kg of unshucked doughboy scallop per zone and quota unit, totalling 600kg for the Fishery.

179 The plaintiff was provided, by Mr Dowling, with a copy of the gazetted revocation of the IQO and a copy of the relevant regulation (which had been made by the Governor-in-Council on 27 March 2017) on 30 March 2017 and with a copy of the gazetted 2017-2018 FQO on 31 March 2017.[142]

180 On 1 April 2017, an access licence for the 2017-2018 fishing year was issued to the plaintiff.[143]

181 On 21 April 2017, the plaintiff, by its solicitors, made a request under s 8 of the *Administrative Law Act 1978* (Vic) (the ALA) for the Minister's reasons for revoking the IQO and a request for the briefing note provided to the Minister in relation to the decision. On the same day, the plaintiff, by its solicitors, made a separate request under s 8 of the ALA for the Executive Director's reasons for making the 2017-2018 FQO and a request for the briefing note provide to the

142 Affidavit of Bruce William Collis sworn 15 May 2017, [47]-[49] (CB 344); Exhibit BWC1 to that affidavit, 246-257 (CB 444-455).

143 Affidavit of Bruce William Collis sworn 15 May 2017, [3] (CB 337); Exhibit BWC1 to that affidavit, 8-13 (CB 226-231).

Executive Director in relation to the decision.[144] Having received no response, on 2 May 2017, the solicitors for the plaintiff sent follow up letters to the Minister and the Director reiterating the requests.[145]

182 The present proceeding was commenced on 16 May 2017. It included, initially, a claim for an order under s 8(4) of the ALA for the provision of the statements of reasons that had been requested.

183 By letter dated 7 June 2017, Ms Annette Wiltshire of the Department responded to the requests under s 8 of the ALA by providing an undated statement of reasons of the Minister for the decision to revoke the IQO and an undated statement of reasons of Mr Dowling for the decision to make the 2017-2018 FQO, both set out below.[146] By a separate letter, of the same date, Ms Wiltshire provided the departmental briefing for the Minister dated 18 January 2017 (redacted for claimed privilege), the departmental briefing for the Minister dated 10 March 2017 and the internal departmental briefing for the Executive Director dated 27 March 2017.[147] By email dated 13 June 2017, the Department provided the plaintiff with a re-issued statement of reasons by the Minister which was in the same terms but corrected an omission in the attachments.[148]

184 The undated statement of reasons of the Minister for the decision to revoke the IQO provided to the plaintiff ran as follows:[149]

> Statement of reasons
>
> On 17 March 2017 I, Jaala Pulford, Minister for Agriculture, made a decision to revoke the Initial Quota Order for the Scallop Dive (Port Phillip Bay) Fishery (the Fishery). A copy of the decision is *Attachment A*.
>
> On 21 April 2017 Port Phillip Scallops Pty Ltd requested reasons for my decision. A copy of the request is *Attachment B*.
>
> In accordance with section 8 of the *Administrative Law Act 1978*, I now provide reasons for my decision.
>
> Background
>
> On 19 December 2013 the Minister for Agriculture and Food Security made:
>
> (1) the Initial Quota Order for the Fishery, pursuant to section 64(1) of the *Fisheries Act 1995* (the *Act*); and
>
> (2) the first Further Quota Order for the Fishery, pursuant to section 64A of the Act, for the period commencing 19 December 2013 and ending 31 March 2015.
>
> A copy of the Government Gazette No S 462, publishing these two Orders, is *Attachment C*.

---

144 Affidavit of Bruce William Collis sworn 15 May 2017, [50]-[51] (CB 344); Exhibit BWC1 to that affidavit, 258-259 (CB 456-457).

145 Affidavit of Bruce William Collis sworn 15 May 2017, [52] (CB 344); Exhibit BWC1 to that affidavit, 260-261 (CB 458-459).

146 The letter was sent to the solicitors for the plaintiff by email sent on 9 June 2017. Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [4] (CB 685); Exhibit LEB2 to that affidavit, 40-41 (CB 232-233).

147 The letter was sent to the solicitors for the plaintiff by email sent on 9 June 2017. Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [3] (CB 684-685); Exhibit LEB2 to that affidavit, 1-39 (CB 688-725).

148 Affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, [5] (CB 685); Exhibit LEB4 to that affidavit, 128-172 (CB 294-336).

149 Exhibit LEB2 to the affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, 42-79 (CB 234-271).

There is only one licence for the Fishery, and at all times Port Phillip Scallops Pty Ltd has been the Licence Holder.

Further Quota Orders for the Fishery were made under section 64A of the Act for the 2015/16 and 2016/17 fishing year.

My decision of 17 March 2017

I had regard to the matters identified in two briefs to me from my Department and to each of the attachments to those briefs. A copy of BMIN16006015 (redacted for privilege), with attachments, is *Attachment D*. A copy of BMIN7000422, with attachments, is *Attachment E*.

The matters identified in the briefs to me from my Department included the following:

(1) The Fishery was established in 2013 as a small-scale "niche" commercial fishery, with an initial precautionary TACC of 12 tonnes of scallops.

(2) A draft Management Plan for the Fishery and was made available for public consultation in 2016.

(3) Key recreational fishing bodies did not support the development of the Fishery to 250 tonnes of scallops or more. On the other hand, the commercial sector supported the development of the Fishery.

(4) In the 2016/17 fishing year, the TACC for the Fishery had been set at 250 tonnes of scallops.

(5) In the 2016/17 fishing year, the Licence Holder had (as of January 2017) caught about 58 tonnes of scallops.

(6) For the 2017/2018 fishing year, the Licence Holder had requested that the TACC be again set at 250 tonnes of scallops.

(7) The Government's policy is to improve recreational fishing opportunities in Victoria, and in particular to make Port Phillip Bay a prime recreational fishing destination.

I had regard to the fact that the Licence Holder was opposed to a catch limit in the Fishery of 60 tonnes of scallops per annum. That opposition had been conveyed at a meeting held on 10 February 2017 with Fisheries Victoria, and by a letter dated 24 February 2017 from Mr Don Hamley, General Manager for the Licence Holder, to Mr Travis Dowling, Executive Director of Fisheries Victoria. I had regard to the views expressed by Mr Hamley in his letter, including on the relevance of the Baseline Management Arrangements.

I came to the conclusion that, with effect from 1 April (the start of the 2017/18 fishing year), and going forward, the Fishery should no longer be managed by quota and that instead a permanent catch limit should be set by regulation at 60 tonnes of scallops per annum as a licence condition.

185 The undated statement of Mr Dowling's reasons for making the 2017-2018 FQO provided to the plaintiff ran as follows:[150]

Statement of reasons

On 27 March 2017 I, Travis Dowling, a delegate of the Minister for Agriculture for the purposes of section 64A(1) of the *Fisheries Act 1995* (the Act), made a decision, in the form of a Further Quota Order, for the Scallop Dive (Port Phillip Bay) Fishery (the Fishery). A copy of the decision is *Attachment A*.

On 21 April 2017 Port Phillip Scallops Pty Ltd requested reasons for my decision. A copy of the request is *Attachment B*.

In accordance with section 8 of the *Administrative Law Act 1978*, I now provide reasons for my decision.

150 Exhibit LEB2 to the affidavit of Laura Elizabeth Brennan affirmed 22 June 2017, 80-99 (CB 272-291).

Background

On 17 March 2017, in Proceeding No S CI 2017 00832, the Supreme Court of Victoria ordered that by 30 March 2017 the Minister for Agriculture for the State of Victoria make and publish in the Government Gazette a Further Quota Order for the Fishery for the period 1 April 2017 to 31 March 2018.

There is only one licence for the Fishery, and at all times Port Phillip Scallops Pty Ltd has been the Licence Holder.

On 21 March 2017, I wrote to the Licence Holder. A copy of my letter is *Attachment C*.

On 23 March 2017, the Licence Holder responded to my letter of 21 March 2017 and made submissions in respect of the proposed TACC of 60 tonnes. A copy of the letter from the Licence Holder is *Attachment D*.

On 24 March 2017, the decision made by Minister Pulford on 17 March 2017, revoking the Initial Quota Order for the Fishery, was gazetted. A copy of that decision is *Attachment E*.

Reasons for decision

In making my decision on 27 March 2017, I had regard to a range of matters falling within the following broad topics (listed in no particular order):

(1) the terms of section 64A, in the context of the Act;
(2) the context in which my decision to make a Further Quota Order for the 2017/18 fishing year was being made;
(3) the submissions made by the Licence Holder;
(4) the establishment of the Fishery as small scale, niche commercial dive fishery;
(5) concerns of the recreational fishing sector:
(6) scallop biology and biomass studies;
(7) past catch in the Fishery by the Licence Holder;
(8) economic analysis for the Fishery, with a limit of 60 tonnes per year.

Statutory context

I had regard to the terms of section 64A, and the objectives set out in section 3 of the Act.

Where there is a declaration under section 64 that a fishery is to be managed by the allocation of quotas, a further quota order under section 64A sets the total allowable catch for a specified period for the quota fishery and determines the quantity of fish comprising an individual quota unit in a quota fishery in a specified period. Both the total allowable catch and the quantity of fish comprising an individual quota unit can be reduced under s 64A before the end of the specified period. In theory, the total allowable catch under a further quota order can even be set at or reduced to zero.

In general, the power to make a further quota order, including the setting of a total allowable catch for the period specified in the order, are exercised in the light of the statutory objectives set out in section 3 of the Act, including the management, development and use of Victoria's fisheries and associated aquatic biological resources in an efficient, effective and ecologically sustainable manner; the protection and conservation of fisheries resources, habitats and ecosystems including the maintenance of aquatic ecological processes and genetic diversity; the promotion of sustainable commercial fishing and quality recreational fishing opportunities for the benefit of present and future generations; and the facilitation of access to fisheries resources for commercial, recreational, traditional and non-consumptive uses.

Context in which the decision to make a Further Quota Order was being made

By an order made on 17 March 2017 and gazetted on 24 March 2017, and commencing on 1 April 2017, the Minister for Agriculture revoked the Initial

Quota Order in relation to the Fishery. Accordingly, with effect from 1 April 2017, the Fishery would cease to be managed as a quota fishery. Nevertheless, pursuant to the orders made by the Supreme Court, a Further Quota Order for the fishing year 2017/18 was required to be made and gazetted by 30 March 2017, one day before the expiry of the Further Quota Order for the fishing year 2016/2018.

Submissions by the Licence Holder

The submissions by the Licence Holder, in relation to the proposed TACC of 60 tonnes for the 2017/18 fishing year, made the following key points.

(1) Past catch, and the prospect of a given quota being fully utilised, are irrelevant to the setting of the TACC. Notwithstanding that view, the Licence Holder submitted that the under utilisation of quota to date was due to difficulties encountered in developing the new business, including delays in obtaining export approval and complexities of live export.

(2) The proposed TACC of 60 tonnes was inconsistent with:
   (i) the basis on which the licence had been granted and acquired;
   (ii) the *Commercial Scallop Dive Fishery (Port Phillip Bay) Management Arrangements* (November 2013) (the *BMA*);
   (iii) TACC being based on survey results;
   (iv) the commitment made by Fisheries Victoria that it was committed to and supportive of a strong commercial fishery in Port Phillip Bay.

(3) The proposed TACC of 60 tonnes lacked any rational justification, whether ecological, commercial or otherwise.

(4) The following considerations were relevant:
   (i) A TACC of 250 tonnes was the recommended starting tonnage for the Fishery in the draft Management Plan endorsed by the steering committee and released for public comment.
   (ii) The most recently completed biomass survey estimated an available biomass of 5,510 tonnes, which could support a TACC of 250 tonnes. On the principles set out in the BMA, a TACC of double this amount could be supported.
   (iii) The view that a TACC of 60 tonnes reflects a "boutique" or "niche" fishery is incompatible with the BMA, other government representations at the time of establishing the Fishery, and the draft Management Plan, and it lacks any basis. A TACC of 250 tonnes, or even 500 tonnes, can correctly be described as a boutique or niche fishery.

(5) A TACC of 60 tonnes would be commercially disastrous for the business of the Licence Holder, and for third parties such as divers who are involved in that business.

(6) A TACC of 250 tonnes would be consistent with:
   (i) principles of sustainability;
   (ii) providing for the development and use of Victoria's fisheries resources in an efficient, effective and ecologically sustainable manner; and
   (iii) promoting sustainable commercial fishing and viable aquaculture industries and quality recreational fishing opportunities for the benefit of present and future generations,

   in accordance with the objectives of the Act.

Establishment of the Fishery as a small scale, niche commercial dive fishery

The Fishery was established in 2013 as a small-scale, "boutique" or "niche" commercial dive fishery. These concepts of a small-scale, nice or boutique commercial fishery, together with preserving existing access to the scallop fishery

in Port Phillip Bay by recreational fishers, were strong themes in communications at the time of establishment, including in the document, *Proposal to establish a commercial dive fishery for scallops in Port Phillip Bay*, which was released for public consultation prior to the public auction of the single licence comprising the Fishery.

The decision to provide for an initial TACC of 12 tonnes reflected the unknown stock status of scallop in Port Phillip Bay at the time the Fishery was established, as well as the precautionary, conservative approach to the setting of the TACC provided for in the BMA, which was issued prior to the public auction of the single licence comprising the Fishery. The BMA outlined the management framework under which the Fishery would potentially be developed.

Concerns of the recreational fishery sector

In late 2015, Fisheries Victoria commenced stakeholder consultation in relation to a draft Management Plan for the Fishery, proposed to be declared under section 28 of the Act. The draft Management Plan released for public consultation set out (amongst other things):

(1) a conservative approach for commercial harvesting (ie 10 to 20 percent of estimated biomass per annum) or 750 tonnes, whichever is lower during the development of the Fishery;
(2) the rationale for the approach being:
    (i) to ensure that harvest remains sustainable in the event of high mortality and/or slow growth;
    (ii) to ensure that, in combination with size limits, sufficient reproductive potential is retained; and
    (iii) to account for the vulnerability of scallops to fishing because they are sedentary and aggregated in beds;
(3) the single Licence Holder would be able to catch an increasingly greater proportion of the biomass, subject to the Licence Holder taking at least 75 percent of the total allowable catch in the previous fishing year and a ceiling of 750 tonnes; and
(4) a maximum TACC for the 2016/2017 fishing year of 250 tonnes.

Fisheries Victoria received a large number of submissions in response to the draft Management Plan. A number of submissions from the commercial sector supported the draft Management Plan. On the other hand, key recreational fishing bodies did not support the draft Management Plan. Some of the key concerns which were expressed regarding the draft Management Plan were as follows:

(1) the draft Management Plan contemplated that the Fishery could increase to a total allowable catch of 750 tonnes, which exceeded the recreational fishing bodies' understanding of the size of the Fishery based on consultation during the introduction of the Fishery;
(2) when the Fishery was established in 2013, government did not communicate that the Fishery would be permitted to grow substantially beyond the initial total allowable catch of 12 tonnes; and
(3) the rate of development of the Fishery since establishment was not consistent with the risk-based, precautionary development of the Fishery.

Scallop biology and biomass studies

Scallop fisheries are characterised by naturally sporadic and fluctuating abundance and irregular, episodic recruitment, which is heavily influenced by environmental conditions (such as predation).

Scallop aggregate in sub-populations (scallop beds), which vary temporally in size and location. As a result, the amount of scallops that can be taken sustainably may vary considerably from year to year.

Existing knowledge of the scallop resource (including the impact of the dredge fishery) in Port Phillip Bay is limited. Data on scallop biomass (ie stock status) in

Port Phillip Bay since the closure of the Port Phillip Bay dredge fishery in 1997 is limited to the following stock surveys commissioned by the Licence Holder, following the establishment of the Fishery:

(1) a dive survey report prepared by Fisheries Victoria (dated October 2014) showing available biomass of 3,629 tonnes;
(2) a dive survey report prepared by Dr David Gwyther of Picton Group Pty Ltd (dated October 2015) showing available biomass of 11,065 tonnes; and
(3) a dive survey report prepared by Dr David Gwyther of Picton Group Pty Ltd (dated October 2016) showing available biomass of 5,510 tonnes.

Past catch in the Fishery by the Licence Holder

Historically, the TACC for the Fishery has increased in each fishing year since establishment in 2013. However, in each fishing year, the TACC has not been fully utilised.

Quota Year	*TACC*	*Reported Catch*
2014/15	12 tonnes	178.59 kgs
2015/16	146 tonnes	10,343.63 kgs
2016/17	250 tonnes	58.735 tonne

Economic analysis for the Fishery

An economic analysis undertaken by Fisheries Victoria indicated that a TACC of 60 tonnes for the Fishery would provide an estimated gross landed value of between $900,000 - $1,200,000, based on a beach price of $15 - $20 per kilogram (as reported in the most recent annual report submitted by the Licence Holder).

Conclusion

After consideration of all of the matters set out above, I concluded that the Further Quota Order for the 2017/18 fishing year should be in the following terms:

(1) the total allowable catch of unshucked commercial scallops for the Fishery should be set at 60 tonnes accross the six quota management zones;
(2) the total allowable catch for doughboy scallops (*Chlamys asperrimus*) for each scallop commercial fishing management zone is 100 kilograms of unshucked doughboy scallops;
(3) the quantity of doughboy scallops comprising a quota unit for the quota period in each scallop commercial fishing management zone of the Fishery is 100 kilograms.

I considered a TACC of 60 tonnes to be consistent with the concept of a small-scale, niche commercial fishery, which underpinned the establishment of the Fishery in 2013. I considered a TACC of 60 tonnes to be consistent with general expectations of the recreational fishing sector in relation to the size and scope of the Fishery, in circumstances where a consideration in establishing the Fishery was the impact of any commercial fishery on recreational fishing.

A TACC of 60 tonnes reflects a precautionary, conservative approach. I considered such an approach to be appropriate and reasonable, having regard to scallop biology and limited existing knowledge of the scallop resource in Port Phillip Bay. This approach and the knowledge constraints in relation to stock have been consistent themes since before establishment of the Fishery.

I had regard to the stock surveys undertaken since the Fishery was established. In exercising the power under section 64A(1) of the Act, I am not limited to considering stock surveys and estimated abundance. The stock surveys suggested that the available biomass of scallops is fluctuating and variable. It remains appropriate to adopt a precautionary, conservative approach in setting the TACC, having regard to the statutory objectives (including the efficient, effective and

ecologically sustainable management, development and use of the fishery, and the protection and conservation of fisheries resources). Further, taking into account the submissions received from the recreational fishing sector in response to the Draft Management Plan, a TACC of 60 tonnes would promote quality recreational fishing opportunities in addition to commercial fishing for the benefit of present and future generations, and would facilitate access to fisheries resources for recreational uses together with commercial uses.

I note that the draft Management Plan has not been declared. Even if it had been declared, its contents, while relevant, could not fetter my discretion under section 64A(1) of the Act.

Although past catch is not determinative, it is generally a relevant consideration in determining a total allowable catch for any quota managed fishery. In the current circumstances, it is relevant that in the most recent fishing year the Licence Holder (who holds the only licence for the Fishery) reported catch of 23.2 percent of TACC. In taking into account this matter, I have accepted that the development of the new business would have contributed to under utilisation of the TACC.

I was not persuaded by the submission of the Licence Holder that a TACC of 60 tonnes would be commercially disastrous, in the light of the economic analysis undertaken by Fisheries Victoria.

Finally, a TACC of 60 tonnes is consistent with the Government's policy, conveyed to the Licence Holder in February 2017, of changing the Fishery from a quota managed fishery to one where the annual catch limit would be set by regulation at 60 tonnes per year. Although this policy cannot fetter my discretion under section 64A of the Act, I considered that it was a relevant matter to be taken into account in the exercise of my discretion.

I decided that the TACC for each commercial fishing management zone should be set in the same proportions as allocated for the 2016/2017 fishing year. I was of the view that this allocation would allow the Licence Holder to maximise the yield from the more productive and food safety approved areas.

186 On 18 July 2018 the plaintiff filed an amended originating motion removing the claim for an order under s 8(4) of the ALA and making other amendments. The amended originating motion seeks:

1. An order in the nature of certiorari quashing the First Defendant's decision made on 17 March 2017 to revoke the Initial Quota Order made on 19 December 2013 in respect of the Scallop Dive (Port Phillip Bay) Fishery.
2. A declaration that the First Defendant's decision made on 17 March 2017 to revoke the Initial Quota Order made on 19 December 2013 in respect of the Scallop Dive (Port Phillip Bay) Fishery is void, invalid and of no effect.
3. An order in the nature of certiorari quashing the decision of the Executive Director, Fisheries as delegate of the First Defendant on 27 March 2017 to make the Further Quota Order in respect of the Scallop Dive (Port Phillip Bay) Fishery.
4. A declaration that the Further Quota Order made on 27 March 2017 in respect of the Scallop Dive (Port Phillip Bay) Fishery by the Executive Director, Fisheries as delegate of the First Defendant is void, invalid and of no legal effect.
5. A declaration that the *Fisheries Amendment (Catch Limit for Scallop Dive (Port Phillip Bay) Fishery) Regulation 2017* (Vic) is void, invalid and of no effect.
6. An order in the nature of mandamus compelling the First Defendant to make and publish in the Government Gazette a further quota order

pursuant to s 64A(1) of the *Fisheries Act 1995* (Vic) for the Scallop Dive (Port Phillip Bay) Fishery for the period 1 April 2017 to 31 March 2018.

187 In the amended originating motion, the grounds relied upon by the plaintiff for the contention that the revocation of the IQO represented an invalid exercise of power and involved a breach of procedural fairness were expressed as follows:

> In making the Revocation Decision, the Minister —
>
> (a) exercised the power under s 64(2) of the Act for an impermissible purpose;
> (b) took into account irrelevant considerations;
> (c) failed to take into account mandatory relevant considerations to the exercise of the statutory power;
> (d) acted irrationally and/or decided so unreasonably that no decision maker acting reasonably could have so decided.
>
> Particulars
>
> *As to (a),* the Minister, in circumstances where she was also intending to procure the promulgation of the Regulation as a concomitant of and as soon as possible after the Revocation decision, exercised the power for the purpose of:
>
> (a) procuring that the Fishery not grow beyond a "very small scale", "boutique" or "niche" fishery;
> (b) acceding to "disquiet behind the scenes about the size of the quota currently and the fact that there is a single licence".
>
> *As to (b)* the Minister took into account the following irrelevant considerations:
>
> (a) the potential for the Fishery, if permitted to do so, to grow beyond a "very small scale", "boutique" or "niche" fishery;
> (b) "disquiet behind the scenes about the size of the quota currently and the fact that there is a single licence";
> (c) her intention to procure the promulgation of the Regulation as a concomitant of and as soon as possible after the Revocation Decision;
> (d) the tonnage that, in fact, the plaintiff had taken in the 2016-2017 year, namely approximately 58 tonnes, as compared to the TACC that it had been authorised to take in that year.
>
> *As to (c)* the Minister failed to take into account:
>
> 1. the objectives of the Act set in s 3, including "to provide for the management, development and use of Victoria's fisheries", to "promote commercial fishing and … for the benefit of future generations" and to "promote the commercial fishing industry";
> 2. the Baseline Management Arrangements;
> 3. the TACC Setting Process;
> 4. the results of the annual scallop biomass survey provided by the Plaintiff to the department on 7 December 2016, and previously; and
> 5. the matters set out in the Plaintiff's letter to the Director dated 20 December 2016 requesting a TACC for the fishing year ending 31 March 2018.
>
> *As to (d),* the plaintiff refers to and repeats the matters set out above in these particulars in respect of (a), (b) and (c), and in paragraph 14 and 15 above.
>
> Procedural Unfairness
>
> As the holder of the Licence the Plaintiff was the person most directly interested in and affected by the subject matter of the Regulation.
>
> The Minister was under a duty to afford procedural fairness to the Plaintiff as the holder of the Licence.

> Further, pursuant to ss 3A(1) and 3A(2)(e) of the Act, the Minister was required to engage to the extent practicable in consultation with the Plaintiff in respect of the Revocation Decision.
>
> In respect of the Revocation Decision, the Minister failed to engage to the extent practicable in consultation with the Plaintiff and to afford the Plaintiff procedural fairness.
>
> Particulars
>
> The plaintiff was not given any, or any proper, opportunity to present its case or to be heard as to whether the Revocation Decision should be made.

188 In my view, the plaintiff has not made out any of these grounds of review.

189 As the defendants submit, the power in s 64(2) of the Act is not a purposive power. It follows that the plaintiff must establish, first, that the allegedly vitiating "purpose" upon which it relies was in fact the purpose (or the true or dominant purpose, among a number of purposes), and, secondly, that that allegedly vitiating purpose is forbidden. Further, improper purpose must be assessed subjectively.

190 Although all relevant evidence is to be considered, the primary source of information as to the Minister's purpose is her statement of reasons given pursuant to her statutory obligations under s 8 of the ALA.[151] As already mentioned, I am satisfied that regard can also be had to the public statements, made by the Minister after the decision was taken, on which the plaintiff relies. Those statement were as follows. On 1 April 2017, the Minister was reported in a newspaper as saying that the Fishery "will continue to be a boutique operation as was always intended … ensuring the bay remains a mecca for recreational fishers". The other statement was made by the Minister on a television program called "Talking Fishing". The Minister said:

> The fishery was, at the time it was described as a niche fishery, as a boutique fishery, those kinds of words to describe it. It's taken in the last fishing year 58 tonnes, so we're not proposing to shrink it or to make it any smaller as I think [is] being claimed here. But we've said that's probably it – 60 tonnes that'll be the new cap, so that's what's in place from the 1st of April.

191 As it happens, in my view, these statements add little or nothing to the statement of reasons and do not really assist the plaintiff further.

192 During oral argument in particular, the plaintiff characterised the Minister's purpose as being to placate the recreational fishing lobby. I am prepared to accept that that was a substantial part of what the Minister had in mind. However, I agree with the defendants that this was not a consideration foreign to the Act. It did not constitute an improper purpose.[152] As to the objectives of the Act, I refer to and repeat what I have already said about them.[153]

---

151 See and compare *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162, esp 179 (French J); *East Melbourne Group Inc v Minister for Planning* (2008) 23 VR 605; 166 LGERA 1 at [308]-[315].

152 On the contrary, arguably it would have been legally inappropriate for the Minister to disregard the perceptions and strongly felt concerns of the "recreational fishing lobby" as to the likely future of recreational fishing opportunities in Port Phillip Bay (cf s 3(c) of the *Fisheries Act 1995* (Vic)) should the plaintiff's operations in the Bay be permitted to expand as the plaintiff was seeking to do; and this regardless of whether those perceptions and concerns (as to the future) were considered to be misconceived. In *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422 at [40]-[74], where a statutory power to approve permission for gaming was exercisable only where "… the net economic and social impact of approval will not be detrimental to the well-being of the community of the

193 I agree with the defendants that the relevant power, being conferred on a Minister, is a power that the Minister is entitled to exercise in accordance with government policy (including a change from previous policy).[154]

194 None of the matters identified by the plaintiff are matters that the Minister was prohibited from considering.

195 Nor was there any failure on the part of the Minister to take into account mandatory relevant considerations.

196 As already mentioned, the objectives of the Act are broadly expressed and may point in different directions. The Minister was not obliged to refer to them expressly in her reasons for decision.

197 Neither was the Minister obliged to take into account, to any greater extent than she did, the BMA or the TACC Setting Process. The very point of the measures being taken was to depart from the prior management arrangements. Neither the BMA nor the TACC Setting Process was a statutory instrument. Both were simply Departmental documents.

198 The same reasoning applies in relation to the results of the annual scallop biomass survey provided on 7 December 2016 and the related matters set out in the plaintiff's letter to the Director dated 20 December 2016. The government was taking a new direction.

199 During oral submissions at the hearing, senior counsel for the plaintiff submitted that the Minister had failed to take into account the detriment to the plaintiff that would be involved in the measures to be taken. No such ground is expressly included in the amended originating motion. In any event, even assuming that this was a mandatory relevant consideration,[155] I am not satisfied that the Minister failed to take into account detriment to the plaintiff. Certainly, the Minister might have given more weight to this factor, but she was not obliged to do so.

200 Another matter that was raised and emphasised at the hearing, although not explicitly pleaded, was the omission in the briefing note to the Minister of any reference to the conclusions that had been reached in December 2015 by the

(cont)

municipal district in which the premises are located", the Court of Appeal held that community opposition was a mandatory relevant consideration. See also *Harburg Investments Pty Ltd v Mackenroth* [2005] 2 Qd R 433; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 284 [5.50]. An order revoking an IQO is quasi-legislative. It is a "legislative instrument" within the meaning of the *Subordinate Legislation Act 1994* (Vic). In the present case, the revocation was part of a package of measures which included the making of the Regulations imposing the 60 tonne cap. The situation is thus, to a considerable extent, comparable with the restructure, by amending regulations, of the River Murray fishery that was the subject of *River Fishery Assn (SA) Inc v South Australia* (2003) 85 SASR 373. In that case it was held that the taking into account of political considerations did not render the amending regulations invalid for improper purpose: *River Fishery Assn (SA) Inc v South Australia* (2003) 85 SASR 373 at [107]-[117] (esp [115]-[116]) (Doyle CJ), [204]-[213] (esp [209]) (Gray J), [220]-[243] (esp [236], [242]) (Besanko J).

153 See paras 77 and 78 above.

154 See para 192 and footnote 152 above and see *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [102] (Gleeson CJ and Gummow J), 563-565 [181]-[187] (Hayne J); *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50] (Gaudron, Gummow and Hayne JJ); *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at [18]; Aronson, Groves and Weeks, above n 152, [5.50], [9.270].

155 See *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

relevant committee (the Port Phillip Bay Scallop Fishery Management Plan Steering Committee) and by Department itself (Fisheries Victoria) to the effect that the expansion of the Fishery was not contrary to the original "niche" intent, and to the effect that the concerns of the recreational fishing lobby were misconceived and misplaced.[156] It would certainly have been a better piece of public administration if those conclusions had been expressly drawn to the Minister's attention as part of the 2017 exercise, but, once again, it is plain that the Department and the Minister had moved beyond the thinking of 2015. I do not accept the plaintiff's contention that the Minister was bound to act in accordance with the approach taken in the BMA. The Minister was entitled to do what she did even if, scientifically, there was little or no basis for the concerns expressed by the recreational fishing lobby, in relation to sustainability of the resource or in relation to any threats to snapper fishing in the bay (the latter being a matter which had been the subject of an expert report to the committee in 2015).

201 It follows that I am likewise unpersuaded that the decision of the Minister was legally unreasonable.[157]

202 Nor in my opinion, was the revocation decision vitiated by any failure to accord procedural fairness to the plaintiff. The Departmental briefings set out above show that the plaintiff was given an explicit opportunity to comment on what was proposed on at least two occasions, namely at the meeting on 10 February 2017 and by the letter from Mr Dowling dated 13 February 2017. The plaintiff took advantage of those opportunities to a certain extent. It was a matter for it as to what it put forward on those occasions. As I have said elsewhere:[158]

> [W]hile the principles of procedural fairness (or natural justice) generally require a decision-maker to ensure that a party is given a reasonable opportunity to present the party's case, they do not impose "the impossible task of ensuring that a party takes the best advantage of the opportunity to which [the party] is entitled".[159]

203 It is no answer to say, as the plaintiff seeks to do, that the Government had already made up its mind as of 18 January 2017. The Government was entitled to formulate a clear and definite proposal for consultation.[160] In my view, there was no breach of the consultation principles in s 3A of the Act. Further, both in relation to the proposed revocation of the IQO and in relation to the proposed

156 Exhibit DGH1 to affidavit of Donald Grant Hamley affirmed 15 May 2017, 106-121 (CB 586-601).

157 See *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 at [57]-[59] (Gageler J) and [131]-[135] (Edelman J); *Seafish Tasmania Pelagic Pty Ltd v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* (2014) 225 FCR 97; 200 LGERA 297, especially at [63], [67] and [95]-[98]; *River Fishery Assn (SA) Inc v South Australia* (2003) 85 SASR 373 at [118]-[124] (Doyle CJ), [214]-[216] (Gray J), [220] (Besanko J); Cf *Mirboo Ridge v Minister for Resources* (2018) 12 ARLR 180 at [125].

158 *Humphries v Allianz Australia Workers Compensation (Vic) Ltd* [2016] VSC 761 at [43].

159 *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 (Deane J, with whom Fisher J agreed); *SZTXE v Minister for Immigration and Border Protection* (2015) 232 FCR 433 at [18] (Flick J) and cases there cited; *Alcoa of Australia Ltd v Edwards* [2016] VSC 630 at [31]-[32] (McDonald J).

160 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552, 559.

regulation, the Minister and the Department proceeded in accordance with the requirements of the *Subordinate Legislation Act 1994* (Vic) (the SLA). The plaintiff does not suggest the contrary.[161]

204 The attack on the manner of exercise of the Minister's power to revoke the IQO fails.

Were the Regulations invalidly made?

205 Having regard to the conclusions which I have just expressed in relation to the making of the IQO, it is all the clearer that the plaintiff cannot succeed in its attack on the process by which the Regulations were made. The plaintiff does not rely on any additional grounds in relation to the Regulations. Indeed, it relies on only a selection of the grounds that were advanced against the IQO. Legal unreasonableness is not argued in relation to the Regulations. Improper purpose is argued, but (even assuming that the Minister's purpose is to be attributed to the Governor-in-Council as the maker of the Regulations), for the reasons already stated, I am not satisfied that the Regulations were made for any improper purpose.[162]

206 The plaintiff raises a procedural fairness complaint about the making of the Regulations. It is unnecessary to decide whether breach of natural justice or procedural fairness can ever be a ground for attacking a Victorian Regulation.[163] The plaintiff was duly consulted about the proposed revocation of the IQO and the proposed Regulations, at the same time, as mentioned above. I repeat that, in my view, there was no breach of the consultation principles in s 3A of the Act. Further, as the plaintiff concedes, there was compliance with the SLA in each case.[164] Indeed, as the defendants point out, the plaintiff went on to make submissions to the Scrutiny of Acts and Regulations Committee with a view to having that Committee make a recommendation for disallowance of the revocation of the IQO and/or the Regulations. However, neither instrument has been disallowed by the Parliament.

207 If follows that the plaintiff's attack on the Regulations must fail.

The FQO made on 27 March 2017

208 Because the IQO was validly revoked, the FQO made on 27 March 2017 by the Executive Director must be taken to have lapsed. Further, the Regulations imposing the 60 tonne cap were validly made and continue to apply. Accordingly, there would be no point in giving any further consideration to the process by which the FQO of 27 March 2017 was made.

---

161 On the last day of the oral hearing (transcript of proceedings 585-586) senior counsel for the defendants mentioned that he had just discovered that the order revoking the IQO (as distinct from the Regulations) may not have been tabled in Parliament as required by Pt 3A of the *Subordinate Legislation Act 1994* (Vic). However, this did not affect the validity or the operation of the order for revocation: see SLA s 16C. Nor is it said to have inhibited the ability of the plaintiff to approach the Scrutiny of Acts and Regulations Committee of the Parliament with a view to advancing its cause.

162 See paras 188-201 above, esp paras 190-193. See also Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis, 4th ed, 2012), 321 [20.11], citing *River Fishery Assn (SA) Inc v South Australia* (2003) 85 SASR 373. Cf *Attorney-General for Northern Territory v Olney* (unreported, Federal Court of Australia, Commonwealth, NG1439 of 1988, 28 June 1989) (the Kenbi Land Claim Case); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

163 Cf *Lyster v Camberwell City Council* (1989) 69 LGRA 250 (Cummins J).

164 Subject to the matter referred to in footnote 161 above.

Conclusion

209 For these reasons, the proceeding will be dismissed.

210 I will hear the parties on the question of costs.

Application dismissed

Solicitors for the applicant: *Fitzpatrick Legal*.

Solicitor for the defendants: Department of Economic Development, Jobs, Transport and Resources and Minter Ellison (from 20 August 2018).

J VENEZIANO