



**REPORT FOR
THE STATE SERVICES COMMISSIONER
OF
AN INQUIRY
INTO FISHERIES MANAGEMENT
OF THE SCAMPI FISHERY**

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25 May 2004

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1.1 LETTERS OF APPOINTMENT

STATE SERVICES COMMISSION
Te Komihana O Ngā Tari Kāwanatanga



18 November 2002

Helen Cull QC
P O Box 10433
WELLINGTON

Dear Ms Cull

Inquiry into Fisheries Management matters

I have decided to undertake an inquiry into the allegations concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, which will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries' current management and systems meet public expectations.

My terms of reference for the inquiry are attached.

Under section 25(2) of the State Sector Act, I appoint you to conduct that inquiry. I am appointing David Smyth, under the same provision, to assist you in the inquiry.

Section 25(1) of the State Sector Act in effect affords the State Services Commissioner the powers of a Commission of Inquiry for the purpose of carrying out duties and functions under the Act. Those powers attach to and may be exercised by you and Mr Smyth in the conduct of the inquiry, by virtue of your appointment under section 25(2).

Thank you for agreeing to undertake this work.

Yours sincerely

Michael Winttingham
State Services Commissioner

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18 November 2002

David Smyth
Deputy Commissioner
State Services Commission
WELLINGTON

Dear David

Inquiry into Fisheries Management matters

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Section 25(1) of the State Sector Act in effect affords the State Services Commissioner the powers of a Commission of Inquiry for the purpose of carrying out duties and functions under the Act. Those powers attach to and may be exercised by you and Ms Cull in the conduct of the inquiry, by virtue of your appointment under section 25(2).

Thank you for agreeing to undertake this work.

Yours sincerely


Michael Winttingham
State Services Commissioner

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1.2 TERMS OF REFERENCE

Inquiry into fisheries management matters concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries

Terms of Reference

Introduction

The Ministry of Fisheries was established in 1995 following the restructuring of the Ministry of Agriculture and Fisheries. Prior to the establishment of the Ministry of Fisheries, the Ministry of Agriculture and Fisheries was responsible for fisheries management.

There have been allegations of corruption and impropriety on the part of the Ministry of Agriculture and Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery.

Terms of Reference

The State Services Commissioner will undertake an inquiry into the allegations concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, which will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries' current management and systems meet public expectations.

The State Services Commissioner will, pursuant to the provisions of the State Sector Act 1988, inquire into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries in the following matters:

1 Given the legislation and Government policy framework within which the former Ministry of Agriculture and Fisheries was operating, did it act reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992?

1.1 Did the former Ministry of Agriculture and Fisheries have adequate, appropriate and consistent administrative systems and processes for the granting of such permits and licences at the time?

1.2 If so, did the former Ministry of Agriculture and Fisheries comply with those systems?

2 Did Fisheries Officers in the former Ministry of Agriculture and Fisheries in 1993, and in the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery?

2.1 If so, did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries respectively carry out adequate investigations into the allegations? If not, why not?

2.2 Did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences, and did the Ministries comply with those systems?

3 Did the former Ministry of Agriculture and Fisheries have adequate grounds for taking disciplinary action against Mr Nalder on each occasion? What were the circumstances surrounding the termination of his employment? Did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery?

4 Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times professional and at arms' length?

5 Any other matter concerning the former Ministry of Agriculture and Fisheries or the Ministry of Fisheries that the reviewers consider relevant to the foregoing questions.

Exclusions

The investigation will not consider the appropriateness of fisheries legislation or Government fisheries policy.

Recommendations

The reviewers will recommend to the State Services Commissioner, on the basis of their findings on these matters, what further action, if any, should be undertaken, whether by the State Services Commissioner or by other parties. The focus of such subsequent action would include the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.

The Commissioner will either initiate or undertake further action or place it in the hands of those for whom it is more appropriate to take action.

Reviewers

Helen Cull QC
David Smyth, Deputy Commissioner, State Services Commission.

Process

The inquiry will identify and access all relevant material in relation to this matter, and interview the relevant people.

Timeframe

This inquiry will be completed by 31 March 2003 and the report and recommendations will be made public.

Michael Wintringham
State Services Commissioner

18 November 2002

1.3 ABBREVIATIONS USED IN THIS REPORT

BARINE	Barine Developments Limited
CELR	Catch Effort Landing Reports
CTC	Compliance Technical Committee
CLR	Catch Landing Returns
DCM	District Compliance Manager
FIN	Fisheries Intelligence Network System
FMA	Fishery Management Area (This is used interchangeably with QMA & SCI)
FMO	Fisheries Management Officer
GOODSHIP	Mr Goodship and the reference to Goodship in the report includes Goodship & Pranfield Holdings Ltd
ICE	Individual Catch Entitlement
ITQ	Individual Transferable Quota
LFRR	Licensed Fish Receiver Return
ISG	Independent Scampi Group
MAF	Ministry Of Agriculture & Fisheries (Prior to July 1995. This is not the current Ministry of Agriculture & Forestry)
MAF/Fish	The Fisheries Group in the Ministry of Agriculture and Fisheries prior to 1995
MCO	Manager Of Compliance Operation
MFISH	Ministry Of Fisheries
MUIRSON	Muirson Fisheries Chathams Limited
FISHERIES	
NCU	National Compliance Unit
PETROMONT	Petromont Holdings Limited
QAA	Quota Appeal Authority
QMA	Quota Management Area (This is used interchangeably with FMA & SCI)
QMR	Quota Management Report
QMS	Quota Management System
RFMO	Regional Fisheries Management Officer
RFO	Regional Fisheries Officer
ROF	Registrar Of Fisheries
SANFORD	Sanford Limited
SEALORD	Sealord Products Limited
SCI	Scampi Management Areas (This is used interchangeably with QMA & FMA)
SFMC	Senior Fisheries Management Committee
SFMO	Senior Fisheries Management Officer
SFP	Senior Fisheries Prosecutor
SIMUNOVICH	Simunovich Fisheries Limited
SOU	Serious Offences Unit
TAC	Total Allowable Catch
TACC	Total Allowable Commercial Catch
TCEPR	Trawl Catch Effort And Processing Returns
UNITED	United Fisheries Limited
VAUTIER	Vautier Shelf Company No. 14 Limited
VMS	Vessels Monitoring System

The Reference to MAF/Fish

Departmental structures and names have changed during the period covered by this report, which runs from the late 1980s to the present day. In July 1995 the current Ministry of Fisheries was established from the former Fisheries group in the then Ministry of Agriculture and Fisheries. Other than the new Ministry of Fisheries Chief Executive, all staff transferred from the Fisheries group to the new Ministry.

In this report the abbreviation “MAF/Fish” is used to refer to the Fisheries group in the former Ministry of Agriculture and Fisheries during the period up to June 1995, and includes interactions between that group and the Director-General of that former Ministry.

In this report “MAF” refers to the former Ministry of Agriculture and Fisheries. The present Ministry of Agriculture and Forestry does not have fisheries responsibilities as did the previous Ministry of Agriculture and Fisheries.

The abbreviation “MFish” is used in this report to refer to the Ministry of Fisheries in the period since July 1995.

When the term “Ministries” is used, this refers to both departments, pre- and post-1995.

SCIs, FMAs and QMAs

The reference to New Zealand fishing areas in the report are variously described as Fisheries Management Areas (FMAs), Quota Management Areas (QMAs) and Scampi Management Areas (SCIs). Although scampi is not in the Quota System, documents produced to the Inquiry refer to QMAs, FMAs and SCIs interchangeably.

References both in evidence and at the hearing often referred to ICE (Individual Catch Entitlement), when describing catch entitlements for individual fishers in fishing years both before and after 1996. The current legal definition of ICE was first introduced in the Fisheries Act 1996.

Because of the frequency of use of the term “ICE” in relation to the period before 1996, this report uses that term and “individual catch limit” interchangeably when referring to those pre-1996 fishing years, although the latter or similar phrases would have been more commonly used at that time.

1.0 EXECUTIVE SUMMARY

This Inquiry was established by the State Services Commissioner, following allegations of corruption and impropriety on the part of the Ministry of Agriculture & Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery.

The Inquiry was established under the State Sector Act and was charged with undertaking an inquiry into the allegations and to assess the quality of the administration and management at the time referred to in the allegations, to determine whether there was a need to take further action to ensure that the current management and systems of the Ministry of Fisheries met public expectations.

1.1.1 Allegations of Corruption and Impropriety

The allegations of corruption and impropriety on the part of both MAF/Fish and the Ministry of Fisheries in relation to the management of the scampi fishery, were raised in Parliament, referred to the Serious Fraud Office, and repeated in the media and in a Television New Zealand “*Assignment*” programme. The Inquiry has undertaken a detailed assessment of the allegations. Many witnesses resiled from restating the allegations, and withdrew parts of the affidavits in which they were placed.

The Inquiry has concluded that the evidence heard by it and the information available to it, do not substantiate any foundation on which to recommend to the State Services Commissioner that he investigate or refer the matters to another agency for further investigation for potential criminality on the part of either officials or fishers. In particular, there is no foundation for the allegations of impropriety or corruption on the part of Mr Crothers or Mr Wood, who were MAF/Fish employees, both of whom were specifically named.

In making their recommendations, the Reviewers have specifically recommended to the State Services Commissioner that no further action should be undertaken, either by the State Services Commissioner or by other parties, in respect of those allegations.

In inquiring into the performance of the former MAF/Fish and the Ministry of Fisheries, five specific questions had to be answered, each under a specific Term of Reference.

1.1.2 1. The Systems for Permitting

Whether the former MAF/Fish acted reasonably in administering the grant of permits to scampi fishers from the late 1980s to 1992, and in particular whether the administrative processes were adequate, appropriate and consistent?

Scampi is a prawn like crustacean, closely related to a rock lobster, living in burrows on the ocean floor in sediment at depths between 200 and 500 metres. They can be caught by pots, but the most successful is by trawling, using mesh size of approximately 43 mm. The

relevant Regulations prohibited mesh size of less than 100 mm, so to trawl for scampi required a permit exemption and this was done by special permit until September 1990.

Scampi is a non-QMS species and after the introduction of the QMS system in 1986, MAF/Fish circulated non-QMS policy directives to the regions, to assist them in deciding which category (e.g. developing or fully developed fishery) non-QMS species were to be placed in and which type of permit should be issued.

The regional organisational structure for MAF/Fish from 1985 to 1995 devolved the permitting and licensing functions to the regions.

Because little was known about this scampi fishery, it was principally classified as a developing fishery and special permits were issued to enable investigative fishing to take place and to specifically permit scampi fishers to use undersized mesh.

In August 1988, MAF/Fish Head Office signalled a policy change to commercial permits, because the use of special permits for a commercial fishing operation was contrary to the purpose of special permits.

The change to commercial permits was critical and significant. A commercial permit gave a fisher "*a foot in the door*" as he could expect the permit to be renewed annually on application. This differed from a special permit which did not accord such an expectation or right. To a commercial fisher therefore, once a commercial permit was issued, it was a de facto acknowledgement that the fishing operation was commercial and the commitment of capital and vessels would not undertaken on an investigative basis any more.

In July 1988, prior to the policy being released from Head Office, Mr Wilkinson of Simunovich learned of the change to commercial permits from the Auckland office and wrote to the Registrar in Auckland requesting the issue of commercial permits. These were issued to Simunovich from January 1989 and Barine later in the same year, for all fishing areas in New Zealand.

The policy change was buried in an appendix to a policy directive of 29 August 1988. The only region which followed the directive was the Northern region, which issued commercial permits together with special permits, endorsing the use of undersized mesh.

Apart from one aberrant commercial permit issued by Christchurch to United in March 1988, and the Invercargill office of the Southern region to Roderique in 1989-90, we have been unable to conclude that any other region issued a commercial scampi permit to its fishers. In the cases of United and Roderique, neither of the Christchurch or the Invercargill offices was following the policy directive. The United permit was issued before the change in policy and the Roderique permit was issued in ignorance of it.

In the lead-up to the 1990-91 fishing year, the Central region discovered that commercial permits had been issued for scampi trawling in its fishery areas. It notified the scampi fishers that subject to further research, special permits only would be issued. This arose from concerns about the juvenile catch rates, dumping of bycatch and the state of the fishery being not fully known to the Central region's personnel.

The Central region advised the scampi fishers that special permits only would be issued for the 1990-91 year. This produced a strong reaction from Simunovich and amid threats of legal action and review, a meeting was convened on 4 September 1990 in Head Office with Simunovich, MAF/Fish Head Office personnel and the acting Regional Manager for the Central region. Simunovich urged that the Minister declare an emergency in the fishery under s 12 Part I of the Fisheries Act 1983, and threatened to take further action if the commercial permits for Simunovich were not renewed.

On 27 September 1990, MAF/Fish Head Office wrote to Simunovich advising that the management of scampi would be by a s 65 moratorium which “*will accommodate your concerns*”. No such advice was sent to any other fisher.

The s 65 scampi moratorium took effect on 1 October 1990 with commercial scampi permits being issued immediately to those that held scampi commercial permits in the previous year, while criteria were being developed to determine more precisely who should get permits.

Seven months into the 1990 fishing year, seven permits were revoked and three additional fishers were approved on the basis that their applications were received in 1990 but no permits had been issued.

In the same month, MAF/Fish declared a vessel restriction in the scampi fishery with retrospective effect, namely a restriction on any further vessels in the fishery that were not fishing as at 30 September 1990. The retrospective effect of the declaration to ad hoc changes in the vessel policy, as exemptions had to be granted to fishers who had acquired vessels in February 1991, before the vessel restriction was announced.

Three fishers were affected, two of which required a vessel to fish their scampi permits. The third was Simunovich, which acquired the *Drysdale*, notified MAF/Fish that the *Drysdale* was one of six scampi vessels currently in the fishery, and at the same time sought approval for a 43 m larger vessel to fish in Areas 3 to 9. MAF/Fish gave approval to the larger vessel and after a review in respect of the *Drysdale*, Simunovich had permission to fish six scampi vessels in the fishery, provided that it fished the larger vessel in Areas 3 to 9 only and nominated which of its vessels would be withdrawn from Areas 1 and 2 as a condition of having the larger vessel approved.

We have concluded that the requirement to nominate the withdrawn vessel from the fishery was not strictly adhered to and gave Simunovich an advantage. Simunovich sought permission to change for the third time the nominated vessel, effectively allowing all seven of its scampi fleet to fish in the 1991-92 year, although not concurrently.

In the same month that the Simunovich larger vessel was approved, Barine requested four extra vessels and was informed by MAF/Fish that it needed a plan but if there was more catch effort in the fishery, approval was unlikely to be granted. We agree with Barine that the effect of this response was to decline its application, as four vessels inevitably would increase effort.

Although there was a change of mind in November 1991 that additional vessels could be introduced into Areas 3 to 9, the advice to the fishers was that they could transfer effort from Areas 1 and 2 to Areas 3 to 9, not that they could bring in additional vessels.

The importance of the vessel restriction is that the catch history during 1990-91 and 1991-92 led to the allocation of fishing rights in the form of individual catch entitlements (ICE) for Areas 1, 2, 4 and 6A. Simunovich was active in urging the allocation of ICE in those Areas and MAF/Fish agreed. When the Independent Scampi Group also urged that ICE should be allocated in Areas 3 and 6B to be consistent, in the face of Simunovich opposition, MAF/Fish did not issue ICE.

We have concluded that the former MAF/Fish acted unreasonably in administering the grant of permits for scampi fishing and for vessel approval during that period.

We have also reached the conclusion that MAF/Fish did not have adequate, appropriate or consistent administrative systems and processes for the granting of such permits. The following factors formed the basis of our conclusions:

1.1 Inappropriate Organisational Structure

The organisational structure was inappropriate, devolving decision-making and power to the regions to grant permits to the fishers in their fisheries areas with no effective system, structure or accountability from Head Office to control or manage inappropriate, inconsistent or divergent permitting practices among the regions.

1.2 Regional Inconsistency

The policy direction to the regions from Head Office was ineffectual and inadequate, leading to inconsistent permitting practices, which resulted in considerable benefit to some fishers, to the detriment of others. It also led to the exclusion of some local fishers from a fishery in their area, and to fishers in one region receiving substantial advantages over fishers in other regions.

1.3 Inappropriate Management Actions

In response to the refusal by Central to issue commercial permits and the complaint by Simunovich, MAF/Fish acted inappropriately by attending on Simunovich immediately, without undertaking a proper investigation of how the regional approaches had differed, taking advice from its officials and considering the impact on other scampi fishers.

The s 65 moratorium decision and permitting exemptions made by MAF/Fish in 1990-91 was implemented, without adequate preparation, relevant information or planning. MAF/Fish imposed a moratorium and subsequently developed criteria for entry to the fishery during the fishing year, revoking eight permits already issued.

The decision-making and allocation of ICE in SCIs 1, 2, 4 and 6A but not in SCIs 3 and 6B was inconsistent and reflected the wishes of the predominant fisher in the scampi industry.

1.4 Inconsistent Permit Types and Conditions

The differences in the types of permits issued and the contradictory conditions within them were a consequence of the regions exercising sole control over their permitting processes. The type of permit issued, namely whether it was a commercial or special permit, gave distinct advantages to those fishers that received commercial permits as opposed to those that received special permits.

Despite the wording on the special permits that no assurances were being given on future access and allocation levels, access to the scampi fishery was based in part on those permits, and later allocations were based on the catch history achieved following such access.

To issue permits, stating that no future entitlements can be acquired by way of catch history and the contrary occurs, is misleading, inappropriate and administratively inconsistent for two reasons:

The permits were never issued for investigative purposes.

The permits contributed towards conferring valuable property rights and entitlements.

1.5 Office Processes

The office administrative procedures and systems within MAF/Fish were inadequate in that:

- there was no compliance with or monitoring of manual instructions on fees and timeliness of permit issue;
- there were inadequate information retrieval systems
- no adequate monitoring of compliance with national directives or guidelines within the scampi fishery; and
- haphazard office processes contributed to permit applications either being mislaid or lost, and led MAF/Fish and MFish to deny the existence of permit applications until discovered years later.

1.6 Treatment of Fishers

- Fishers received disparate treatment by MAF/Fish. MAF/Fish either ignored applications or failed to communicate in a timely and effective way.
- Fishers were subject to delay in the granting of permits and did not receive information on changes in policy, resulting in some fishers being excluded entirely from the scampi fishery with others being unable to establish catch history in the relevant years, affecting the later allocations of ICE.

1.7 Vessels

- The policy on vessel restriction having been imposed retrospectively, developed in an ad hoc manner, was not soundly based on relevant information and was inappropriate.
- The management of the permitting of scampi vessels was grossly inadequate, inappropriate and unreasonable, resulting in unevenhanded treatment among the scampi fishers.

1.1.3 2. Compliance Systems

Did Fishery officers in the former MAF/Fish in 1993 and the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery.

The Inquiry heard evidence in relation to the allegations about illegal fishing by one or more fishing companies involved in the scampi fishery in 1993 and in 1998 in respect of four investigations into the scampi fishery. We found that the Fisheries officers in MAF/Fish in 1993 and in MFish in 1998 did have a reasonable basis to suspect illegal fishing.

In 1993, MAF/Fish did not carry out adequate investigations into those allegations. The reasons which contributed to that included the inappropriate regional structure for compliance activities, the lack of adequate oversight and prioritisation, the fragmented nature of resource allocation decisions in respect of compliance activities and in respect of Operation Export in 1993, a failure to ensure that an apparent lack of motivation to continue the investigation was reversed and activity renewed.

We found that MFish did carry out adequate investigations into allegations of current illegal activity in 1998, but was constrained by its understanding of the two-year limitation on prosecutions and on the exercise of fisheries officers powers, so that allegations of historical offending were not adequately pursued.

In the circumstances, this limitation is not appropriate or adequate, given the serious nature of the allegations and the complexity of potential fraud on the QMS. In order for MFish to exercise its powers lawfully and appropriately, and to ensure compliance with the QMS, the time limitation for the bringing of Fisheries Act offences should be greater than two years.

We find that in 1993 MAF/Fish did not have adequate and appropriate administrative systems and processes in place for the identification and investigation of complex offending, but they were adequate and appropriate in 1998 and M/Fish did comply with those systems.

1.1.4 3. Mr Nalder

Did MAF/Fish have adequate grounds for taking disciplinary action against Mr Nalder and did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery.

Between 1989 and 1994, Mr Nalder was employed respectively as the District Compliance Manager in Tauranga and Senior Fisheries Investigator in Auckland. During his employment, two disciplinary investigations were undertaken into incidents unrelated to any suspected illegal fishing in the scampi fishery.

In respect of the first disciplinary investigation, we found that there were grounds to direct a disciplinary investigation and for finding that Mr Nalder did not properly advise of costs but there were not grounds for the other disciplinary action taken. The disciplinary outcome for Mr Nalder was more serious than the circumstances warranted.

In the second incident, there were some grounds to initiate disciplinary action, but there were inadequate grounds for the finding against or the penalty imposed on Mr Nalder.

Mr Nalder took over an investigation in 1993 called “Operation Export” into suspected illegal fishing against Simunovich. On the commencement of the first disciplinary investigation, his work on “*Operation Export*” was curtailed and on his suspension at the commencement of the second disciplinary action it was suspended.

There was no connection between the ending of Mr Nalder’s employment with MAF/Fish and his investigation of alleged offences relating to the scampi fishery.

The Terms of Reference refer to a “*dismissal*”. There was no “*dismissal*” as Mr Nalder’s employment came to an end by agreement.

1.1.4.1 Relationships between Ministry Officials and Commercial Scampi Fishers

Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times, professional and at arms length.

There are six matters which arose from the Inquiry’s examination of these relationships.

They are:

(i) MAF/Fish forged relationships with larger companies

The focus of MAF/Fish in forging relationships with industry players was on the larger companies or industry fishers, with whom they maintained contact and sought information. The perception by other fishers, who presented their case histories to this Inquiry, that because they were smaller fishers they did not feature in MAF/Fish’s eyes, is understandable.

The ease of access for a company like Simunovich or Sanford, compared to the problems encountered by Barine, Mr Goodship and Mr Jose emphasised the perceptions that MAF/Fish was unevenhanded in their approach to the scampi fishers and favoured Simunovich.

(ii) MAF/Fish had a closer relationship with industry players on working parties

The approach taken by MAF/Fish in processing applications by fishers depended on the frequency of contact and the strength of the approach made by the fisher.

Larger companies were also more likely to be at industry meetings where they could pursue their own interests outside the formal meetings. MAF/Fish's expectation that if fishers wished to pursue something, they should make a personal approach, did not reflect an even-handed approach to administration.

The problem for the smaller fishers was that they had no way of knowing, nor did they have the influence to enable them to be taken seriously as their larger competitors were. The Reviewers conclude that the interests of smaller fishers:

- Were not given proper weight in policy decision making; and
- Did not receive even-handed treatment in the processing of permit and vessel applications and associated enquiries.

(iii) Relationships with previous MAF/Fish personnel

The advantages that ex-employees could bring to their current employers as a result of being an ex employee of MAF/Fish were considerable. They included knowledge of research results, administrative processes, Ministry personnel, how to use the OIA, and the easier and more effective access that such knowledge enabled. Ex-employees in that situation are perfectly entitled, and would be expected by their new employers, to use those advantages.

We do not recommend constraints on such employment changes or on the use of such knowledge by ex-employees (unless it amounts to conflict of interest or breach of confidentiality).

The responsibility is on departmental staff to ensure that their processes and decisions do not unduly accommodate the advantages that ex-employees may have. The interests advocated by ex-employees must be properly balanced within the wider public interest. Current staff need to be alert to the risk that a perception of favouritism could develop if those staff do not deal with ex-employees and their interests in ways which are seen to be totally even handed.

(iv) The frequency, assertiveness and relative importance of the contacts with Simunovich

The perceptions within MAF/Fish and in the industry were that Simunovich was being treated differently. MAF/Fish appeared to have been influenced by Simunovich to the degree that a perception was created that all the key decision-making in scampi management were driven by Simunovich submission or demand.

Overall the impression gleaned from examining four to five years of interactions and the nature of the outcomes from those exchanges is that the exchanges with Simunovich were not appropriately counter-balanced by proper consideration of the interests of other sectors of the scampi fishing industry.

MAF/Fish officials failed to gauge whether they were acting even-handedly amongst all the scampi fishers, fairly and impartially. We do not suggest that any Ministry official was dishonest in any way, but their inadvertence to ensure that they were acting fairly, has led us to the conclusion that their relationship with Mr Wilkinson and Simunovich was not professional or at arms length.

We acknowledge that outcomes do not have to be equal for all industry players. But they must all be treated impartially and with integrity and decisions must take proper account of all players' interests.

(v) The acceptance of Gifts and Entertainment Offers

The acceptance of gifts and entertainment offers, and in particular the acceptance of gifts from certain companies which were also having influence in the development of fishery policy, where MAF/Fish was involved in ultimately allocating valuable property rights, compromised the independence and integrity of MAF/Fish.

(vi) Relationship with compliance staff

The evidence before the Inquiry revealed that staff of the Ministries, both in the late 80s and up to the present time, used and are still prepared to use certain fishers to detect offending by others.

To use, or be prepared to use, such offers from major industry players as MAF/Fish did in that period was to compromise the integrity of MAF/Fish's ability to be even-handed, impartial and undertake compliance procedures with the rigor, integrity and independence that compliance activities demand. We conclude that MAF/Fish did not act professionally or at arms length, in undertaking detection of offending by using the property of major industry players.

The above factors lead us to conclude that relationships between officials and commercial scampi fishers were not professional and arms length in the period between 1988 and 1992. One outcome was that Simunovich was treated in a favourable way, in contrast to the other fishers in the scampi fishery.

1.1.4.2 Other Matters

Is there any other matter concerning the former MAF/Fish or the Ministry of Fisheries that the Reviewers consider relevant to the foregoing questions.

Under this Term of Reference, the Reviewers were asked to raise any other matter concerning MAF/Fish or MFish that was considered relevant to the foregoing Terms of Reference.

We have concluded the relevant matters are:

(1) The impact of the Quota Management System on MAF/Fish’s capability in both policy and compliance functions.

The Inquiry agrees that the introduction of the QMS was important and positive for New Zealand fisheries, and that it was a major change with full implementation being delayed by the 1987 Maori fisheries injunction. Insufficient time, resources and thought went into the implementation. There was no recognition that when systems and resources were so stretched in implementing change, even more attention must be placed on ensuring impartiality and integrity. The reverse occurred.

(2) The failure of MAF/Fish and MFish to respond to criticism appropriately and effectively.

MFish still demonstrates an overall defensiveness, particularly in respect of litigation. The effect of this has been that MFish has not addressed the criticisms of unfairness and unevenhandedness expressed by the Courts. MAF/Fish had earlier failed to respond effectively to reports critical of its decision-making processes and structures, in both administration and compliance.

The Inquiry received submissions that the prescriptive nature of the 1996 legislation leaves little or no discretion for MFish in the administration of permitting. Nevertheless there are aspects of decision-making and policy advice where greater emphasis should be given to fairness and evenhandedness.

2.0 RECOMMENDATIONS

The Terms of Reference indicated that:

“the inquiry will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries’ current management and systems meet public expectations.”

and

“the reviewers will recommend to the State Services Commissioner, on the basis of their findings on these matters, what further action, if any, should be undertaken, whether by the State Services Commissioner or by other parties. The focus of such subsequent action would include the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.”

2.1.1.1 Recommendations Relating Specifically to the Ministry of Fisheries

- The Ministry should reduce the defensiveness which is presently characterised in the evidence and the hearing for this Inquiry. This defensiveness appears to be the legacy of the long and difficult introduction of the QMS system and the years of associated litigation. The Ministry should give greater emphasis to fairness and evenhandedness in its decision-making, as well as continuing to emphasise legal compliance.
- The Ministry should introduce a system to record the nature of complaints received from the fishing industry and fishers, which would enable trends in fishers perceptions of the Ministry’s decision-making to be analysed and monitored. This system could include complaints about the current system which have been contracted out or devolved.
- In enforcement activities the Inquiry recommends that the Ministry ensure that no facilities or vessels owned by fishers be used as part of surveillance or compliance activities by enforcement officers to investigate possible offending by a competitor in that fishery, to maintain the independence and integrity of investigations and the prosecution process.
- If the legislation, policy and process for the allocation of scampi quota finally adopted allows administrative discretion, then the reviewers recommend that to the extent such discretion allows, those exercising it consider, when coming to an overall view of the relevant public interest, the exercise of the discretion be informed by the findings of this Inquiry. Such an approach would assist in meeting the public expectations of fairness and impartiality in the administration of fisheries and also meet the requirements of the Public Service Code of Conduct.

- MFish should ensure that there is a consistent and fair process for the statutory right of review against decisions on fishing permits under s 94 Fisheries Act 1996 by prescribing clear procedures for the conduct of a fair and transparent hearing.

2.1.1.2 Recommendations which Apply to the Ministry of Fisheries and have Wider Application in the Public Service

- Departments engaged in developing advice on, administering, or monitoring regulatory processes should periodically review their processes and behaviours in such administration to ensure that all interests are taken properly into account in assessing the overall public interest in regulatory decision making;
- In undertaking such reviews departments should consider whether specific attention to or support for smaller or less forthcoming enterprises in the industry being regulated may be required;
- Departments should alert and train staff on the need to counter balance the effects of lobbying, greater information and persistent inquiries by major enterprises in an industry, with a view to ensuring that a proper balance of interest in regulatory decision-making is achieved. The reviewers note that this does not necessarily mean weighting all interests equally but ensuring that a proper balance of interests is recognised, and the processes leading to that view have the fullest integrity;
- Departments should ensure that in exit interviews with employees departing to work in the industry regulated by that department, such employees are made aware of the fact that future approaches by them to officials in relation to regulatory matters will be treated carefully and with a degree of caution, to ensure that undue advantage is not being given to their future employer;
- Departments should train the staff administering regulatory processes on how they should deal with ex-employees relative to others – that all care should be taken to ensure that transactions and relationships with such ex-employees is fully even-handed and if necessary cautious, to ensure that no undue advantage is given to them or to their new employer.
- All Departments or Ministries should reinforce in staff training and by other means the importance of the Public Service Code of Conduct on Offers of Gifts or Gratuities. It is particularly important for Departments administering regulatory processes to ensure that its employees do not compromise or be perceived to be compromising their integrity, particularly when they are entrusted to administer and allocate valuable commercial property rights.

2.1.1.3 Recommendations to the State Services Commissioner

- The State Services Commissioner should take no further action in respect of the allegations of corruption and impropriety which were made against the Ministry of Agriculture and Fisheries and the Ministry of Fishers.
- The State Services Commissioner should consider if further supporting material for the Public Service Code of Conduct should be developed to enable departments to train staff better on the ethics and behaviours needed to ensure that advisory and administrative processes give proper and balanced recognition to the interests of different enterprises in a regulated industry.

2.1.1.4 Other Issues Raised in Final Submissions

- We do not propose to make any recommendations on the powers of inquiries under the State Sector Act to award costs.
- We do not propose to release the transcript of the Inquiry or to recommend its release.

3.0 BACKGROUND

3.1.1 How the Inquiry Came About

The introduction to the Inquiry's Terms of Reference refers to allegations of corruption and impropriety on the part of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery.

The allegations are contained in the affidavits, which were presented by Barine to the Rt. Hon. Winston Peters, MP and were later referred to the Solicitor-General and the Serious Fraud Office. In the House of Representatives, reference was made to the allegations of corruption and following that, the Serious Fraud Office, the media, and a Television New Zealand "Assignment" programme have publicly repeated that these allegations are about corruption. It should also be noted that Mr Tuck, the Chief Executive of the Ministry of Fisheries and the State Services Commissioner respectively, issued press releases referring to the allegations of corruption having been made.

In August and October 2002, the Chief Executive of MFish referred the original affidavits and materials presented by Barine to an independent barrister, Mr Peter Andrew, to review the allegations and receive responses from two of the Fisheries Officers named to ascertain whether any further investigation was required. Mr Andrew interviewed both officers about the specific allegations and completed a report dated 2 October 2002, in which he recommended that the Chief Executive need take no further steps to investigate the allegations against them and that there was no need for any further inquiry. He recommended¹ that MFish make further inquiries in relation to the allegations of illegal fishing by Simunovich, which appeared to be directly relevant to the ongoing issue of the allocation of catch rights in the scampi fishery.

The State Services Commissioner announced publicly on 18 November 2002 that he would undertake an inquiry and released the Terms of Reference of this Inquiry.

The Primary Production Select Committee announced that it would hold an Inquiry into the scampi fishery and released its Terms of Reference on 14 November 2002.

During the Inquiry, three decisions were issued by the Court of Appeal and the High Court and were circulated to the Reviewers and to Counsel.²

¹ Para. 2.3 page 2 Peter Andrew's report 2 October 2002

² *Goodship & Pranfield Holdings Ltd v. Ministry of Fisheries & anor* (Unreported: CA 236/02 2 October 2003) *Westhaven Shellfish Limited v Chief Executive of the Ministry of Fisheries* (Unreported: Goddard High Court, CP102/00 21 July 2003) and *Sealord Group Ltd v. Chief Executive of the Ministry of Fisheries* (Unreported: CA 238/02 1 April 2004).

3.1.1.1 The Inquiry Process

The Reviewers were:

- Helen Cull QC
- David Smyth, Deputy Commissioner, State Services Commission

The Reviewers were assisted by:

- Mr John Stevenson – Senior Counsel Assisting
- Ms Nerissa Barber – Counsel Assisting from December 2002 to July 2003
- Ms Elizabeth Hird – Counsel Assisting from February to May 2004
- Ms Megan George – Secretary to the Inquiry from December 2002 to July 2003

The Reviewers also acknowledge with thanks the considerable administrative and secretarial assistance provided by Sue Rose and Mary Taurima.

Following the appointment of the Reviewers, notice was given to persons who may have an interest in the Inquiry.

On 16 December 2002 and after hearing the parties, the Inquiry issued Minute 1³ setting out the timetable and procedures for the conduct of the hearing. The Minute specified that:

- the hearing would be conducted with the public and media excluded for the following reasons:
 - (a) At the preliminary hearing on 10 December 2002 only one person indicated a desire for the hearing to be in public;
 - (b) Some details of the employment of some Fisheries personnel is private and personal information;
 - (c) Some of the evidence to be considered by the Inquiry will be commercially sensitive;
 - (d) The frank and free giving of evidence by witnesses is likely to be enhanced;
 - (e) The Select Committee Inquiry is a more appropriate forum, open to the public on issues of public interest;
- The focus of this Inquiry is principally to review the processes and administrative systems within the Public Sector;

³ Appendix 1

- persons who had given an address for service and their Counsel could be present;
- evidence would be given on oath;
- the hearing would be on an inquisitorial basis with parties being allowed to put questions through the Reviewers and with consideration being given to allowing cross-examination where warranted;
- a transcript would be taken and be made available on the conditions specified in the Minute;
- documents should be identified and made available by 20 December 2002. Statements of concern were to be filed by 24 January 2003, responses by 10 February 2003 and replies by 19 February 2003;
- the Primary Production Selection Committee was conducting a public hearing into the same issues.

The Minute directed that the hearing would commence on 3 March 2003 and continue to 14 March 2003 with provision to resume on 24 March 2003. In response to matters raised by MFish, Simunovich and Barine, Minute 2 relating to briefs, affidavits and witnesses was issued on 4 February 2003. As MFish had not complied with the timetable in Minute 1, the Inquiry issued Minute 3 dated 21 February 2003, and called a directions conference.⁴

The directions conference resulted in Minute 4 dated 25 February 2003, which noted as “*serious defaults*”, the failure of MFish to provide lists of documents and evidence and the effect of late compliance on the timetable. It also recorded that as a result of the defaults the Inquiry accepted that the existing timetable was not feasible. A new timetable for documents and evidence was established.⁵

Minute 4 also directed that the hearing should start on 28 April 2003 and continue to 16 May 2003 and noted that future hearing time would be allocated, if required. The Minute also specified that any party seeking an extension of time must make a formal application.

On 19 March 2003 MFish made an application for an extension of time to file evidence. The Inquiry recorded in Minute 5 dated 21 March 2003⁶ that this was the second time MFish had failed to comply with the timetable, which had been established with all Counsel present and no disagreement and that it had been agreed that the Inquiry needed to commence without delay. As an extension could be granted without jeopardising the commencement of the hearing, on 28 April 2003 a “*final extension*” was made extending the time for the filing of evidence by MFish.

⁴ Appendix 2

⁵ *ibid*

⁶ *ibid*

The Inquiry gave notice of the witnesses which it wanted to hear. Some witnesses were subpoenaed by the Inquiry. Additional witnesses were called by some parties. The Inquiry called as expert witnesses:

- Mr Laking who retired from the public service after 32 years service, had experience in administrative systems and processes and who was currently a university lecturer in public management.
- Mr Spong who retired after 42 years service with New Zealand Customs Service and who had extensive enforcement management experience.
- Mr Jones who had experience as an owner of his own fishing vessel in dealing with returns. He had been managing director of New Zealand Quota Management Services Limited and was currently assisting the Ministry and commercial stakeholders to develop new reporting forms.

Hearings commenced on 28 April 2003.

Minute 6 dated 20 June 2003 was issued drawing attention to an article in the Independent, which referred to the raising by the Ministry of privilege. The Minute noted that the passing of information or the disclosure of the transcript to the media would be improper. Written assurances were obtained from Counsel that neither they nor their clients had passed any information to the media.

The hearings ended on 19 July 2003 with sittings on 44 days between the commencement of hearings on 28 April and the ending on 19 July 2003.

A total of 73 witnesses gave evidence on oath or affirmation in person or by video link from Auckland, Christchurch, Yugoslavia and Germany.

A transcript of evidence comprising 5461 pages was taken.

In addition to the evidence in the transcript, the material considered by the Inquiry included:

- the original affidavits;
- affidavits from persons who were not called as witnesses;
- briefs and/or submissions, which were unsworn, where neither the Inquiry nor any party required the attendance of the maker;
- extensive documentation which had been filed in the Court of Appeal in the scampi litigation; and
- masked and unmasked compendiums and other documentation compiled by MFish.

During the first day of the hearing MFish foreshadowed that it may make an application to have Ms Grey, who appeared as counsel for Barine, called as a witness to the Inquiry. Later in the hearing MFish confirmed that it would make an application and written application was

made on 9 May 2003. All interested parties made submission and the Inquiry issued its decision on 23 May 2003 declining the application⁷.

After the establishment of the Inquiry Simunovich commenced proceedings in the High Court at Wellington⁸ against the Chief Executive of MFish seeking a judicial review of matters relating to Section 66(6) of the Fisheries Act 1983, which provides that, with two exceptions, returns or information furnished under the Act shall not be disclosed or used in any proceedings whatever. The proceedings were served on the Inquiry and by consent an order was made joining the Inquiry as a defendant. During the Inquiry hearings it became apparent that the returns and information furnished would be relevant to the Terms of Reference of the Inquiry. An application was made for an order that the relevant records and information be disclosed to the Inquiry.

On 11 June 2003 Justice France gave judgement⁹ authorising disclosure of records and fishing returns, subject to confidentiality conditions. The Inquiry subsequently received records and information relating to scampi fishing by Simunovich.

At the conclusion of the hearing it was agreed that final submissions by the parties were to be filed by 11 August 2003 and any submissions in reply were to be filed by 18 August 2003. An extension of time for the filing of final submissions was sought by and granted to Goodship, Pranfield and United with their final submissions being filed on 2 September 2003. Following the Court of Appeal judgment in **Goodship** on 16 September 2003, submissions were received from Goodship and Pranfield and supplementary submissions from MFish.

Mr Carter, a representative for Mr Jose, a small fisher, advised the Inquiry on 9 July 2003, that as a result of an Official Information request and a search of five boxes held by MFish and not previously disclosed, documents relevant to Mr Jose had been found.

On 16 July 2003 MFish advised the Inquiry that it regretted that at that late stage of the Inquiry, two days before the closure of evidence, it had emerged that there may be a further 180 cartons of relevant documents from the Ministry's archives. MFish filed supplementary lists of documents number 10 on 6 August 2003, number 12 on 9 December 2003 and number 11, which had been mislaid, as late as 24 March 2004.

Mr Wilkinson of Simunovich, who had also been making Official Information requests of MFish, filed a supplementary brief dated 11 August 2003 relating to the documents recently disclosed by MFish.

The Inquiry directed that the 180 cartons of documents be searched. Senior Counsel Assisting reported to the Inquiry on 13 February 2004 on the search of the 180 cartons and his report was circulated to the parties.

⁷ Appendix 3

⁸ CP36/03

⁹ Appendix 4

Matters relevant to Mr Patterson and Mr Hunt arose after they had given evidence and the parties were notified by the Inquiry that natural justice required the matters be put to Mr Patterson and Mr Hunt. Senior Counsel Assisting attended Mr Patterson at Opuia, Bay of Islands, on 4 September 2003 and Mr Hunt on 4 September 2003 and 10 November 2003 at Whangarei. Counsel's report dated 4 December 2003 to the Inquiry relating to Mr Patterson and Mr Hunt was received.

Barine submitted that further material should be put to Mr Hunt.

Minute 8 dated 27 January 2004 advised parties of the submission from Barine and that Senior Counsel Assisting had been instructed to investigate and report in relation to the further material. Reference was also made to searching 186 cartons of documents recently disclosed by the Ministry. The minute also addressed and timetabled a number of applications made by the parties.

Senior Counsel Assisting attended Mr Hunt on 23 February 2004 and his further report was circulated to the parties.

After the close of evidence, Barine made an application that the Inquiry receive an affidavit dated 3 May 1992 sworn by Mr Wilkinson. In its decision of 17 February 2004,¹⁰ the Inquiry set out its reasons for not receiving or considering the affidavit.

Mr Chadwick filed a combined application and affidavit dated 17 December 2003. In the decision of 17 February 2004 the Inquiry decided to receive part of the material filed by Mr Chadwick.

In the decision of 17 February 2004, the Inquiry decided to receive, and take into consideration, submissions from Ms Lanauze in respect of documents made available after she gave evidence.

On 18 February 2004 the report of Senior Counsel Assisting in respect of the inspection of documents held by the Ministry was circulated to the parties.

On 27 February 2004, the Inquiry made a further request of MFish to inspect scampi permits for Simunovich for the periods October 1990 – September 1991 and October 1991 – September 1992. This request was made through the Crown Law Office, which advised that the documents were not available in Wellington and would have to be recalled from the Regional Office. The documents were inspected on 4 and 8 March 2004 at the direction of the Inquiry. The documents discovered and referred to in the Inquiry report as “*new documents*” are in addition to those in document lists 10, 11 and 12.

Further, the Inquiry requested on 12 March 2004 that MFish supply documents referred to in Part IVB of its submission. These documents were provided to the Inquiry by Crown Counsel on 17 March 2004.

¹⁰ Appendix 3

On 8 April 2004 the Inquiry wrote to counsel, some parties and witnesses who had appeared in person, advising that, following the Easter break, it would release its draft report or part thereof to provide those about whom adverse comments had been made an opportunity to respond. The fax advised that the draft report was private and confidential and stipulated that the draft report must not be copied to or discussed with or disclosed to anyone other than parties or counsel and should not be communicated to any third party or the media. A written undertaking as to confidentiality was required. Counsel were required to obtain a similar undertaking from a client before discussing or disclosing the draft report to the client. The letter advised that submissions or comments should be served on the parties.

The whole or part of the draft report was sent to counsel or parties who had signed and returned the undertaking. The release was tailored to the circumstances with the draft report being sent to those who were referred to throughout and with part of the report being sent to those who were referred to in a part. The draft report was sent under cover of standard letters which repeated that the purpose was to enable responses to adverse comments, the report was confidential; and that there were restraints on copying and discussion.

On 15 April 2004 the complete draft report or Terms of Reference 1 was couriered to eight persons and on 20 April 2004 Terms of Reference 1 was sent to one further person.

The front page of the draft report was over-printed “*Private and Confidential*” and each page is headed “*Private and Confidential*”.

On 21 April 2004 The Independent newspaper published an article by Tim Donoghue headed “*Secret Scampi Report Canes MAF*”. The article stated that the Independent had obtained a draft copy of key sections of the report. It was clear from the article that the Independent had or had seen a copy of the draft report or Term of Reference 1.

The Inquiry required the return of the draft report or part thereof held by the newspaper and an undertaking not to publish the draft report or part thereof. As no satisfactory response was received, the Inquiry issued proceedings in the High Court at Auckland seeking an injunction to restrain publication¹¹.

On 26 April 2004 a permanent injunction was issued restraining the Independent from publishing any information that disclosed the contents of the draft report and ordered that the newspaper file an affidavit as to why it was not in a position to return the draft report or part thereof previously held by it. An affidavit was filed deposing that the material in the possession of the newspaper was destroyed following publication of the article.

¹¹ State Services Commissioner and others v Pauanui Publishing Limited CIV 2004 –404-2013

The Inquiry conducted an investigation into the leak of material to the newspaper. The Inquiry wrote to persons to whom the draft report or Terms of Reference 1 had been sent asking for confirmation in writing of compliance with the undertaking. Confirmation of compliance was received from them. The Inquiry also sought from counsel a list of clients to whom material had been copied or with whom there had been discussion together with an affidavit from the client in relation to compliance with the undertaking. Affidavits confirming compliance have been received. The investigation has not uncovered the source of the leak to the Independent.

The draft report was released to MFish and it was anticipated that MFish would make it available to persons whom it had called to give evidence and in respect of whom adverse comment was made. On 16 April 2004 MFish wrote asking for confirmation that relevant parts of the report had been sent by the Inquiry to five persons, who were ex-employees of MFish. On 19 April 2004 the Inquiry advised MFish that, at the relevant time, the persons specified had been employees of MFish, had been called as witnesses by MFish and the Crown Law Office could make the draft report available to them.

MFish wrote on 21 April 2004 advising that insofar as current employees were subject to adverse comment, the Crown Law Office would ensure there was an opportunity to respond but that MFish could not *“accept that responsibility in respect of any other witnesses”*.

The Inquiry released the draft report or part thereof to four ex-employees.

The fifth ex-employee had been represented by counsel. Counsel advised the Inquiry that MFish was not funding the ex-employee’s legal advice further so that counsel was not in a position to receive the draft report. The Inquiry released part of the draft report to the fifth ex-employee.

Each of the five ex-employees in person filed submissions or comments in response to the draft report.

The material filed by the fifth ex-employee raised issues, which two parties were given an opportunity to address.

Contained in submissions on the draft report by MFish and Simunovich were references to documents not previously disclosed to the Inquiry. This resulted in considerable further effort to obtain these and related documents in the last two weeks before completion of the report. They were still being received right up to 22 May 2004.

The difficulties in tracking and obtaining documents throughout the Inquiry helped confirm the conclusions we reached about administrative systems in MAF/Fish in the period up to and including 1992.

4.0 CHRONOLOGY OF PRINCIPAL EVENTS

Chronology

General Fisheries Policy and Management

1 October – Fisheries Amendment Act introduces QMS.

MAF Fisheries Group established, with regional administrative structure.

Maori interests' injunction prohibits further species coming under QMS.

1 October – S 65 moratorium placed on many non-QMS species (not scampi).

1 October – Dual permits (commercial and special permits issued in combination) were introduced.

Delegations to regional staff to issue non-QMS permits withdrawn, and permit issued centralised.

Settlement of Maori Fisheries Injunction.

S 63 (13) moratorium on all new fishing permits.

Minister of Fisheries approves under S64(1)(c) the use of special permits to correct “administrative errors”.

1990/91 and 1991/92 fishing years included in Fisheries Bill as the catch history years for non-QMS species.

1 July – Ministry of Fisheries established.

1 October - Fisheries Act 1996 comes into effect.

1 October – S329 of Fisheries Act 1996 validates previous permitting decisions.

Scampi Fishery Policy and Management

Compliance

1986

First special permits for scampi issued (Tuck, United, Kiwi Prawns, Fletcher Fishing).

1987

1988

26 July – Simunovich makes request to place scampi on commercial permit.

Compliance activities restructured to give more emphasis to QMS, but organised on a regional basis.

1989

Regional non-QMS Fisheries Management Plans begin to include specific reference to scampi.

1990

Review of ownership status of Mr Penwarden's vessel “Bilyara”.

Concern expressed by Central Region over risks to scampi fishery.

11 July – Fishers told that only special permits would be issued for scampi in Central's management areas.

4 September – Fisheries Officials meet with Simunovich on scampi policy.

1 October – S 65 Moratorium introduced for scampi fishery.

1991

Moratorium Exemptions granted to fishers.

22 April – Criteria finalised and permits issued; seven which had been previously issued were revoked.

22 April – Vessel Restriction – Requirement that fishers could only use vessels that were used in the fishery as at September 1990.

Applications for extra vessels from Barine and Simunovich.

Bilyara seized for use of undersized mesh in scampi net.

Operation Export (Simunovich investigation) commenced.

1992

1 October - S 65 moratorium expired and scampi fishery brought under regional regulations.

Total catch limits imposed in each scampi management area; individual catch limits also imposed in areas 1 and 2.

1993

1 October – Total catch limits increased in areas 4 and 6; individual catch limits extended to apply also in areas 4 and 6A.

Mr Nalder takes over Operation Export.

1994

Operation Export investigation going into effective abeyance.

1995

“Operation” Dog (scampi fishery investigation) was commenced.

1996

Centralised organisational and management structure established for MFish compliance activities.

1997

1998

Operation Forrest (Simunovich investigation) commences.

1999

Operation Forrest stopped with no conclusions reached.

2000

2001

Operation Metro commenced, re-opening Operation Forrest.

2002

5.0 PURPOSE AND SCOPE OF THE INQUIRY

This Inquiry was established under the provisions of the State Sector Act 1988.

The purpose of the State Sector Act is set out in its long title. It is an Act, designed among other things:

- To ensure that employees in the State services are imbued with the spirit of service to the community; and
- To promote efficiency in the State services; and
- To ensure the responsible management of the State services; and
- To maintain appropriate standards of integrity and conduct among employees in the State Services.

The functions of the State Services Commissioner are contained in section 6. They include the functions of:

- Reviewing the machinery of Government including the coordination of the activities of Departments: (s 6(a)(iii)) and
- Reviewing the performance of each Department, including the discharge by the chief executive of his or her functions; (s 6(b)) and
- Providing advice on management systems, structures and organisations. (s 6(i)).

In carrying out the functions in respect of the public service, under section 8, the Commissioner is empowered to conduct such inspections and investigations and make and receive such reports as the Commissioner considers necessary.

The Commissioner's powers of inquiry have been delegated to the Reviewers pursuant to section 25(2). Section 25(1) provides that for the purposes of carrying out the duties and functions imposed on the Commissioner by this Act, the Commissioner shall have the same powers and authority to summon witnesses and receive evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908 and the provisions of that Act apply.¹² The statutory powers of a Commission are wide, enabling a Commission to receive as evidence any statement, document, information or matter that in its opinion may assist it to deal effectively with the subject of the Inquiry, whether or not it would be admissible in a Court of law.¹³

¹² Refer section 25(1) State Sector Act 1988. Sections 11 and 12 of the Commissions of Inquiry Act 1908 are specifically exempted.

¹³ Section 4B Commissions of Inquiry Act 1908

In addition, the Commission may inspect and examine any papers, documents, records or things and require any person to produce for examination any papers or documents in that person's possession for the purposes of the Inquiry.¹⁴

The starting point for an inquiry is its Terms of Reference.

In the introduction to the Terms of Reference, the background to the establishment of this Inquiry is described. We refer to the second paragraph of the Inquiry's Terms of Reference:

"There have been allegations of corruption and impropriety on the part of the Ministry of Agriculture and Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery."

The body of the Terms of Reference then refers to:

"The State Services Commissioner will undertake an inquiry into the allegations concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, which will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries' current management and systems meet public expectations."

There is then a direction that the State Services Commissioner will inquire into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries in the following matters and the specific questions numbered 1 to 5 in the Terms of Reference then follow.

In undertaking an inquiry into the allegations concerning the former and present Ministries, the focus of the Inquiry is to assess the quality of the administration and management at the time referred to in the allegations. The Inquiry has already determined¹⁵ that the allegations are those contained in the "*original*" affidavits, which contain the direct evidence of what is alleged. The relevant times, referred to in the allegations, are reflected in the Terms of Reference, which require the focus of the Inquiry on the late 1980s to 1992 in respect of Term of Reference 1, 1993 and 1998 in respect of Term of Reference 2 and 1993 to 1994 in respect of Term of Reference 3. Term of Reference 4 requires consideration "*at the relevant times*" referred to both in the specific Terms of Reference and in the allegations.

Having assessed the quality of the administration and management at the relevant times, the Inquiry must then determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries current management and systems meet public expectations.

¹⁴ Section 4C Commissions of Inquiry Act

¹⁵ Decision of the Reviewers dated 23 May 2003 annexed in Appendix 3

Under the recommendatory powers, the Inquiry must assess what action should be taken by the State Services Commissioner or other parties, and this includes an assessment of the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.

5.1 WHAT IS “CORRUPTION?”

It is important to understand what is meant by “*corruption*”. The logical reference point is the Crimes Act, particularly as the Inquiry is required to recommend whether any further action should be undertaken in relation to practices and behaviours in respect of Fisheries management. Under the recommendatory part of the Terms of Reference for the Inquiry, on the basis of the Reviewers recommendation to the State Services Commissioner, he

“will either initiate or undertake further action or place it in the hands of those for whom it is more appropriate to take action.”

Before any recommendation is to be made, such that the Commissioner should place allegations of impropriety or corruption in the hands of an enforcement agency, as the recommendatory powers imply, the basis for further action must be tested against the relevant laws.

The most relevant section containing reference to corruption is s 105 Crimes Act 1961. This provides:

105. Corruption and bribery of official—

- (1) Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.
- (2) Every one is liable to imprisonment for a term not exceeding [7 years] who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him in his official capacity.

In *Adams on Criminal Law*, the commentary describes the word “*corruptly*” as describing the mental element an offender must have when giving or accepting a gift.

“The offender is required to have that degree of deliberate criminal intent necessary, not only to perform the act itself, but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party. The authority is R v McDonald.”¹⁶

¹⁶ (Unreported: High Court, Invercargill, T1/93, 29.3.93, Williamson J). ”

The commentary further notes:

“For a public officer to act corruptly while performing his or her duty, it is not necessary that he or she act in a way that is likely or intended to corrupt another. It is the exercise of authority for an improper purpose, such as a purpose activated by malice, which constitutes the corrupt act, and takes the activity outside the scope of the person’s authority. R v Willers (1995) 81A Crim. R 219.”

Under s 105 (2) “*intent to influence*” does not require that the offeror of the bribe specify at the time of the offer the specific time at which the recipients are expected to depart from their duty. As one Court held:

“It will be sufficient that the inducement or benefit is accompanied by express or implied intimations that at some future time a corrupt favour would or might be sought and further, that the recipient, by accepting the inducement or benefit, is tacitly or expressly agreeing to comply with such corrupt future requests.”¹⁷

5.1.1 Jurisdiction of this Inquiry

It is our view that before this Inquiry can recommend further investigation of activity labelled as “*corruption*”, there must be a sufficient foundation for the definition of “*corruption*” to apply. This Inquiry cannot make a finding of “*corruption*”, but, if satisfied that the facts or allegations warrant it, it could recommend further investigation into alleged activity.

It should be noted that before a prosecution can be brought under any of the relevant sections in the Crimes Act, namely sections 100-105, the leave of the Attorney-General must be given.

This reasoning was canvassed in our interim decision dated 23 May 2003, which declined an application to call Ms Grey, Counsel for Barine, as a witness for cross-examination in relation to allegations of corruption.¹⁸

At the time, the Inquiry was urged by MFish that it should not be constrained in its consideration of allegations of corruption and impropriety by the definition in the Crimes Act. MFish supported a common meaning of “*corruption*” and “*impropriety*” which should include the following elements:

- Offering or accepting bribes (be it monetary or other favour) in exchange for certain official actions or failures to act.
- Officials favouring one or more participants in the industry in the exercise of public duty.

¹⁷ R v. Glynn (1994) 71 A Crim R 537 (NSW CCA) at p. 544

¹⁸ Appendix 3.

- Lack of integrity and impartiality in the discharge of public duties.

We gave careful consideration to the submissions we received at the time of the interim decision and at the close of the hearing of this Inquiry.

The specific Terms of Reference, as framed, refrain from the use of the term “*corruption*”. Instead, the questions which we must address do not involve definitions of “*corruption*”, “*impropriety*” or “*fraud*”, but rather ask whether there was a reasonable basis to suspect illegal fishing and whether adequate investigations into allegations of illegal fishing were carried out in Term of Reference 2 and Term of Reference 4 asks specifically whether the relationships between officials at the Ministries and commercial scampi fishers at the relevant times were professional and at arms length.

Those questions must govern the jurisdiction of this Inquiry. In the context of this Inquiry, it is our view that the use of the term “*corruption*” should be confined to the Crimes Act definition.

We have also had regard to the judgment of the Privy Council in ***Re Erebus Royal Commission; Air New Zealand Limited v. Mahon*** [1983] NZLR 663 at 671. In referring to the relevant rules of natural justice, the judgment stated:

“The first rule is that the person making a finding in the exercise of such a jurisdiction [investigative jurisdiction] must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the Inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.”

In amplifying what is required by the first rule, Lord Diplock said:

“What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.”

5.2 SUBMISSIONS ON THE PURPOSE AND SCOPE OF THE INQUIRY

The Inquiry has received submissions from the respective parties to the Inquiry, dealing with the purpose and scope of this Inquiry.

In summary, the Ministry of Fisheries submit that the scope of the Inquiry is an Inquiry into the allegations of corruption and impropriety and the purpose of the Inquiry is to assess the quality of the administration and management

“at the time referred to in the allegations to determine whether there is a need to take further action ...”.

MFish submits that the only relevance of what occurred in terms of administration and management at the time referred to in the allegations of corruption and impropriety is to inform the Inquiry in its assessment of whether public expectations of MFish are met. MFish further submits that the questions framed in numbers 1-5 in the Terms of Reference are the specific issues.

MFish’s submission can be summarised as follows. The specific issues are subject to the purpose of the Inquiry and the purpose is in turn subject to the scope of the Inquiry. MFish contend that the allegations of corruption and impropriety are therefore of crucial importance in determining the scope of the Inquiry which in turn must guide the Inquiry in its final recommendations to the Commissioner. MFish further submitted that the Inquiry should make recommendations for the future, based on its assessment of the past activities of the Ministry.

Submissions on behalf of Barine and Sealord urge the Inquiry to draw a distinction between the preamble and the questions in the Terms of Reference. By reference to the “Winebox” cases, namely the decision of the Court of Appeal in **Fay Richwhite Limited v. Davison** [1995] 1 NZLR 517 and **Peters v. Davison** [1989] 3 NZLR 744, the submissions urge that the Inquiry must observe the distinction of allegations of corruption being referred to in the preamble of the Terms of Reference, but not in the express questions in the Terms of Reference themselves, with the focus of the Inquiry being on the specific questions framed within the Terms of Reference.

The Inquiry was also urged to have regard to the title of the Inquiry, namely an:

“Inquiry into Fisheries Management matters concerning the former Ministry of Agriculture & Fisheries and the Ministry of Fisheries.”

The focus of the 1953 legislation which established MAF/Fish, was the legislation which governed MAF/Fish till 1995. Section 5 of the 1953 Act provided that the principal function of the Department shall be:

“to promote and encourage the development of all phases of the fishing industry in New Zealand ...”

and the Inquiry has been urged that the 1953 Act, with its explicit statements of statutory function for MAF/Fish and its senior staff applied during the relevant period for this Inquiry, namely through the late 1980s and early 1990s, and forms an important backdrop to the consideration of the Terms of Reference for this Inquiry.

Submissions also urged that the Terms of Reference require that the Inquiry is to assess:

“the quality of the administration and management at the time”

which must be conditioned by the words which follow, namely

“to determine whether there is a need to take further action to ensure that the quality of Ministry of Fisheries current management and systems meets public expectations ...”.

The issue as to the correct focus of this Inquiry, which is at the heart of the parties’ closing submissions, is similar to the issues addressed in the Inquiry’s interim decision, annexed in Appendix 3. In the interim decision, we found that the Terms of Reference were specific as to the issues to be addressed, and the relevant times, which were the focus of each of the questions to be answered.

Our views were:

- “[1] The overall thrust of the Terms of Reference, without detracting from its actual wording, is an inquiry into the management, administration, administrative systems and processes within the Terms of Reference, and whether or not there has been compliance with them. Term of Reference 4, again specific to times, requires a focus of whether relationships were professional and at arms length.
- [2] In addressing each of the issues under the Terms of Reference, the Inquiry is charged, amongst other things, with inquiring into the allegations which have been raised. As specified, the Terms of Reference require the focus of the Inquiry on the late 1980s to 1992, 1993 and 1998.
- [3] Under the recommendatory powers, the Inquiry must assess what action should be taken by the State Services Commissioner or other parties and this includes an assessment of the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.”

We found:

- “[1] The specific Terms of Reference, as framed, refrain from the use of the term “*corruption*”. Instead, the questions which we must address do not involve definitions of “*corruption*”, “*impropriety*” or “*fraud*”, but rather ask whether there was a reasonable basis to suspect illegal fishing and whether adequate investigations into allegations of illegal fishing were carried out (Term of Reference 2) and Term of Reference 4 asks specifically whether the relationships between officials at the Ministries and commercial scampi fishers at the relevant times were professional and at arms length.
- [2] Those questions must govern the jurisdiction of this Inquiry. As has been evident from the response from the parties, “*corruption*” has a number of meanings. In the context of this Inquiry, it is our view that the use of the term “*corruption*” should be confined to the Crimes Act definition.”

Our interim decision was issued on 23 May 2003 and no challenge was made by any party in respect of that decision.

In light of our findings in the interim decision, we turn then to consider the parties closing submissions as to the proper approach this Inquiry should take, including its purpose and scope. We consider:

- The function of a Commission of Inquiry
- This Inquiry's Terms of Reference
- The focus of this Inquiry.

5.3 THE FUNCTION OF A COMMISSION OF INQUIRY

A Commission of Inquiry is not a court of law or an administrative tribunal entrusted with the duty of deciding questions between parties. It has no general power of adjudication; it determines no-one's rights and its report is not binding.¹⁹ We are reminded in *Re the Royal Commission* case²⁰ at pp 113 and 115 that:

"the function of a Commission of Inquiry, as its name indicates, is to conduct an inquiry ... Apart from any powers conferred upon it by statute, such a Commission has no power to determine rights, either judicially or by executive or administrative action, and any attempt in the warrant of appointment to confer such powers upon it would, in the absence of enabling statutory authority, render it unlawful."

In 1966, the Salmon Commission on Tribunals of Inquiry²¹ in England discussed the topic of terms of reference and because of their applicability to all forms of inquiry, they were incorporated into the New Zealand Department of Internal Affairs *Royal Commissions and Commission of Inquiry*, published in 1974. It is apposite to refer to the following passage:

"78. As the agitation for an inquiry is very often the result of nothing more than general allegation and rumour, it is necessary to keep the Tribunal within reasonable bounds. It is not of urgent public importance merely to satisfy idle public curiosity. The Tribunals of Inquiry (Evidence) Act (UK) 1921 lays down, rightly in our view, that what is to be inquired into shall be a 'definite matter'. Accordingly no Tribunal should be set up to investigate a nebulous mass of vague and unspecified rumours. The reference should confine the inquiry to the investigation of the definite matter which is causing a crisis of public confidence. On the other hand, it is essential that the Tribunals should not be fettered by terms of reference which are too narrowly drawn."

¹⁹ *In Re the Royal Commission to Inquire into and report upon State Services in New Zealand* [1962] NZLR 96 at 109 (CA)

²⁰ *ibid*

²¹ Command Paper No. 3121, 1966

The Courts have reinforced that findings made by Commissions of Inquiry are in the end only expressions of opinion, which in themselves do not alter the legal rights of the persons to whom they refer:

*“Nevertheless, they may greatly influence public and Government opinion ...”*²²

A Commission of Inquiry must comply with the rules of natural justice. The Privy Council in ***Re Erebus Royal Commission*** summarised the guiding principles as they affect Commissions of Inquiry. The two rules are:

- The person making a finding must base the decision upon evidence that has some probative value.
- The inquirer must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interest may be adversely affected by it, may wish to place before the inquirer.

The Privy Council specifically noted:

*“The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding, and that the reasons supportive of the finding, if it be disclosed, is not logically self-contradictory.”*²³

The background to this Inquiry involved the “original” affidavits together with two briefing papers²⁴ being sent by Barine and its Counsel to the Hon. Winston Peters, who made allegations in the House of corruption in relation to the performance of the Ministry of Fisheries. Similar allegations were aired in an “*Assignment*” television documentary.

5.3.1 This Inquiry’s Terms of Reference

In this Inquiry, the allegations of corruption and impropriety are referred to in paragraphs 2 and 3 of the Terms of Reference, namely in the second paragraph of the introduction and the first paragraph under the heading “Terms of Reference” but do not form the basis of the questions directly asked of the Reviewers.

²² *Re Erebus Royal Commission: Air New Zealand v. Mahon* No. 2 [1981] 1 NZLR 618 at 653

²³ *Re Erebus Royal Commission* [1983] NZLR 662 at 671

²⁴ There were two scampi briefing note documents: one accompanying the original affidavits called “Briefing Notes re Scampi” and the second, unnumbered, produced as Exhibit “N” called “Scampi Briefing Notes”

The fourth paragraph of the Terms of Reference states:

“The State Services Commissioner will, pursuant to the provisions of the State Sector Act 1988, inquire into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries in the following matters ...”

and the five questions follow which require answers.

By comparison, the Winebox Inquiry was established after the Hon. Winston Peters made statements in the House of Representatives alleging tax evasion and fraud against those concerned in the Winebox transactions, copies of which had been delivered to Hon. Winston Peters, the Commissioner of Inland Revenue and the Director of the Serious Fraud Office by an employee of European Pacific Group. In addition, Hon. Winston Peters also alleged that the Commissioner and the Director of the Serious Fraud Office were linked to a criminal conspiracy involving named persons and secret agreements not to prosecute European Pacific.

In the Winebox Inquiry, the Government bodies and affected parties contended that Mr Peters should particularise his allegations at the outset of the Inquiry. There was a similar approach by parties to this Inquiry, requesting particulars of the allegations of corruption or impropriety alleged.

The Court of Appeal in **Fay Richwhite v. Davison** [1995] 1 NZLR 517 at 522 noted that the Commissioner of Inland Revenue and the Director of the Serious Fraud Office had each issued public statements stating there was no evidence of tax evasion and Cooke P said:

“The subsequent establishment of the Commission of Inquiry may be seen as in part a response to the allegations made by Mr Peters, but it is not specifically directed at or limited to those allegations. Evidently the Government concluded that an impartial inquiry into the Winebox transactions and more general issues of possible legislative changes arising from them, is in the public interest. Mr Peters will be no more than a witness, possibly a quite important one, at the Inquiry. Like other witnesses after the initial phase, he will be subject to public cross-examination.”

Counsel for Barine and Sealord has submitted there are parallels between the Winebox Inquiry and the present Inquiry. The Hon. Winston Peters made allegations, both inside and outside of Parliament, including a frontline television documentary which, after a Court of Appeal ruling, led to the formation of the Winebox Commission of Inquiry.

In the Terms of Reference for the Winebox Inquiry, the preamble contained reference to the allegations, and required the Commission to inquire into and report upon two particular questions, one of which included whether the Commissioner of Inland Revenue and the Director of the Serious Fraud Office, had acted “*in a lawful proper and competent manner*” in dealing with the transaction referred to in the Winebox documents.

The observation by the Court of Appeal in **Fay Richwhite v. Davison** is of relevance. At page 530 of the decision Hardie Boys J, noted:

“Counsel referred to three other matters of concern. The first is that Mr Peters has not yet been required to give details of what are at present somewhat general allegations. It is argued that until he does so, the scope of the Inquiry, even the need for evidence on confidential matters, cannot be known. However, the Inquiry is not an adversary situation. It is not even an Inquiry into Mr Peters’ allegation. The Commissioner has intimated that he will call on Mr Peters to give evidence in due course. But it will not be incumbent on Mr Peters to prove anything. Even if he is able to proffer no proof of his allegations, the Commission must still conduct its Inquiry into the nominated transaction. Thus the stage at which Mr Peters is called on is for the Commission to determine. It is not the Court’s business.”

In the report of the Winebox Inquiry, the Commission found no tax avoidance or fraud and no incompetence by the Inland Revenue Department or the Serious Fraud Office. The Commission was, however, “severely critical of Mr Peters” for making the allegations and made findings accordingly.

On Judicial Review, the High Court addressed the question of the relevance of the allegations referred to in the preamble to the Terms of Reference. In **Peters v. Davison** [1999] 3 NZLR 744 at 766, Anderson and Robertson JJ held:

“[89] The recitals to the Order in Council refer to allegations concerning the conduct of the CIR and the SFO in these terms:

‘Whereas –

- a) It has been alleged that the Commissioner of Inland Revenue and his staff and the Director of the Serious Fraud Office and his staff have not, in the course of their official duties, acted in a lawful, proper, and competent manner, in relation to certain transactions; and*
- b) Questions have arisen about the adequacy of the laws of New Zealand in relation to certain transactions:*

And whereas the question whether the allegations or any of them is true and the question whether those laws are adequate are both matters of public importance.’

[90] Mr Harrison submitted that the recitals set the commission in a context of character and reputation and that in making his allegations in the House of Representatives the plaintiff put his own reputation in issue.

[91] It is the case that the preamble of the Order in Council recites the circumstances in which the order came to be made. It does not follow that the plaintiff’s allegations in the House made his character an issue for the commission. The matters which the Order in Council required the commission to inquire into and report upon were not whether the plaintiff was right or wrong, nor whether he could make out a case before the commission to support the allegations he had made in the House, but whether the matters alleged as defined by the Order in Council were true. In short, the intended focus of the commission was not the character of the plaintiff, nor whether he should be vindicated or rebuked by the commission

in respect of his speeches in the House. The terms of reference focused upon the lawfulness, propriety, and competence of the CIR and his staff and the Director of the Serious Fraud Office and his staff in the course of their official dealings in connection with the Winebox documents. Many of the criticisms of the plaintiff, including, for example the observations in the last paragraph of Part Seven at p 2:7:19, seem to blur that distinction.”

5.3.2 The Focus of this Inquiry

Turning to the Terms of Reference for this Inquiry, we have already found that in undertaking an Inquiry into the allegations concerning the former and present Ministries, the focus of the Inquiry is to assess the quality of the administration and management at the time referred to in the Terms of Reference. These times have been informed from the allegations, which were contained in the original affidavits.²⁵

In referring to the specific questions numbered 1 to 5, we have found they are specific as to the issues to be addressed at the relevant times and form the focus of each of the questions to be answered.²⁶

The decision of ***Peters v. Davison*** confirms, in our view, that as the specific Terms of Reference as framed, refrain from the use of the term “*corruption*”, the questions which we must address do not involve definitions of “*corruption*” “*impropriety*” or “*fraud*” but rather ask whether there was a reasonable basis to suspect illegal fishing and whether adequate investigations into allegations of illegal fishing were carried out²⁷. Term of Reference 4 asks specifically whether the relationships between officials at the Ministries and commercial scampi fishers at the relevant times were professional and at arms length.

We also note that Term of Reference 1 specifically asks whether MAF/Fish acted reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992, with specific sub-questions asking whether MAF/Fish had adequate appropriate and consistent administrative systems and processes for the granting of permits and licences at the time and whether it complied with those systems.

The Terms of Reference focus on the performance of the former MAF/Fish and the specific matters identified in the five questions posed. The Inquiry by the Reviewers has been undertaken into the allegations concerning the former MAF/Fish and MFish. In as far as the allegations are relevant to the specific issues we have been asked to address in the Terms of Reference, we have assessed the nature of the allegations and its effect on each of the specific Terms of Reference.

²⁵ Para. 62 Decision of the Reviewers 23 May 2003, Appendix 3

²⁶ Para 64 *ibid*

²⁷ Refer Term of Reference 2

We do not accept however, that the reference to the allegations in the introduction or in paragraph 3 of our Terms of Reference alone define the scope of the Inquiry or guide the Inquiry in its final recommendations to the Commissioner. The allegations have been inquired into during the course of the hearings of this Inquiry with cross-examination rights being reserved to those parties affected by the allegations. We deal with the specifics of those allegations under Term of Reference 2 Part II, Term of Reference 3 and Appendix 11.

We are mindful of the jurisdiction of Commissions of Inquiry, that it is not appropriate for a Commission to make findings of guilt or innocence. If however, there is sufficient evidential foundation to support another agency investigating potential criminality, the only power open to the Inquiry is to recommend that the particular matter be investigated further. All parties were in agreement as to our powers in this regard, in making submissions in respect of our interim decision.

The Inquiry will deal with each of the specific issues raised in the Terms of Reference, namely questions 1 to 5, and the relevance, if any, of the allegations will be dealt with in relation to those issues.

6.0 TERM OF REFERENCE 1: SYSTEMS FOR PERMITTING

- 1 Given the legislation and Government policy framework within which the former Ministry of Agriculture and Fisheries was operating, did it act reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992?**
- 1.1 Did the former Ministry of Agriculture and Fisheries have adequate, appropriate and consistent administrative systems and processes for the granting of such permits and licences at the time?**
- 1.2 If so, did the former Ministry of Agriculture and Fisheries comply with those systems?**

Introduction

This Term of Reference requires the Inquiry to report on whether MAF/Fish acted reasonably in administering the grant of scampi permits to fishers from the late 1980s to 1992, given the legislation and relevant policies at the time.

The Inquiry is specifically asked under two discrete questions, whether MAF/Fish's administrative systems and processes were adequate, appropriate and consistent and, if so, did MAF/Fish comply with them.

To address this term of reference, we propose to deal with it in the following way:

Part I –A description of scampi and the scampi fishery in New Zealand

Part II – Legislative and Administrative frameworks

- The legislative framework in New Zealand from the 1980s to 1996, including the types of permits that could be issued and the allocation mechanisms for fishing rights.
- The Administrative structure and processes of MAF/Fish
- The Policy Environment from 1983-1992 including:
 - The development of new fisheries
 - The change in Fisheries policy
 - The Maori Fisheries Injunction

Part III Policy Development

- The Development of Non-ITQ policy for the scampi fishery by each fishing year from 1986 to 1990
- The Policy change to commercial permits in the scampi fishery
- The Central v. Northern region crisis
- The Head Office meeting with Simunovich
- The s 65 Scampi Fishers Moratorium from 1 October 1990
- Inconsistent approach to catch limits.

Part IV Impact of Policy on Fishers

- Northern region
 - Mr Jose
 - Barine
- Central region
 - Goodship
 - United Fisheries
 - T Roderique
 - Mr Tau & Mr Pohio
 - Chatham Islanders
 - Tuck/Lanauze
 - Clarke
 - Muirson
- Summary of Permitting among the regions from 1986 to 1992
- Analysis of Permit Policy and Application

Part V Vessels

- Vessel Policy and application
- The Vessel Restriction
- The new criteria and exemptions
- Comparison with other fishers
- Analysis of the Vessel Policy including unevenhandedness, failure to monitor permit conditions and face to face contract

Part VI – The Court Decisions in the Scampi Fishery

- A review of the significant Court decisions in the Scampi Fishery

6.1 PART I: A DESCRIPTION OF SCAMPI AND THE SCAMPI FISHERY IN NEW ZEALAND

6.1.1 What is Scampi?

New Zealand scampi (*metanephrops challengeri*) is a bottom dwelling species, living in and emerging from burrows in the sediment at depths normally between 200 and 500 metres.

Scampi has been described as “prawn-like crustaceans but more closely related to a rock lobster”²⁸ In the early days of scampi fishing in New Zealand they were sometimes described as “deepwater prawns”.

Scampi is widely distributed around the New Zealand coast. They can be caught by pot or trawl. They comprise a potentially lucrative catch and much is exported.

In a 1969 Prawn Fishing Survey Report, New Zealand scampi were described as follows:

“This lobster occurs in all waters off the New Zealand coast and grows to a length of 10 inches. It is whitish or pinkish in colour, with a strong orange band at the hind end of the carapace or shield. Another orange band occurs at the “elbow” joint of the long pincer claw. There is also some orange staining on the abdominal segments.

The rostrum is strong, upward curved and has two large spines above the eye and a strong terminal spine; below the terminal spine is another single strong spine. There is also a strong sharp spine on the shield and level with the eye, which is large.

The weight of a large scampi is ¼ lb (not headed).²⁹”

Exploratory trawling for scampi had taken place around New Zealand from September 1970 to November 1972.³⁰ and potting trials were undertaken in the Bay of Plenty in 1987³¹.

In an early report on Reproduction of Scampi³² New Zealand scampi is recorded as being found throughout New Zealand. The genus *Metanephrops* is composed of fifteen extant species and one fossil species, and is distributed in the Indo-West-Pacific region, the West Indies and off the southeast coast of South America.

²⁸ Vautier Shelf Co. No. 14 Ltd & ors v Chief Executive of the Ministry of Fisheries & ors: (Unreported: Wellington High Court, CP 20/97; 24 July 2000)

²⁹ Pike & Cooper: 1969 Prawn fishing Survey Report

³⁰ P M Hine: Fisheries Research Division

³¹ G P Olsen and P Aibben reported to the Department of Trade and Industry on Scampi Potting Trials in the Bay of Plenty 1987

³² C Fenaughty: “Reproduction in *Metanephrops Challengeri*”.

The New Zealand scampi was first described as *Nehrops challenger* by Balss in 1914. No further studies were undertaken until a re-description of the species in 1954 as *metanephrops challenger*.

An exploratory survey of prawns and scampi, funded jointly by Sanford and the Fishing Industry Board was made in 1969. This was followed up by investigations into the commercial potential of a scampi fishery by MAF/Fish during 1970-72. Low catch rates, the scattered nature of the populations and difficulties imposed by the deep depths at which the scampi occurred, suggested that stocks were insufficient to support a fishery based on the technology available at the time.

In 1979 Sanford, with the aid of a Government grant, fished experimentally for prawns and scampi in the Bay of Plenty. Problems with operating the trawl and winches in deep water again discouraged any development of a fishery.

In 1980 there was a circumnavigation of New Zealand by the James Cook in which research into scampi was conducted.

Kiwi Prawn Fishing Industries Limited, as the first scampi fisher, landed 40 tonnes in the 1986-88 period.

In about 1987 interest renewed. Large catches of 800 kilograms a week were landed by a Tauranga fisherman in the Bay of Plenty. He was using specially developed gear which had proven successful in Australia.

The evidence before the Inquiry showed that MFish held information relating to scampi from foreign fishing vessels that had fished New Zealand waters.

There was also evidence that New Zealand fishers were aware of the existence of scampi by reason of catching them in nets or by observing them in the gut/stomach of wet fish catch.

They are found in commercial quantities in certain locations off the east coast and to the south of New Zealand, and around the Chathams. The fishery is currently divided into 11 fisheries management area called "Scampi Quota Management areas" (SCIs) but no fishing is allowed in SCI 10, around the Kermadec Islands.

Scampi are typically fished by vessels of up to 45 metres using light bottom trawl gear and the main fisheries are in waters 300-500 metres deep in SCI 1 (Bay of Plenty), SCI 2 (Wairarapa Coast), SCI 3 (Mernoo Bank), SCI 4 (Western Chatham Rise and Chatham Islands) and SCI 6 (Sub-Antarctic).

Throughout the period this review covers, fisheries law policy and management in New Zealand have undergone significant changes. The main legal policy and management are outlined in this introductory section. More detail is included in the relevant sections of the report.

6.2 PART II: LEGISLATIVE AND ADMINISTRATIVE FRAMEWORK

6.2.1 The Legislative Framework in New Zealand from the 1980s to 1996

Throughout the period that this review covers, fisheries policy and management in New Zealand have been governed by the legislative framework of the Fisheries Act 1983, the subsequent Fisheries Act 1996, the frequent amendments to both Acts and the Ministry of Agriculture & Fisheries Act 1953 (“the 1953 Act”).

Fisheries management was administered by the Ministry of Agriculture and Fisheries (MAF) until 1995, and since 1 July 1995, by the Ministry of Fisheries (MFish). During the period covered by the review there were many changes both in the legislative framework as well as the organisational structures and management processes in the two Ministries.

The Inquiry was informed that in the 1960s and 1970s persons had been

“by and large, automatically granted permits on application for any species for which they chose to apply”.

In the early 1980s, the legal basis for fisheries administration under the Fisheries Act 1983 was primarily through the issue of annual permits to catch fish, and the registration of fishing vessels. The conditions of the permits included area and species, together with conditions on boats, gear and method and periods of the year when fishing was permitted or restricted.

From the early 1980s, policy began to shift from the system of detailed administrative decision-making towards the allocation of individual property rights in the fisheries resource. This was enacted by statute to become the “Quota Management System” and the Fisheries Act 1983 was amended in 1986 to provide for individual transferable quotas to be allocated to fishers. At the outset, these were for a term, but later the rights were allocated in perpetuity.

Initial quotas were to be allocated by species and area based on catch history in previous years, subject to a test for fairness to individual applicants based on *“commitment to and dependence on fishing in a particular area”*.

6.2.2 Fisheries Act 1983 – Introduction of the Quota Management System

The Fisheries Act 1983 (Part 1) provided for the development of Fisheries Management Plans. Such Plans were intended to conserve and manage fish resources but no such plans were put into effect, either before or after 1986. The introduction of the Quota Management System on 1 October 1986 was the preferred management tool, which was effected by the Fisheries Amendment Act in 1986.

The Inquiry was informed that:

“the prime reason for moving the major commercial fisheries under the QMS was because many of the inshore species were overstressed. The amount of fish that had been taken from the inshore fisheries was not something that could be sustained over a long period and the need to take definite steps to manage these fisheries on a more long term sustainable basis had become critical. To achieve this end the Crown was aware that the amount of fishing effort in these fisheries would need to be reduced.”

Policy development during 1984 and 1985 led to legislation in the Fisheries Amendment Act 1986 introducing the QMS. This provided a mechanism, to enable individual fish species TACC limits to be established QMA, when a fish species was declared to be subject to quota fishing.

Individual Transferable Quotas (ITQ) within that TACC were to be allocated to holders of fishing permits for the relevant species. Where bycatch (other species caught while fishing for the primary target) was involved, ITQs needed to be held for the bycatch if those species were also under the quota system, and this requirement existed for these bycatch species even where the primary target species was not a quota species.³³

The species initially brought into the QMS in 1986 were the major commercial species at that time.

6.2.2.1 Commercial and Special Permits

Section 63 of the Fisheries Act 1983 made provision for permits to be applied for and issued to fishers. Permits under this section were generally referred to as “commercial” permits.

Section 64 provided for the issue of “special” permits. In summary the three possible grounds for special permits were, for:

- educational, research, or trial purposes
- fishing by people with disabilities
- any purpose approved by the Minister

The fact that fish were caught under a special permit did not of itself preclude the catch being sold commercially.

The distinction between commercial and special permits in the legislation has been carried through into the 1996 Act.

³³ Part II A of Fisheries Act 1983

Many of the permits issued to scampi fishers in the early years of the fishery were special permits. The reason was that scampi can only be caught effectively by using trawl nets with mesh size smaller than the standard minimum permitted in regulations, which was 100 mm³⁴. Section 64 enabled a special permit, with a condition specifying a smaller minimum mesh size, to override the standard minimum. “Potting” was the alternative method for scampi fishing, although not as successful. No special permit was required for this method.

Special permits also typically included a condition relating to the eligibility of fish caught under such permits in establishing catch history. The exact meaning of this condition, and the perception which scampi fishers had of its meaning, was a significant factor in the issues covered in the review.

For species not in the QMS, the previous system of permitting continued.

The introduction of the QMS created some powerful motivating influences for fishers to turn to or develop non-QMS fisheries. Those who were not allocated ITQs or who received quotas for smaller volumes often turned their attention to non-QMS species. There was also motivation to build catch history, and demonstrate “dependence and commitment” to a non-QMS fishery, as these were the criteria which determined the allocation of potentially valuable ITQs for new QMS species in the future. This is described below.

6.2.2.2 “Commitment and Dependence”

The allocation of ITQ could be reviewed on the basis that a fisher’s commitment and dependence on a fishery was such that the ITQ should be altered to reflect it.

Section 28E(3) of the 1983 Act gives power to the Director-General, to allocate a different ITQ where the provisional ITQ would be unfair, having regard to the fishers commitment and dependence on the particular fishery. It provides:

“(3) In determining any provisional maximum individual transferable quota the Director-General may, where the Director-General is satisfied in a particular case that the provisional maximum individual transferable quota determined under subsection (1) of this section would be unfair having regard to—

- (a) The **commitment** to, and **dependence** on, the taking of fish of that species or class in that quota management area by the person at that date of the declaration under section 28B of this Act; and*
- (b) The other provisional maximum individual transferable quota (if any) allocated to that person ...*

the Minister may allocate a different ITQ to that fisher.”

³⁴ Reg. 47(1)(d) Fisheries (Commercial Fishing) Regs 1986

This provision was enacted by the Fisheries Amendment Act 1986 as part of the QMS. It was contained in Part IIA of the 1983 Act and enabled the Minister to allocate an ITQ which was not based on catch history alone. ITQ has been judicially described as a “*tradeable and valuable asset*” Justice Ellis noted of s 28E3 that:

*“Its effect was to ensure that fishers whose commitment to and dependence on a particular fishery was not fairly represented by its catch history would be treated fairly in the allocation of ITQ nevertheless. This is against the background that as a starting point a fishers merits were represented by his actual catch history. The impact of this provision was defined by the Court of Appeal in Jenssen in 1992 and this was the legal position until s 28ZGA was passed in December 1992. That did not repeal the subsection, but limited the power of the Quota Appeal Authority and the courts”.*³⁵

For completeness, s 28ZGA limits the powers of the Quota Appeal Authority or the courts in certain cases in respect of any proceedings filed after 16 September 1992, to allocate quota, unless that person was lawfully entitled to take fish of that species, through the holding of a fishing permit at that date in that area. Further, no court or tribunal had the power to review, quash, or call into question, any decision of the Director-General or the Quota Appeal Authority made under s 28E(3) or 28I after 16 September 1992.

The provisions of s 28 I relate to the decisions of the Quota Appeal Authority in respect of any increase or decrease of quota to be allocated and s 28 E(3) is the provision where the Director-General may allocate a different ITQ to any person where s/he is satisfied that the provisional maximum ITQ would be unfair having regard to the commitment and dependence on the taking of fish of that species or class in the Quota Management Area allocated.

Section 28E(3) was repealed as from 1 October 1996.

6.2.3 The Ministry of Agriculture & Fisheries Act 1953 (“The 1953 Act”)

The 1953 Act established MAF/Fish as a Ministry, charged with the administration of the fisheries Act and “*with such other functions as may be lawfully conferred on it*”. Section 4 of the 1953 Act provides that the principal functions of the Department shall be, among others:

“To carry out ... any investigations ... in relation to any matters affecting the operation of the fishing industry which it is the function of the Department or promote and encourage;

To promote and encourage the marketing and sale of those products”.

³⁵ Ellis J, *Vautier Shelf Ltd*: Appendix: 9

In addition, the Minister, under section 11 of the Act, had the power to:

“To carry out ... any investigations ... in relation to any matters affecting the operation of the fishing industry which it is the function of the Department or promote and encourage;

(b) To promote and carry out by publicity or other means the diffusion or dissemination of information relating to or affecting any of those industries (including the fishing industry) for the instruction, guidance and benefit of persons engaged in those industries; ...

(j) to exercise such other powers as are reasonably necessary for the effective performance of the functions of the Department.”

It has been submitted to the Inquiry that those statutory provisions serve to emphasise the overall obligation on the part of MAF/Fish to encourage and promote the fishing industry. The relevance of those statutory provisions on the Terms of Reference for this Inquiry concern the quality (or lack thereof) of administration and management at relevant times.

The 1953 Act was repealed in 1995, when MAF/Fish was abolished by the 1995 Ministry of Agriculture & Fisheries (Restructuring) Act 1995.

6.2.4 Fisheries Act 1996

While the policy and legislative context for Term of Reference 1 is confined up to the period of 1992, it is important to note that a further Fisheries Act was enacted in 1996. We confine ourselves to those aspects of the 1996 Act which have relevance to this Inquiry.

The 1996 Act enacted a number of complex provisions in relation to sustainability measures of the fisheries resource, calculations for setting or varying a total allowable commercial catch and alteration of quota management areas, as well as including New Zealand’s international obligations relating to fishing. Apart from the complexity of the provisions within the legislation, the application of fisheries legislation became complicated, because both Acts operated simultaneously from 1996 through to the present day. This led Justice Ellis to make the following observation in *Vautier Shelf Company et al v. Chief Executive Ministry of Fisheries*³⁶:

“[69] Counsel agreed it is probably the most difficult on the statute book to apply and understand. It is fertile ground for sea lawyers and the ordinary fisher can only struggle to comprehend long and devious inter-relations between sections acts and regulations, mixed as they are with policy decisions at all levels. ...”

³⁶ *Vautier Shelf No. 14 Limited & ors v. Chief Executive of Ministry of Fisheries & ors* (Unreported Ellis J, High Court, Wellington 20/97 24 July 2000)

The following provisions are of note. Part II A of the 1983 Fisheries Act was “*the primary mechanism for the long term management of established fisheries*” but this was repealed by the Fisheries Act 1996 and revived in part by Regulation. The scampi fishery has not become part of such management.

As Justice Ellis notes, the Part IV procedure under the 1996 Act starts with a declaration under s 18 to bring a fish stock under the QMS, which can only be altered by Act of Parliament under Section 19(4). Sections 20-23 provide how TAC is transferred to ICE. The mechanisms for the allocation of quota are by way of the s 18 notice, which converts individual catch entitlement (ICE) to quota, or by s 31, or by calculation under sections 33 and 34.

For the scampi fishery, the catch history for the 1990-91 fishing year was the mechanism for allocating ICE. Thus, ICE and catch history in 1990-91 are significant. The elements of commitment and dependence on the fishery were repealed in 1995 and no longer play a part.

The other provision, enacted in 1996 which has been the subject of submissions to this Inquiry and Judicial comment in the scampi litigation, is s 329 of the Fisheries Act 1996. Section 329 provided:

“329. *Validation of certain decisions relating to permits—*

- (1) *Every decision and every purported decision of the Director-General of Agriculture and Fisheries—*
 - (a) *Made in respect of the issue, variation, refusal, revocation, or cancellation of any fishing permit under section 63 or any special permit under section 64 of the Fisheries Act 1983; and*
 - (b) *Made before the 1st day of October 1992—*

is hereby declared to be and always to have been valid.
- (2) *Every decision and every purported decision of the chief executive (whether made by the chief executive or the Director-General of Agriculture and Fisheries)—*
 - (a) *Made in respect of the issue, variation, refusal, revocation, or cancellation of any fishing permit under section 63 or special permit under section 64 of the Fisheries Act 1983; and*
 - (b) *Made on or after the 1st day of October 1992 but before the commencement of this section—*

is hereby declared to be and always to have been valid.
- (3) *Subsection (1) of this section does not apply to a decision or purported decision referred to in that subsection if the decision or purported decision is being challenged in or is otherwise subject to any court proceedings commenced before the date of commencement of this section.*
- (4) *Subsection (2) of this section does not apply to a decision or purported decision referred to in that subsection if—*

- (a) *The decision or purported decision is being challenged in or is otherwise subject to any court proceedings commenced before the date of commencement of this section; or*
 - (b) *The applicant for the permit which was the subject of a decision or purported decision referred to in that subsection—*
 - (i) *Has, before the commencement of this section, lodged with the chief executive; or*
 - (ii) *Within 12 months after the commencement of this section, lodges with the chief executive—*
- a notice requesting the chief executive to review that decision or purported decision.*
- (5) *Notwithstanding anything in section 93 of this Act or in section 63(13) of the Fisheries Act 1983, if a person has been or is granted a special permit under section 64(1)(c) of that Act or section 97(1)(c) of this Act, being a special permit granted to rectify an administrative error, the following provisions shall apply:*
- (a) *The chief executive may from time to time, but is not obliged to, issue to the person an appropriate fishing permit in place of the special permit:*
 - (b) *Upon the commencement of a fishing permit issued to any person under this subsection, the special permit held by that person shall be deemed to be revoked.”*

This provides validation of permit decisions made in respect of any fishing permit under s 63 or any special permit under s 64 of the Fisheries Act 1983, before or after 1 October 1992. If, however, the decision in relation to a permit had been challenged or was subject to a court proceeding commenced before the date of commencement of the section, namely 1 October 1996, subsections (1) and (2) did not apply. By this enactment, MAF/Fish received validation of its permitting process, regardless of the fairness or consistency of its processes, unless challenged before 1 October 1996.

Having detailed the legislative overview, we now consider the administrative structure and policy framework.

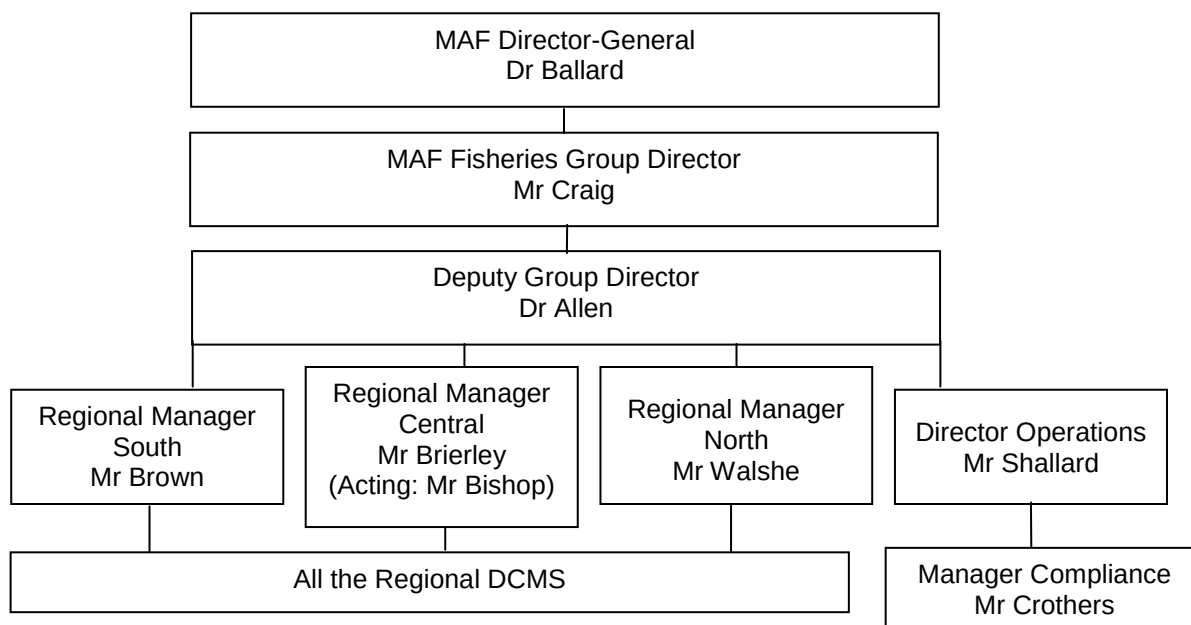
6.2.5 The Administrative Structure and Processes of MAF/Fish

To assist the Inquiry to understand the administrative systems and processes for the granting of permits from the late 1980s to 1992, MFish produced two charts depicting MAF/Fish fishery organisational structure for 1990 and 1992 which are appended to this Report³⁷.

³⁷ Appendices 5 and 6 respectively

The structure was described by former National Director of Operations, Mr Shallard, as a regional management structure, which operated as a “*matrix*”, although this label was not unanimously agreed upon. There is a brief outline of this disagreement later in this section, but the question of what to name the structure is not particularly relevant to the Inquiry’s assessment of it.

In the MAF/Fish structure from 1988, the Head Office directors of operations and (until 1991-92) fisheries policy had responsibilities for deciding on operational policy and directions, which regional managers and their staff were to implement. However these directors were at the same level as regional managers and had no direct authority to tell them what to do. Equally, the regional managers were not accountable to the director of operations. Both reported to the Deputy Group Director who for the relevant period was Dr Allen.



In essence, the organisation structure had its tiers as follows:³⁸

Mr Shallard told the Inquiry that he and a number of his colleagues did not find this structure easy. The problem with the structure, as he described it, was the uncertainty about the responsibilities attaching to each of the roles in it.

“It wasn’t in our mind clear enough cut where our responsibilities in terms of policy and operational directions finished and the regional manager’s responsibilities to implement started.”

³⁸ See Appendices 5 and 6 respectively for more detail

The “*lack of clarity*” led to frustration for the directors, such as Mr Shallard as Director of Operations and the Manager of Fisheries Compliance, Mr Crothers, having no power to direct what the regional managers or the enforcement staff did in their day to day work. The administrative structure for compliance is discussed in the sections of this Report which deal with Term of Reference 2.

Because Mr Shallard had no direct authority to tell the regional managers what to do, Head Office could formulate

“the way things should be done, but it gave the regions the opportunity to express their way of doing things in their own way”.

Because the three regional managers managed their region and organised their staff differently,

“[i]t led to more complexity than a straightforward hierarchy would have done.”

In Mr Shallard’s view, the management structure gave flexibility to each region to do things differently, including taking different approaches and issuing different types of permits.

Alluding to one example which will be explored in greater depth later, the Northern region took a different approach to permitting for scampi compared with the Central region. Mr Shallard told the Inquiry that both regions had different approaches to scampi permitting and recalled that Head Office was frustrated by the fact that

“... we have a management structure which allowed different regions to do different things, and we did not believe that was appropriate.

A number of the documents produced to the Inquiry and referred to by Mr Shallard illustrated this frustration and the steps that were taken to try to correct the inconsistent management approaches.

The regionalised management approach and structure remained for seven years. During that time, Mr Shallard along with Mr Crothers among others, expressed their dissatisfaction with the structure, but this view was not shared by the Director-General, the Group Director or the Deputy Group-Director.

Dr Ballard who was the Chief Executive of the Ministry of Agriculture and Fisheries at the relevant time, attributed the dissatisfaction with the structure to the introduction of the QMS system.

In response to the criticism that a number of senior people in the organisation were frustrated at the lack of accountability and control over the implementation of policies in the regions, Dr Ballard described the transition from a highly devolved localised management of fisheries in the regions, to a central administration, as a result of the QMS system, which was starting to dominate the national approach to local management of fisheries. In relation to the scampi fishery, he described that as being a local fishery, in that it was not in the QMS system and the decision-making power reflected the nature of the devolved power to the regions of the 1980s.

Dr Ballard acknowledged that the fisheries administration environment during the period 1989-94 was frequently confrontational, not assisted by the complexity and vagueness of the legislation and the inadequate information for sound decision-making. Inadequate science information led to decision-makers, in his view, erring on the side of caution, resulting in fishers receiving less quota than if adequate information had been provided.

He acknowledged that administration of scampi could undoubtedly have been handled better over this period, but the environment within which it operated was not conducive to the maintenance of a stable and robust administration regime, nor to taking rapid corrective action in the face of known difficulties. The differences in permitting or treatment of fishers in his view, stemmed from the traditional regional management approach which allowed considerable discretion to regions and developing fisheries management practices. By 1990, he believed there was a substantial effort to bring a common approach to policies and systems.

Dr Ballard's view was that there had been a progression from very localised structures to a regionalised approach, which was in the course of progressing to an even more centralised structure. An issue for the Inquiry is whether this had progressed sufficiently to provide an adequate administrative foundation for management of the scampi fishery at the time.

The complaints or frustrations at the administration system were mainly directed at the Deputy Group Director, Dr Allen, whom Dr Ballard described as the person who controlled the regions and their powers. Dr Allen placed a somewhat different perspective on the reasons which led to the regional structure. He believed:

“the structure with regional managers was the best approach at that time”

because pre-1988:

“MAF was notorious for having very poor communication between anything in the regions and Head Office.”

Prior to 1988 the three divisions in MAF/Fish, namely the Fisheries Management Division, the Fisheries Research Division and the Economics Division ALSO did not communicate very well among themselves.

As well as internal communication issues, Dr Allen believed the regional structure was appropriate from 1988 because the organisation needed to communicate easily to ensure that fishers and organisations around New Zealand had *“good access into the Ministry.”*

“Because MAF had come from a time when there was a fisheries management division, a research division and an economics division which did not communicate very well among themselves, MAF was designed to overcome those communication problems by having high level regional managers who were placed close to the industry and recreational fishers and other clients, to ensure the Ministry at a very high level got communication rapidly from the outside.”

The structure was designed to have high level regional managers who were placed close to the industry, recreational fishers and other clients to ensure that MAF/Fish received communication from those sources at a very high level.

Dr Allen also outlined his view of the scale of the change following the introduction of the QMS. It was understood to create big change in the industry, with the consequence that MAF/Fish would have to change its functions “dramatically”. He described it as follows

“We were aware that everything would change from the nature of the business of the fisherman, from basically being someone who was working to hunt or gather things within the constraints of the law to really running a business. That was going to be an enormous change in the industry, that was going to be a very large change in the industry, and we realised that the Ministry had to change dramatically in all of its functions. The research functions would have to change to provide an orientation to provide total allowable catches. The administrative functions would be completely changed to provide for a quota management system, and enforcement would be focusing on - more on crimes that are associated with documents rather than standing round inspecting catches. So, we basically foresaw a revolution both in the Ministry and in the industry.”

This appreciation of the scale of changes required was not matched by the management and administrative action adequate to achieve them and is the subject of further comment in Term of Reference 5.

When asked whether Mr Shallard’s concerns that the regions were doing things differently was leading to inconsistency of permitting amongst other things, Dr Allen acknowledged that those issues would have been raised and that his response would depend on the particular issue involved:

“We intended that the regions would be focused on their own region because the regions were different, they had different issues, the fish stocks were different in different areas so it was appropriate that the regions had a focus on their areas. But if it came to an issue where cooperation was needed and regions weren’t cooperating, then my job would have been to bring them together to make sure they did.”

The intention of the regional structure was to balance the need for flexibility in responding to local issues and industry, with ensuring national co-ordination and direction where that was necessary.

In relation to the making of policy for the QMS system, Dr Allen confirmed that almost all the policies would have been made in Head Office. Promulgation of the policies would be done through the operations directorate. It would send out circulars or other means of advising people, and it would be up to the regions to implement. For the most part, however, it was Head Office who made the policy decisions. He described at times talking directly to the regional managers and sending them a communication, but if there were formal directions, there was normally some sort of written circular within the Operations Directorate advising the regions of the policy.

The principal mechanism for the promulgation of policy was by circulars from Head Office. He confirmed that after 1991, some operational decisions such as permitting were brought into Head Office. This has particular relevance for scampi and this is described more fully under the section “Central v. Northern Crisis”³⁹.

Mr Shallard’s description of the structure under which regional managers were alongside the director of operations as a “matrix” organisation was disputed by Dr Ballard and Dr Allen. Dr Ballard’s definition of a matrix organisation was one involving multiple managers [for an individual or group] with the manager being different depending on the task being performed. The issue however is not the label, but whether the structure which existed contributed to any problems in the scampi fishery. This is discussed in the ensuing sections of the report.

Dr Ballard also indicated why he split the fisheries policy function within Head Office in 1991-92. He described policy decisions as stretching over a wide range of areas and categorised them as being either “big P” or “little p”:

Small “p” tends to be policy around the ... day-to-day activities, technical policy, standards would fall into that sort of domain; whereas large policy would be stuff which would affect legislation, which would set the frameworks, the long-term directions, having significant impact on the allocation of resources.

Those ones would certainly come up at my level and potentially to the Minister.”

Thus, in looking at the MAF/Fish organisational structure, from 1992, the “big” policy area was undertaken by the policy group. In 1990, Dr Allen was dealing with both “big policy areas” and “little policy”.

Dr Ballard believed the technical aspects associated with regulation should not be determined by the people who were setting the high level framework. In his view, consistency could be tested by having one person developing the technical requirements in the regulations, to comply with the Policy which had been determined at a higher level.

To understand the impact on the making of policy, particularly in relation to non-QMS species such as scampi, it is appropriate to understand the policy environment from 1983 to 1992.

6.2.6 The Policy Environment from 1983-1992

The Inquiry has received a considerable volume of policy documents, both during and following the hearing of evidence, together with a considerable volume of evidence and submissions in relation to the permitting systems and processes used by MAF/Fish from 1983 to 1992.

³⁹ Refer p. 19

The period 1983-92 was one of enormous change in New Zealand fisheries. Three factors have been identified as having significant effects on the system in place in MAF/Fish for administrative decision-making on fisheries management policy. They were:

- The development of new fisheries under New Zealand's economic zone;
- The policy shift from management of fisheries by administrative decision-making to management by allocation of property rights under the quota management system; and
- The recognition of Maori indigenous rights in New Zealand fisheries.

6.2.6.1 The Development of New Fisheries

During the 1980s there was a significant expansion of fishing effort and fish catch by New Zealand companies in New Zealand's economic zone. In the developed fisheries, which were recognised fisheries, there was intensification of effort. Secondly there was expansion into new areas and species of fish which had not previously been the focus of fishing history. In respect of the new areas and species, there was a need to develop an understanding of the biology of new fisheries and of the impact of fishing on the stocks to establish whether there was sufficient to enable future management for sustainable yield. This required collecting information from commercial fishers, who were interested in exploitation of the resource for profit.

As Mr Laking has identified, there was a conflict of interest between the Government, interested in controlling expansion of fishing effort until there was a proper understanding of the resource, and the fishers, who were interested in establishing future commercial viability with the establishment of profit and claim to a future property right.

In the case of the scampi fishery, fishing effort was growing rapidly but little was known about the sustainable yield from the stock in various areas or the effects of fishing methods on the surrounding or nearby species.

6.2.6.2 Change in Fisheries Policy

With the introduction of the QMS system, the policies of MAF/Fish reflected the shift from the system of detailed administrative decision-making and the issue of annual permits to fishers defined by area and species, to the allocation of individual property rights in the fisheries resource. In 1986 the Fisheries Act 1983 was amended to provide for individual transferable quotas to be allocated to fishers. These were ultimately allocated in perpetuity with mechanisms in place for adjustment of individual quotas up or down, depending on revised information about the total resource.

When the QMS was introduced in 1986, most of New Zealand's developed fisheries or well known fisheries were brought under the new management regime.

The other fisheries remained outside the QMS and continued to be subject to the administrative decision-making process of the original 1983 Act. This involved administrative distinctions being made among categories of fisheries, whether they were open, developing, fully developed, over-developed and protected, and the control of permits was based on the identification of these categories. The issue of annual permits to fishers with defined areas and species, subject to conditions, continued.

With the commencement of the ITQ system from 1 October 1986 under the QMS regime, MAF/Fish made changes to its system for processing applications for fishing permits and vessel registration. By circulars promulgated from Head Office, the regions were advised the policy for the renewal of fishing permits and/or fishing vessel registrations for the fishing year.

Essentially, the policies required fishers to apply for permits for the species they were seeking to catch and any other species likely to be caught in association with the target catch. The other species were called “bycatch”.

The policies were generally based on the assumption by MAF/Fish, that it could not reject permit applications to fish non-ITQ species but that conditions could be placed on permits to restrict the capture of specific species of fish, the fishing gear to be used and the periods of time, with the exception of protected fisheries.

The management of a fishery was determined by the regional office and involved the categorisation of the development of the fishery.

As scampi was a new fishery, with the first commercial fishing to any marked degree taking place in 1987, it fell to be considered under the guidelines for permit issue for non-ITQ species.

It was, and still is, a non-QMS fishery and the development of the non-ITQ policy in relation to the scampi fishery in New Zealand is considered below.

6.2.6.3 Maori Fisheries Injunction

In 1987, Maori Tribes obtained an interim injunction from the High Court that prevented further species being brought under the QMS until their claims in respect of New Zealand Fisheries could be held and determined.

The injunction led to a negotiating process, which culminated in the Deed of Settlement, dated 23 September 1992. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (The Treaty of Waitangi Settlement Act) was passed to give effect to the settlement of claims relating to Maori fishing rights, and to make better provision for Maori participation in the management and conservation of New Zealand fisheries, as well as customary fishing rights and interests. Of significance, the Deed of Settlement and the Act secured 20% of any new species being brought into the Quota Management System, for Maori.

Mr Shallard has described the impact of the injunction obtained by Maori in 1987 as “*leaving the Crown with having to manage the remaining non-QMS fisheries by other means*”. The Crown had no control over the time-frame within which the Maori fisheries litigation was to be determined. The dilemma faced by the Crown was a need to control the “*burgeoning expansion of effort in a non-ITQ fishery*” and the recognised need to make allowance for Maori fishing rights and fulfil the Crown’s obligations to Maori under the Treaty of Waitangi.

Following the introduction of the QMS, many fishers were looking at “*expanding rapidly*” into the species that were outside the QMS.

The conflicting pressure on MAF/Fish is highlighted in a paper to the Minister of Fisheries dated 21 October 1991 which described the problems surrounding permits, authorisations and Fisheries rights as follows:

“The fundamental cause of these problems is the existence of uncoordinated processes to simultaneously pursue the following Government objectives:

Encouraging the development of fisheries

Allocating further fisheries rights on the basis of catch history

Recognising Maori fishery rights

Minimising government expenditure.”

By 21 October 1991, MAF/Fish had recognised that the combination of incomplete or inconsistent criteria for the issuing of permits, together with the criteria which had to be followed when allocating quota, combined to make the Crown’s responsibility to recognise and protect Maori fishing rights unnecessarily difficult and expensive. In its evidence and submissions, MFish has stressed the impact of the Maori fishing rights and the existence of the injunction, which prevented the entry of further species into the Quota Management System. The policy direction, following the injunction, was to take a cautious approach by MAF/Fish to the decisions to be made in respect of permitting non-QMS species.

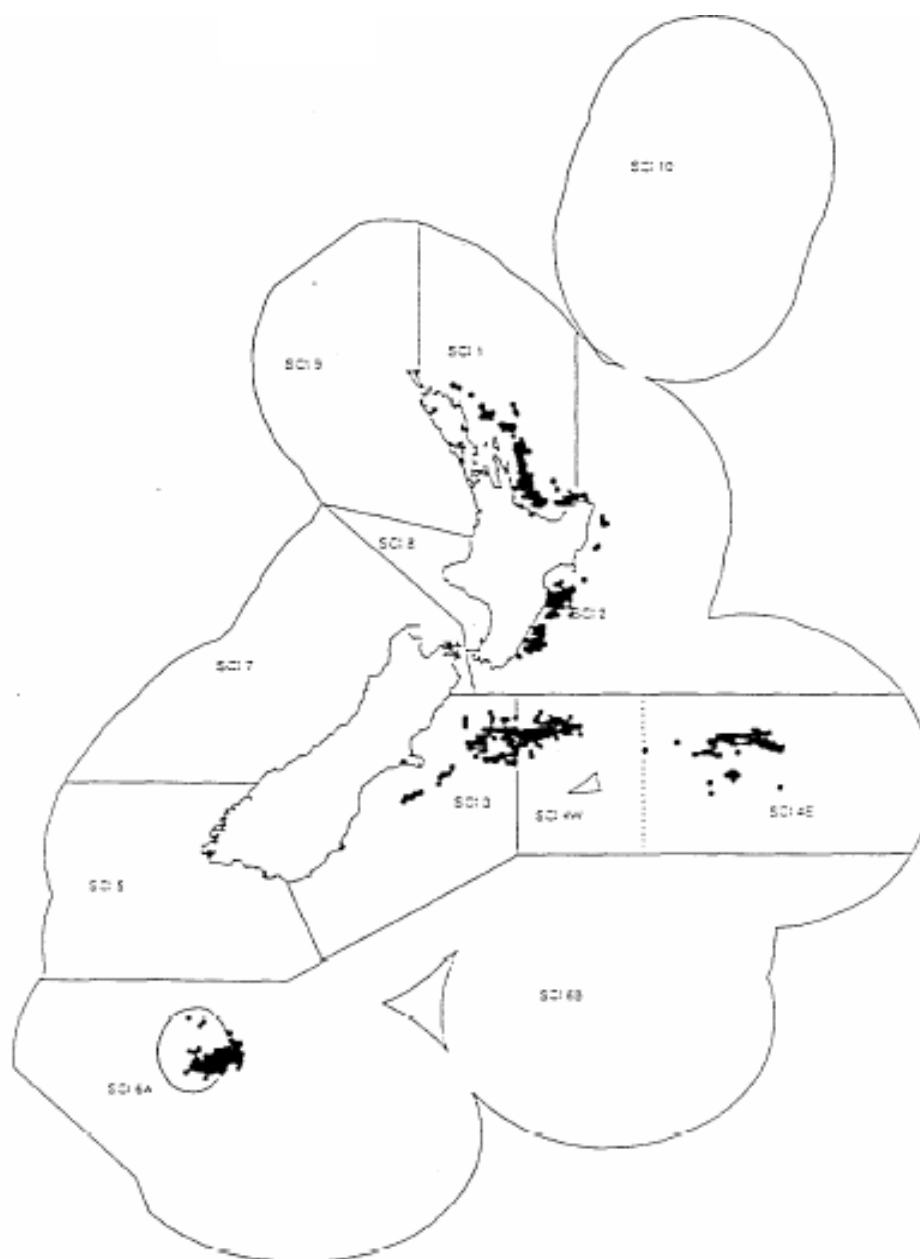
The reliance by MFish on the impact of the injunction has been criticised and the Inquiry has received submissions that the existence of the injunction and the ensuing cautious approach to policy-making, should have led to a “*more considered and careful approach to the permitting decisions that were made*”.

Although the Maori fisheries injunction prevented the introduction of further species into the QMS from 1987, we are of the view that it was nevertheless incumbent on MAF/Fish to ensure that the permitting or authorisation for fishing non-QMS species should be approached

on a consistent and fair basis. The existence of the injunction did not prevent MAF/Fish from formulating and implementing policy for non-QMS species.

It should be noted that the Maori fisheries claim was not settled finally until 1992. Thus no further species of fish, other than rock lobster, were introduced into the QMS over the period 1988 to 1992.

6.3 PART III: POLICY DEVELOPMENT FOR THE SCAMPI FISHERY



Under the regional structure of MAF/Fish there were three main regions. They were the Northern region, the Central region and the Southern region. As a Non-Quota species, the scampi fishery is divided into eleven fishery management areas numbered SCI 1 to SCI 10 (as shown in the map above) with area SCI 6 subdivided into two areas, SCI 6A and SCI 6B. In Areas 1 to 9 commercial fishing is permitted, but in Area 10, around the Kermadec Islands, no commercial fishing is permitted.

Each region was responsible for the particular fishery management area adjacent to its area of operation. For the Northern Area this included Areas 1, 9 and 10; the Central region (the office of which was based in Nelson) was responsible for the management areas 2, 7 and 8 and Southern region had responsibility for Areas 3, 4 5, 6A and 6B.

Prior to 1986, the scampi fishery had been the subject of investigation by MAF/Fish, in conjunction with other middle and deepwater species. The investigation was conducted by Mr Patchell, who was formerly a fish scientist for MAF/Fish, and since 1990, has been the resource manager for Sealord. Following a circumnavigation of New Zealand in 1980 aboard the *James Cook*, scampi stocks were located at a depth of 400-700 metres in Areas 2, 3 and 4. His investigation also showed scampi present in Areas 3, 4 and 6.

In July 1985, a position paper was prepared by the Fisheries Management Division on the management of non-ITQ species by permit control. This appears to be the first policy document on the development of the inshore policy, preceding the imposition of the QMS system, which addressed the implications for management of non-ITQ species and the change to the definition of a commercial fisherman.

The policy was seen to give greater flexibility to a fisher, as he had

“a wider choice of which species he will fish, and in which areas and seasons and by what methods he will take his catches than under other management schemes”.

The effect of the policy was to “open up” all commercial and controlled fisheries, other than those subject to ITQs to any person who wished to fish for sale.

To prevent “*biological overfishing*”, a natural consequence of the change in definition and policy, was to set a TAC or limit permit numbers to maintain fish populations of non-ITQ species which were subject to competition. The paper recommended that regions use limited permit numbers as a tool to manage non-ITQ species in the in-shore fishery.

The option favoured in the Position Paper was to amend s 64 of the Fisheries Act, to allow for some discretionary authority in the issuing of permits for non-ITQ species. Specifically, the Paper noted that in the proposed definition of a “*commercial fisherman*”, there should be an empowering section which allowed for some discretionary authority in the issuing of permits for non-ITQ species using s 64 of the Fisheries Act. It was envisaged that criteria under s 64 for the granting of permits for non-ITQ species would be established, in addition to the provision for conditions to be placed on fishing permits concerning area species, quantities, methods, types of fishing and periods of time.

In the assessment of the potential problems for each of the fisheries, the scampi fishery was specifically assessed as having the following:

- Lack of biological knowledge for stock assessment and management;
- Bycatch problem with trawl-caught ITQ species;
- Marginally economical with fishers needing supplementary income or access to another fishery.

By March 1986, the difference in approach by the three regions to the management of non-ITQ fisheries in their fishery management plans had already been identified. The paper entitled Current and Potential Management Requirements in the Challenger Fisheries Management Area identified that the Northern region was proposing to take a different approach to permitting for its non-ITQ fisheries compared to Central and Southern.

By August 1986, the Director of Fisheries Management Division issued a divisional circular to the regional fisheries officers, the regional fishery management offices and the registrars of fisheries.

This divisional circular contained the policy which provided the guidelines for the permitting of all non-ITQ species.

The policy required fishers to identify the species they were seeking to catch and any other species likely to be caught in association with the target catch (bycatch). More importantly, the policy was based on the premise that

“MAF cannot reject permit applications to fish non-ITQ species”

but conditions could be placed on permits to restrict the capture of specific species of fish and restrict the fishing gear to be used.

The policy set five level of development categories to guide the permitting procedures. The five categories were:

(1) Open –	where there was no TAC and for which no limits were proposed. There would be automatic issue of permits provided the general permit criteria were met.
(2) Developing –	where catches were increasing and approaching the optimum yield for the fishery permits would have few, if any, conditions. Conditions might be necessary to assist in management of the species. No restrictions would be placed on the number of permits issued.
(3) Fully developed –	where MAF/Fish believed that the current catch was approaching the optimum yield, the objective was to maintain the optimum yield by conditions on permits and to only issue permits where they replaced lapsed permits. New permits were to be issued to replace lapsed permits.

- (4) Overdeveloped – where the current catch exceeded the optimum yield, the objective was to reduce the catch to at least the optimum levels by not re-issuing lapsed permits and by placing conditions on permits to prevent increases in effort and/or catch.
- (5) Protected – where there were species for which fishing was prohibited by regulation or notice, application for permits would be rejected.

The five “*level of development*” categories were to guide the permitting procedures. If catch and effort on a species increased, the policy provided that a fishery may move progressively from an open or developing fishery to a fully developed and in some cases, an overdeveloped fishery. As the development level changed, the criteria for permitting would also change. In the general guidelines for permitting non-ITQ species, the circular noted the following under “*Administrative Support*”:

“Most non-ITQ, non-controlled fishery species are of low economic importance.

The administrative procedures for permitting must reflect this principle. Specifically permitting criteria must be simple, easily administered and require minimal maintenance”.

Guidelines for permit issue by the regions for non-ITQ species were based on the categorisation of each of the fisheries.

Just prior to the commencement of the 1986-87 fishing year, a policy was promulgated by Dr Allen for investigative fishing which was effective as of 1 October 1986. Of importance to the scampi fishery, the policy provided the principles for granting investigative fishing rights by the issuing of special permits.

Section 66 special permits became section 64 special permits. Although the policy referred to s 66 of the Fisheries Act, this was subsequently amended to become s 64 Fisheries Act 1983, the special permit section. Part IV Fisheries Act 1983 was enacted by the Fisheries Amendment Act 1986, reformatting the sections. This was to encourage fishers to explore and develop new resources. The policy specifically provided that no fish caught during exploratory fishing surveys will form part of any ITQ entitlement.

Following these circulars, all three regions categorised the scampi fishery as a developing fishery and if undersize mesh nets were to be used, then RFMO approval was required.

A fishing year commences from 1 October and finishes on 30 September the following year. We review the permitting policies for the Scampi fishery by the respective fishing years.

6.3.1 1986-87 Fishing Year

There was no specific policy relating to scampi and from the information available to the Inquiry, the first scampi fishing permits to be granted were in 1986. Kiwi Prawn Fishing Industry Limited (Kiwi Prawns) was granted a special permit and using the vessel “Trinity” landed 40 tonnes of scampi during the 1986-87 period.

In the same year, the Whangarei office in the Northern region granted a permit to Mr Tuck and Hazel Lanauze and the Dunedin Office in the Southern region granted a special permit for Area 3 to United Fisheries. A special permit under s 66 of the Fisheries Act 1983 was issued to Fletcher Fishing Limited on 13 October 1986, valid to 30 September 1987.

On 9 October 1986, the Regional Fishing Manager of Nelson sent a telex to all registrars of fisheries saying:

“I am aware of some other registration officers having issued some permits for the Challenger area which are not consistent with the Challenger policy for non-ITQ species. We cannot afford to have inconsistencies between different permits issued for the same area as this undermines the policy.”

If any of your fisherman apply for non-ITQ species in the Challenger area, please contact ROF Nelson for conditions that should be attached to the permit. We will contact you in the case of our fisherman wishing to fish in your area.”

Annexed to the telex to the other seven registrars is a policy circular which⁴⁰ reinforces that management of non-ITQ species should require a minimum of administration, as non-ITQ species were of small commercial importance in their value to the nation.

“For this reason their management priority is low and the effort targeted on their management should be small.”

It also stressed that decisions should be consistent, and the criteria used in the decision-making process should be clear.

“Decisions made by authorised people should be consistent and repeatable. Criteria used in the decision-making process should be clear to enable staff to make the same decision given the same information base or consistent decisions given different situations and information base.”

The document appears to build upon the previous divisional circular and contains a strategy for identifying which species may or may not be fished in granting permits. It appears to have been formulated for the Central region and in particular the Challenger area.

⁴⁰ The signature of the author on this document is not recorded and a date of 16.10.86 from file X30 is noted on the Inquiry’s copy of the document.

It was implicit that regional fisheries officers should consult other regional fishery management officers, about the state of regionally managed fisheries. The examples provided are shellfish, kina, and seaweed but given that the regional structures envisage fishery management plans for each of the specific regions, the strategy envisaged regional fishery officers contacting other regions if there were applications to fish non-ITQ species in areas not governed by the fisheries office nearest to where the fisherman resided.

The regional structure of MAF/Fish gave the regional fisheries management officers control over the fish stocks in their respective regions. This appears to follow the statutory requirement under section 63 Fisheries Act 1983, which required a person to apply for a fishing permit to the registrar at the registration office nearest to the area where the applicant wishes to take the fish.⁴¹

6.3.2 1987-88 Fishing Year

On the basis of the divisional circular of August 1986, the regional offices had developed framework for the management of non-quota species for the 1987-88 year. The examples available are:

- June 1987 Central region (Napier office) included “*deep water prawns*” in the Open Species category.
- July 1987 Southern region (Dunedin office) released their policy for non-ITQ species and scampi were included in the developing species. If small mesh nets were to be used, then RFMO approval had to be obtained.
- In October 1987 Northern region released an amended policy paper for issuing permits for non-ITQ species which included:

“prawns in the developing species category which was open to all applicants with s 64 permit required for experimental trawling using mesh less than 100 mm.

Mr Shallard issued a circular from Head Office dated 10 September 1987, containing further guidelines in respect of developing species and special permits. MAF/Fish intended that in managing the developing species, it was to provide for development without exceeding the optimum yield for the species, noting that catches of species in this category were increasing and were approaching the optimum yield for the fishery.

⁴¹ Originally the fishing permit section was s 64 but the section became s 63 when a new Part IV was enacted by the Fisheries Amendment Act 1986. Section 66 prior to the amendment related to special permits. After the Fisheries Amendment Act s 66 became s 64 special permits.

The procedure to be followed was that permits were to be issued automatically for species in the “developing” category, provided the general permit criteria were met and the permit had appropriate conditions. The policy advised that the number of permits issued for each species should be restricted to an assessment of the potential catch of the issued permits determined by the regional fishery officer or regional fishery management officer.

The policy also contained directions regarding special permits. The special permit only related to species, gear, methods and areas which are ordinarily unlawful under the Act or Regulations and may only be issued for:

- the purposes of education, investigative research or gear and method experiments; or
- the purposes of sport or recreation in the case of any disabled person; or
- the purpose approved by the Minister.

On 17 September 1987, Dr Allen wrote to the RFOs requiring them to notify the Fisheries Research Centre of any new trawling operations for scampi and prawns

“because of the need to acquire a fishery data base for scampi and prawns ...”

In addition, they were required to report on conditions of any new special permits or special permit renewals for scampi fishing, together with a report from the fisher on the investigative research and results of the fishing, once fishing ceased under the permit.

In March 1988, a revised policy for permitting non-ITQ species from 1 October 1987 was circulated. The permitting criteria for developing species remained the same: namely there would be automatic permitting with appropriate conditions. However, the number of permits issued was to be restricted to an assessment of the potential catch of the issued permits. When the assessed level was reached *“the level of development”* classification would be reviewed.

The policy for fully developed or over-developed species was changed from the policy in 1987 which had been conditioning commercial permits under s 63(4). In March 1988, a legal opinion from MAF/Fish legal services meant changes to the 1987 policy needed to be made. This change was that s 63 (4) could not be used to grant or not grant permits for non-ITQ species.

The effect of the change was that those species classified as *“fully developed”* or *“over-developed”* had to be dealt with under s 65. A revision of the policy for non-ITQ species was made for this purpose. No change was made to the policy for developing species which included scampi.

This is the only policy change in March 1988. Submissions by the parties that a change to the scampi policy occurred in the March 1988 policy document are incorrect as scampi was not in the “fully developed” or “over-developed” category.

In May 1988, this policy change was reversed because of a further legal opinion from the Office Solicitor. Section 63 commercial permits were reinstated with conditions as the permitting policy for full developed or over-developed species. No change was made to the policy for developing non-ITQ species.

Simunovich and Kiwi Prawns made application for special permits to bottom trawl for prawns and scampi in July 1987. These applications were referred to Mr Wilkinson, who was then RFMO in the Auckland office. As the 1987 policy circular warned, special permits would be required where the fishing methods or gear would be contrary to the statute or regulations. In the scampi fishery, the methods of fishing were either by the use of pots or by trawling. If a bottom trawl for scampi was approved, the fisher needed to use a trawl net with a mesh of less than 100 mm, contrary to Regulation 47(1)(d) Fisheries (Commercial Fishing) Regulations 1986.

The regions continued to develop their own frameworks for the management of non-quota species in their region. The Northern and Southern regions retained scampi in the “*developing*” category.

Central region (Napier office) prepared a new non-QMS document which did not list scampi. As a result, scampi, or deep-water prawns, were assigned to the “*open species*” category, which had no TAC and no limits on catch or entry for the fishery defined. Further, it did not specify any conditions on permits or restrictions on the numbers of permits issued.

Although the policies on permitting non-ITQ species from 1 October 1987 were silent on whether s 63 permits could be issued, Mr Wilkinson as former RFMO, told the Inquiry that MAF/Fish had determined it wanted to make non-QMS species liberal and permissive and provide for development opportunity.

“So, they essentially said in this form of categorisation, ‘we will open all of this up.’”

The impact of the Maori fisheries injunction however, prompted MAF/Fish

“to turn a big corner to go back the other way and say “we want to prohibit instead of permit”.”

In applying the policies regarding permitting of non-ITQ species in 1987, Mr Wilkinson took into account two factors that led to the granting of special permits, rather than s 63 commercial permits.

The first factor was the use of mesh less than 100 mm contrary to regulation, and the second factor was that the scampi fishery had not proved to be commercially viable in the 1960s and 1970s.

The Northern region (Auckland office) determined that they would be “*a bit conservative*” by not permitting under s 63 immediately, but granting special permits under s 64

“because previously scampi fishing ... hadn’t proven to be commercially viable”.

Mr Wilkinson thought it was likely that the registrars would have told the fishers at the time, namely Kiwi Prawns and Simunovich, that they were granted special permits, but if the fishery proved to be viable commercially, then

“somebody will have to make a determination of the change.”

In his positions as a former FMO and RFMO, Mr Wilkinson followed a liberal policy in respect of special permitting for non-ITQ species, by permitting people to explore fisheries, unless there was good reason not to.

6.3.3 1988-89 Fishing Year – the Change in Policy

Mr Wilkinson left MAF/Fish in March 1988, taking up employment with Simunovich.

On 26 July 1988 (during the 1987-88 fishing year) Mr Wilkinson, in his new capacity as Resource Manager for Simunovich, wrote to the Registrar of Fisheries, advising that Mr Hore, (the RFMO who succeeded Mr Wilkinson), had notified him that there had been a policy change relating to the use of special permits. He drew attention to the fact that Simunovich held special permits under s 64 to provide for the use of small mesh size while the entitlement to catch scampi was conditioned as a non-ITQ species on fishing permits.

He requested that scampi be conditioned as a non-ITQ species on the permits of their domestic fishing vessels and that special permits be issued for the use of the small mesh size. These variations were being sought because Simunovich wished to increase its commitment and dependence on the scampi fishery and it wished to forward-plan their vessel operations, in line with the changes in the special permit policy.

In the documents produced by MFish at the Inquiry hearing, no policy change was evident on or before 26 July 1988, and Mr Shallard could not point to any specific change, apart from referring to the non-QMS policy documents and describing them as guidelines with flexibility reserved to the regions. Mr Burnard referred to the National Guidelines circular from Mr Dobson dated 10 September 1987, in which paragraph 7.2 provided that:

“Each Regional fishery officer is responsible for liaising with the RFMO and advising registrars and other Regional staff of the species ...”

In addition, there was the policy that the regions could develop within the stated five categories contained in the documents.

In summary, from a national perspective, Mr Burnard described the issuing of a s 63 commercial permit depended on the categorisation of the species and if particular gear had to be used which was “*problematic*” a special permit should be issued. Ultimately, it was at the discretion of the RFMO of the region, as to whether a commercial or special permit would be issued.

However, following the hearings, further documents from the 186 boxes were disclosed which contained the 1988 policy, issued on 29 August 1988.

We have compared the 1988 policy relating to the renewal of fishing permits for the 88-89 year, with the equivalent divisional circular for the previous fishing year issued in September 1987. Annexed as Appendix B to each of those circulars was a section relating to special fishing permits issued under section 64 of the Fisheries Act 1983.

The appendix to the 1987 circular had only a brief description of the section 64 provisions and a note simply indicating that such permits were to be issued for the purposes set out in section 64 and when the issue of a permit would otherwise be unlawful.

By contrast, the 1988 annexure was much more extensive, and effectively was a set of guidelines to officers with delegated authority to issue special permits under either section 64 (1) (a) or section 64 (1) (b). Scattered through these guidelines are phrases like “*should normally only apply*” or “*should be limited as far as possible to*”, which suggests a restrictive approach to the use of special permits. The annexure also in section (e) headed “Commercial Fishing Permits,” provided:

“in many cases in the past, special permits have been applied for when a commercial fishing permit would suffice. The following guidelines are to be used in this respect:

...

- 2 *Where an application is received for a special permit in conjunction with what is partly a commercial fishing operation, the approval of a special permit should relate only to the exceptional aspect of the proposal, and the applicant should be advised to take out a commercial fishing permit for that part of the operation which does not necessarily require a special permit”.*

The Inquiry considers that this appendix indicating how narrowly section 64 permits should be used, implies that commercial permits should be used more. The annexure foreshadows the possibility of dual permits (a combination of commercial and special permits for the same fishing operation). For these reasons, the annexure may be indicative of the change of policy to which Mr Wilkinson referred in his letter of 26 July 1988.

On 8 August 1988, two weeks after Mr Wilkinson had written to the Registrar of Fisheries in Auckland, Mr Shallard circulated a paper, proposing that in the non-ITQ policy for the 1988-89 fishing year, some species be placed under a s 65 moratorium. In the introductory paragraphs, he refers to the concerns that have been expressed by the Office Solicitor and others:

“about the defensibility of our current non-ITQ policy with its reliance on extensive conditions on permits to control the taking of non-ITQ species. The view that has now been put to us is that the present policy based on these restrictions is probably not legally defensible.”

It was imperative in his view that changes were made to provisions that were legally defensible, less cumbersome and not subject to individual variation. He proposed the new policy would be in place in time for the renewal of permits for the 1988-89 fishing year.

The proposal was to do three things:

- Place restrictions on taking certain species using the provisions of s 65 of the Fisheries Act;

- Promulgate regional regulations to provide input restrictions on other non-ITQ species; and
- Restrict the types of conditions placed on permits.

The proposal noted that for all other non-ITQ species not subject to any restriction, such as a moratorium under s 65,

“...access will need to be openly available to all that apply for permits for such species.

If there is a need to place restrictions such as area methods, size limits or quantity limits on any species for sound management reasons, they would need to be done by way of regulation rather than conditioning of a permit. Conditioning a permit is to be restricted to conditions relating to the species and methods that are applicable to that particular permit. Regions were asked to advise which species they would wish to put in the s 65 restricted list and those that need to be place on their non-ITQ species”.

The Inquiry was only provided with a copy of the response from the Northern region, and not from Central or Southern. The Northern response proposed that scampi and deep water prawns be included in any section 65 moratorium primarily because of concern about pressure on the ling bycatch from scampi fishing.

The decision on which species were to be included in the section 65 Gazette Notice implementing moratorium from 1 October 1988 did not include scampi. A letter dated 27 September 1988 from Ms Sharp-Brewer to Mr Hore indicated that scampi and prawns were not included because the issue of the “*at risk bycatch*” could be considered in another context, and “*in addition to this these species are seen to be developing fisheries.*”

A section 65 notice was promulgated on 15 September 1988, but did not contain any reference to scampi. All species that were listed under the notice could not be fished unless specifically authorised.⁴²

On 19 September 1988 RFMO (Central) wrote to RFMO (North) confirming that a special permit for fishing scampi and deepwater prawn in the Central and Challenger Fisheries Management areas, similar to the fishing permit issued for the Auckland FMA, could be granted to Simunovich provided that each time fishing under the special permit is to occur in Central or Challenger FMAs, Simunovich must notify the Regional Fisheries Management Officer, Nelson.

⁴² The Fisheries (Species and Area Prohibition) Notice 1988, No. 4462 published in the Gazette on 15.9.88

6.3.3.1 The Significance of Commercial Permits in the Scampi Fishery

The most significant development in this fishing year (1988-89), was the granting of commercial permits together with a special permit for the fishing of scampi in the Northern region⁴³. These “dual” or “hybrid” permits in the 1988-89 fishing year marked the first time that commercial fishing permits under s 63 together with a special permit under s 64 had been issued by MAF/Fish for the scampi fishery. This is the first time a fisheries area had decided permits were being issued for scampi on a commercial basis.

The change in permitting was critical. By receiving a s 63 permit in a fishery, the fisher was entitled to expect the permit to be renewed annually on application. A section 64 special permit, however, did not accord such expectation or rights.

A s 64 special permit, issued for investigative or exploratory fishing in developing fisheries was different in a number of critical respects to a commercial permit issued under s 63. A commercial permit signified that the fishery was commercially viable and competitive and conferred a right on a fisher, who was entitled to expect the permit to be renewed annually on application. This statutory obligation arising by implication under s 63 has been the subject of judicial consideration in *Montgomery v. Attorney-General*⁴⁴ which held that once the fisherman came within the definition of “commercial fisherman” for the purposes of granting a fishing permit under s 64(1) of the Fisheries Act 1983, he was entitled to the grant of a permit.⁴⁵

The significance of the granting of commercial permits was critical to Simunovich’s approach to the fishery. Once a section 63 permit was issued, it was a de facto acknowledgement that the fishing operation was commercial and was not subject to the type of conditions found on the special permits.

It should be noted that all special permits from the Northern region contained the caveat that the taking of any fish under a special permit did not entitle the holder to any advantage or privilege with respect to any of the species taken.

⁴³ It has been submitted that the Central region issued dual permits in the 1988-89 fishing year for Amaltal and Mr Okey. It appears that a Registrar, Ms Foster-Barham, formerly from the Northern Region’s Tauranga office signed a commercial permit for Amaltal for 3 months from 23 June 1989 to 30 September 1989 and a special permit was signed by the Regional Manager for the period 13 July 1989 to 31 May 1990. As with a number of permits in the files discovered, permits may have been signed but not issued. We cannot safely conclude the commercial permit for Amaltal was ever issued. Further, of the 3 months permitted, one month did not have a special permit for fishing gear. In the case of Mr Okey, the permit situation is confused. It appears from the file (we never heard from Mr Okey and nor was his file or permits available to the Inquiry until 20 May 2004) that Ms Foster-Barham signed a commercial permit for 4 months from 31 May 1989 to 30 September 1989 and a special permit was signed for 29 May 1989 to 30 September 1989 but we are unsure whether one or both permits were ever issued. Only a special permit fee was paid on the application (dated 4 May 1989).

⁴⁴ *Montgomery v. Attorney-General & ors.* (Unreported: High Court, Auckland, CP 1445/86, 28 March 1988, Henry J)

⁴⁵ See also *Gunn v. Quota Appeal Authority* : (1993) NZAR 102

For a commercial operator, the commitment of capital and vessels would not be undertaken on an investigative basis alone. Mr Wilkinson in his capacity as a Simunovich Director told the Inquiry:

“You would not commit capital and purchase the vessels, in my view, on an investigative fishing basis alone. ... If the venture didn’t succeed, then you simply didn’t continue. Sinking your own capital required the assurity of a commercial fishing permit.”

The assurance of a commercial fishing permit therefore was a key factor for Simunovich justifying the expenditure of more capital and effort in the fishery.

6.3.4 1989-90 Fishing Year

In April 1989 the Director of Operations, Mr Shallard, advised that he did not have any changes to the non-QMS management for the 1989-90 fishing year. He wanted regulations to include controls on species that were restricted by Gazette Notice under s 65.

On 1 May 1989, Mr Brierley, Central’s Regional Manager, wrote to Mr Shallard recording that there was confusion over what actions could or could not be taken under MAF/Fish policies and what was currently allowed by the Fisheries Act. He specifically sought advice on a number of matters but in particular whether there were policies on permitting which would bind the regional managers for the 1989-99 fishing year.

On 17 May 1989, Mr Shallard sent a letter to all fisheries management offices concerning the management of non-ITQ species for the 1989-90 fishing year. He reminded them of the previous policy, which was considered to be “*legally indefensive*,” of relying on extensive conditions on permits to control the taking of non-ITQ species.

The policy for the 1989-90 fishing year placed restrictions on the taking of certain species using s 65 notices. He advised that this was only a short term and interim application while a longer term management regime was devised. He advised that it was prudent for the RFMOs to commence the development of management regimes for each non-ITQ species based on the absence of a s 65 moratorium and on the basis that access to each fishery would need to be openly available to all who apply for permits for such species. If there were sound management reasons to place restrictions on areas, methods, size limits or quantity limits, these should only be done by way of regulations, rather than by conditions on permits.

The regions responded to this directive in different ways.

6.3.4.1 Northern Region’s Response

The manager, fisheries administration sent the RFMO (Auckland) a copy of a non-ITQ species management flow chart in which four operations were designated as part of the non-ITQ species management, namely:

- declining a permit under s 63

- granting a special permit under s 64
- a combination of s 63 and 64 permits and
- issuing a s 63 permit.

On 21 July 1989, the Auckland office recommended to their RFMO that permit conditioning should be continued for one more fishing year and an undertaking given that a thorough review would be conducted in time to make new regulations for the following year.

He noted:

“Having briefly reviewed the existing conditions on permits for Non-ITQ species, which are mainly related to shellfish and seaweed permits only, it appears that an extensive revision of these conditions is necessary. The conditions have evolved over the years in an ad hoc manner, and in some cases, the basis for their existence has been largely obscured by time.”

On 28 July 1989 the RFMO (North) wrote to the Regional Manager, Mr Walshe, attaching the proposed management strategy for non-ITQ fisheries in the Auckland FMA. He noted that the current legislation did not provide an adequate framework to manage non-ITQ fisheries currently subject to s 65 restrictions. Without an amendment to s 63 of the Act to provide the Director-General with discretion to decline permits on stated grounds, he expressed concern that in addition to the prevailing difficulties in managing non-ITQ fisheries, allowing open access to the fisheries meant that there would be an increase in potential management problems. He warned that increases in permit numbers were likely to result.

On 14 September 1989, the Regional Manager (North) outlined to all commercial fishers the management of non-ITQ species in the MAF/Fish (North) region for 1989-90. He did not specify any particular approach to be followed in the case of scampi and, by default, scampi fell into the category of:

“open for permit application, subject to method restrictions that limit the incidental catch of other species.”

Before 1 October 1989, the strategy for the 1989-90 fishing year was confirmed for the North region. For scampi the strategy was:

Current Management:	Open Section 64 Special Permit for undersized trawl mesh
Management Strategy:	Open No trawl unless approximate ITQ mix Section 64 Special Permit for undersized mesh.

In the explanatory note the document described the scampi fishery in the Auckland fishing management area as:

“newly developed with two vessels currently actively fishing the species. Trawling for scampi results in a bycatch of hoki and ling, both of which are quota species. Markets for scampi are currently limiting the development of the fishery; however once established a rapid establishment of interest can be anticipated. Worldwide crustacean fisheries are sensitive to over-exploitation. A change in status of this fishery may be required if development is too rapid.”

It should be noted that in or about April 1989 Simunovich attended on the Regional Manager, Mr Walshe, to make comments on the priorities and objectives for MAF/Fish North in the 1989-90 year.

A letter from Mr Walshe recording the discussion and thanking Simunovich for the time that they had taken to talk about MAF/Fish priorities and objectives, noted that:

“Simunovich Fishery would like to see the scampi fishery changed from a developing category to an open category Concern was expressed about Australian companies forming joint venture arrangements with New Zealanders in order to exploit the New Zealand fishery and, as a consequence, the resource may be overfished or the price or quality of scampi deteriorate.”

6.3.4.2 Central Region's Response

The Central region, which comprised the Napier office and the Nelson office, were re-structured, making the Nelson office the principal Central region's office. It became the base for the Challenger and Central Fishery Management areas, which made up the Central region.

In August 1989 the Regional Manager (Central) advised all commercial fishers of the proposed approach for the 1989-90 fishing year in the Central region. It explained the factors which were taken into account in the review for the fishing year commencing 1 October 1989. They were:

- The moratorium under s 65 for certain non-QMS species (not scampi) needed to be replaced by Fisheries Regulations;
- The existing restrictions on permit conditions were to be transferred into regulation; and
- Where there had been development, new controls would be introduced for some fisheries.

In the interim it was intended to continue the 1988-89 policy.

On 31 August 1989, Simunovich wrote to the Regional Manager (Central) questioning the need to implement restrictions on the availability of certain fishing methods by permit conditions. It also questioned a QMA management approach on non-QMS policy. The Regional Manager responded to Simunovich stressing that the policy related to the

management of non-ITQ fisheries and did not affect non-ITQ policy on either a national or regional basis, as regards method used to catch quota species.

The Central region ultimately produced a document setting out the framework for managing non-QMS for the 1989-90 fishing year. It contained two strategies related to the management of scampi in QMAs 2, 7 and 8. They were:

- Pre-policy management: s 89 restriction for fine-mesh trawl and requirement for adequate ITQ holding,
- Amended management; continue s 89 restriction for fine-mesh trawl.

6.3.5 1990-91 Fishing Year – The Year of the Moratorium

Although the development of the non-QMS policy during 1990 overlaps with the 1989-90 fishing year, it is important to set out the chronology of events which occurred prior to 1 October 1990, which was a critical date for the scampi fishery.

Not only did 1 October mark the beginning of the 1990-91 fishing year, but a s 65 moratorium on scampi fishing came into effect, allowing the 15 existing permit holders only to have the opportunity authority to fish under s 65(2). The following sets out the sequence of events leading up to the Gazette Notice declaring the moratorium on scampi fishing.

On 1 February 1990, a revised s 65 Gazette Notice came into effect, but as with previous notices, there was no restriction placed on the scampi fishery.⁴⁶

6.3.6 The Central v. Northern Crisis

The culmination of events from March 1990 to September 1990, when the decision to impose the scampi moratorium was made, has been described as “*Central turning the clock back*”. This sequence of events illustrates the tensions, which were created as a result of the differences in permitting practices of the regions. It also serves to illustrate the effect of the delays in the issuing of permits to fishers and the resulting unfairness to fishers, given the disparity of the treatment, depending on the office and the region to whom the fisher made application. As the events unfolded, the crisis management approach by MAF/Fish allowed Simunovich to influence the decision-making process.

On 16 March 1990, Dr Knedler, senior scientist for the Central region, wrote to Mr Hore, the Northern RFMO, outlining the Central region’s position on scampi fishing, the current status of the fishery and the main issues to be addressed. Dr Knedler’s interest in the scampi fishery followed a permit application by Sealord in January 1990. She noted that four special scampi

⁴⁶ Fisheries (Species and Area Prohibition) Notice 1990, No. 4956.

permits had been issued by Central region, which allowed fishing for scampi in QMAs 2, 7 and 8 as well as some areas in the North and South regions.

A number of special permits in the Central region had been issued from Auckland, with the potential for investigative fishing for scampi being very large. Special permits issued from Central were conditioned with the objective of limiting the bycatch of ITQ species and juveniles and the Central region required those fishing pursuant to a special permit to supply information on location and rates of catch of scampi.

Dr Knedler advised Mr Hore that the Central region's proposed policy for scampi fishing in the 1990 fishing year was to allow the use of fine mesh trawls by method endorsement on an applicant's commercial fishing permit, which would be granted where the applicant has adequate ITQ holdings and a minimum holding of 25 tonnes has been specified as a condition of the endorsement.

Five recommendations were proposed by Central region:

- A recommendation that the guidelines should be modified to a preferred option that some fisheries should be managed by the special permit system, whether or not a commercial permit could be issued.
- No more permits were to be issued for SCI 2, because there were a number of permits for scampi currently being worked in SCI 2 and because sustainable harvest levels were not yet known.
- That a specific number of permits be allowed for each SCI (e.g. 5).
- If a special permit was issued to a scampi fisher and not used, renewals would not be granted in the absence of any reason.
- That special permits be recalled in such cases where the fisher failed to provide a monthly return.

On 23 March 1990, Dr Allen prepared a briefing paper to the Minister of Fisheries on the scampi fishery and management for the East Coast of the North Island. Because the scampi fishery was open to application for a fishing permit and had the potential to become over-developed, Dr Allen suggested a short term option to close the scampi fishery in SCI 1 and 2, using s 65(1) of the Fisheries Amendment Act to introduce a moratorium halting the issue of further fishing permits and special permits, allowing the use of small mesh. This option also signalled that endorsements should be declined under s 65(2) to fishers who hold scampi fishing permits but have as yet made no commitment to the fishery.

In May 1990, Central region confirmed its non-ITQ policy for the 1989-90 fishing year, with a cover note from the Regional Manager Central, Mr Brierley noting that it would be of assistance when dealing with these “*capricious fishers*”. Scampi remained in the “*open*” category for the remainder of the fishing year, with permit endorsements for fine mesh trawls where the applicant had adequate ITQ holding.

At the same time, the Auckland office issued a revised guideline for its non-ITQ policy for scampi. As of 3 May 1990, the scampi fishery was open only to applicants who wished to use pots. Trawling for scampi was placed in Category 5, which required a detailed fishing plan to be submitted to the RFMO and restrictive methods would be introduced to reduce bycatch of other species. The scampi fishery in the Northern region was no longer an open fishery.

On 31 May, the RFMO and the Regional Manager for the Northern region wrote to Dr Allen advising that there was increasing interest in expanding the scampi fishery in the Auckland fishery management area and to appropriately manage the fishery, they proposed that entry to the fishery be restricted. In particular, they proposed:

- The fishery for scampi and deepwater prawns in QMAs 1 and 9 (the Auckland fishery management area) be closed using s 65(1) Fisheries Act 1983.
- Exemptions would be issued to existing permit holders using s 65 (2).
- Restriction of the issue of special permits exempting mesh of less than 100 mm, to renewing existing permits only.

Approval was sought and a draft Gazette Notice was attached for Dr Allen’s signature.

In June 1990, a draft memorandum was prepared by Mr Arbuckle for the Regional Manager (Central). The memorandum noted that the scampi fishery had attracted a great deal of attention and had been the subject of a ministerial briefing in April 1990. At that time the catches were:

1986-87	3.5 tonnes
1987-88	15.3 tonnes
1988-89	31.6 tonnes
1989-90	130 tonnes

Mr Arbuckle considered that the fishery no longer met the criteria of investigative research with controls being exercised by way of special permits. In his view, the scampi fishery needed to be managed as a commercial fishery. Apart from noting the two main problems with scampi management, being (1) the large bycatch of ITQ species associated with scampi and (2) the use of fine mesh posing a significant threat to juvenile fish, the memorandum proposed increasing the required bycatch mix to 25 tonnes. Further controls on fishing were suggested by restricting trawling in depths greater than 200 metres, restrictions on the type or nets used and that fishing should cease if significant quantities of juveniles were caught. It was noted that permit conditions were central to the recommendations.

On 27 June 1990, Mr Arbuckle wrote to the Regional Manager (Central) addressing permitting issues for scampi in SCIs 2, 7 and 8. The memorandum proposed that for the remainder of the 1989-90 and 1990-91 fishing years, the following should apply:

- Continue to allow scampi fishing using the method of potting.
- Introduce a Regulation prohibiting the fishing of scampi in waters less than 200 metres deep.
- For SCIs 7 and 8, continue with the 1989-90 fishing year management strategy unless sufficient information becomes available to assess the abundance of scampi and to calculate associated bycatches.
- For SCI 2, set the TAC for scampi taken by method of trawl netting.
- Continue issuing permit endorsement to use trawl nets of less than 100 mm for fishers with adequate ITQ holdings of hoki, ling and giant stargazer.
- Revoke all special permits that do not have adequate ITQ bycatch.
- Invite special permit applications for investigative fishing, subject to improved criteria and revoke all existing investigative special permits.
- Advise all Central region fishers of the management approach.

In July 1990 the RFMO Auckland circulated proposed regulatory amendments to replace and update the s 65 notice for the 1990-91 fishing year. The proposed amendments included the placing of scampi on the prohibited fish and aquatic life category.

In the same month, on 9 July, the Central region reviewed its management of the scampi fishery.

“[i]n response to increasing interest in this fishery and an upsurge in special permit applications for the use of mesh less than 100 mm.”

Dr Knedler noted that:

“last fishing year scampi could be fished in conjunction with a special permit allowing the use of mesh less than 100 mm”

and a small number of special permits were issued, principally for SCI 2. She noted that in the 1989-90 fishing year there was a deliberate move away from special permits if commercial permit endorsements could be issued instead. This occurred in the scampi fishery as tonnages were already at commercial levels and a minimum ITQ holding of 25 tonnes was required for such an endorsement.

She noted further that a paper was recently prepared recommending that commercial permits be endorsed for mesh less than 100 mm if a fisher held at least 12 tonnes of ling, 8 tonnes of hoki and 5 tonnes of giant stargazer. This was a proposed interim arrangement until October 1990, after which time the fishery was to be managed by a TAC set on the basis of current catch.

In view of the lack of knowledge about the fishery, Central was recommending that there be a change to managing the fishery in the Central region by special permit, until such time that there was sufficient information to manage it as an open fishery.

In line with this proposal and recommendation, Mr Brierley, Regional Manager Central, sought assistance from the Manager of the Fisheries Research Centre to design special permit conditions appropriate for investigative fishing.

On 11 July 1990, a notice was sent to all Central region fishers about scampi fishing in Quota Management Areas 2, 7 and 8. The notice advised that the strategy to be adopted for the rest of the 1989-90 fishing year was to issue a limited number of additional special permits and successful applicants must hold appropriate quota to cover bycatch.

The notice warned that existing special permit holders could fish until the end of the fishing year, 30 September 1990, at which time all special permits would be revoked and although applications for further special permits could be made for the remainder of the 1989-90 fishing year, only a limited number of additional permits were likely to be issued. The notice also advised that the fishery would continue to be managed by special permits for the 1990-91 fishing year and that all fishers who wished to fish scampi in SCIs 2, 7 and 8 after 30 September 1990 had to apply for a special permit by 15 August 1990.

The notice contained the permit criteria for the 1989-90 and 1990-91 fishing years, including the following:

“Special permits issued for scampi fishing in QMAs 2, 7 and 8 will be for the express purpose of conducting investigative research. There is no automatic right of renewal. Furthermore, special permits confer no right in priority to the fishery and cannot be used to establish catch history”.

This approach by the Central region which sparked the crisis, differed to that in the Northern region, which had issued commercial and special permits for all QMAs including the Central region’s Fishery Management Areas 2, 7 and 8 since 1989.

The Central region do not appear to have issued a commercial permit to scampi fishers in its own region in the 1989-90 year. It has been submitted by MAF/Fish and Simunovich that Central issued commercial permits in 1988-89 and 1989-90 and both referred to various permits⁴⁷ from Amaltal and Mr Okey.

⁴⁷ We record that an incomplete fisher file for Amaltal was supplied to the Inquiry by MFish. An incomplete commercial fishing permit was disclosed with the Simunovich submissions. Crown Law supplied a full document on 20 May 2004. Further commercial fishing permits were disclosed to the Inquiry by letters from Mr Ivory, Counsel

Footnote continued:

We have considered the Mr Okey's fisher file and the various commercial and special permits supplied. We have also considered Mr Arbuckle's letter of November 1990 where he recorded there were inconsistencies between the quota monitoring system computer printout and the records held by the regions.

The evaluation of scampi permits was undertaken by Mr Arbuckle after the scampi moratorium was declared. In his memorandum of 5 February 1991, which was the basis of MAF/Fish's advice to the Minister, he confirmed the situation for Amaltal and Mr Okey⁴⁸. Both Amaltal and Mr Okey were not included in the fourteen permits issued to those who held quota prior to the moratorium. Both were not issued with either commercial or special permits in 1989-90 because their applications were being held until appropriate bycatch arrangement were identified.

The Inquiry does not consider that it can safely conclude that any of the late permits disclosed were actually issued.

The reason for the difference in approach by the Central region was explained by Mr Bishop, who had in 1990 been the acting Regional Manager. In July 1990, Central received complaints from fishers within the industry that scampi boats were killing juvenile ITQ and non-ITQ stock and dumping it at sea, by the use of small sized mesh nets, without reporting that the stocks were being caught. Bycatch problem had been of concern to the Central office, who viewed the problem arising as a result of the permitting decisions of the Northern region. Mr Bishop described it as follows:

"The fact that Northern had issued permits for QMA 2 had been concerning in itself, because we had made a policy decision in relation to areas for which we were responsible, including Area 2 that no commercial permits would be issued at all at that time. Neither had we been given notification by Northern Region that they were issuing these permits."

When Central region learned that the Northern region was issuing permits to fishers in the north to trawl for scampi in the Central region, this was described as a "complete bombshell". Mr Sullivan, the Nelson office solicitor, told the Inquiry:

"The way permitting worked at the time was that a fisher would apply. If it wanted to fish in Area 1 to Northern Region, he would apply to Northern Region for permission to fish and so forth; if he wanted to fish in Area Central, he would apply to Nelson office; if he wanted to fish in the Southern Region, he would apply to Dunedin and so forth and that was a standard norm. ... and until scampi, I've never seen a deviation from it."

for Simunovich, on 12 May. The full fisher file is not available to the Inquiry. Following submissions from Simunovich about Mr Okey on 7 May, a request for Mr Okey's file was made to Crown Law. The file was delivered on 20 May 2004 and further permit was received from Simunovich through Crown Law, on 21 May. We observe that during the hearings, when the issue of Central's approach was being tested, no permits for Amaltal or Okey were produced or inquired into.

⁴⁸

No fisher file for Mr Okey was supplied to the Inquiry.

Then much to our – and I remember the surprise that descended upon the Nelson office when we learnt that Auckland was permitting Simunovich across the entire country without any reference to the science team, or the permitting officers, or the monitoring officers in Central Region. It came as a complete bombshell and it caused quite a reaction because, as I mentioned before, there was a little bit of patch mentality and people jealously guarded their patch”.

Central region also disapproved of the Northern region’s “hybrid” permits, being a combination of the s 63 commercial permits and the s 64 special permits⁴⁹. Mr Bishop explained this was of additional concern in two respects:

“First we were surprised that Northern Region had thought it appropriate to issue commercial permits for scampi of an unusual kind in areas for which we were responsible. Secondly, when we gave further thought to what had been done, we did not understand the essential character of the “hybrid” special/commercial permit.

This matter had become “a very hot topic” in the Central region and on 6 August, in his capacity as acting Regional Manager for the Central region, Mr Bishop sent out letters to Simunovich, Barine, Fletcher Fishing (a company which Sealord acquired) Mr Jenssen and Sanford. The letter advised that a limited number of scampi permits would be issued for QMA 2, 7 and 8 and that special permit applications would be assessed on the ability to provide information required for the future management of the scampi fishery. As Mr Bishop explained in his letter to Sanford, it was MAF/Fish’s policy that an application made for one of Central region’s areas be referred on to Central region, notwithstanding the fact that the application had been made to the Northern region.

The Northern region continued to advocate the closure of the scampi fishery by way of a moratorium and the issue of a s 65 notice. On 17 August 1990, Mr Walshe (Regional Manager Northern) wrote to Dr Allen proposing that s 65 be used to restrict the access to the scampi fishery within the Auckland FMA as soon as possible, noting:

“there is now concern over the potential impact” from the scampi resource. Attempts have been made to reconcile management across Regions which have different stages of development.”

It appears Dr Allen did not approve this proposal.

During August, MAF/Fish received communications from Simunovich and Barine. On 17 August, Mr Penwarden telephoned Dr Knedler to make inquiries about the scampi special permit procedure and to report on bycatch, noting that only small scampi were left in the Bay of Plenty region, prompting him to move to SCI 2.

⁴⁹ It has been submitted that Central Region also issued hybrid permits. Apart from an inconclusive 4 month period at the end of the 1988-89 fishing year where a former Northern Region Registrar appears to have issued 2 commercial permits at the same time as a special permit for Amaltal and Okey. We are satisfied those permits actually issued. See footnote 47.

The day before, on 16 August, Mr Wilkinson from Simunovich phoned Mr Bishop to protest that Simunovich should receive commercial scampi permits in Areas 2, 7 and 8. The telephone conversation was heated and “difficult”.

On 22 August, Mr Bishop replied to Mr Wilkinson in writing explaining that the current special permits would expire at the end of the fishing year and that special permits for the subsequent year would be considered on the ability of the fisher to provide relevant information for investigative research. Mr Bishop advised Simunovich that if it wished to fish for scampi in SCIs 2, 7 and 8 in the 1990-91 fishing year, then it could do so by obtaining a commercial permit for the method of “potting” only. Special permit applications, if received by 24 August 1990 would be considered for investigative fishing using mesh less than 100 mm.

Mr Wilkinson telephoned Mr Bishop immediately after receipt of the facsimile. A file note which was subsequently recorded, noted that Mr Wilkinson reacted strongly, threatening Court action when told that MAF/Fish had received information on the dumping of fish by scampi fishing operations in QMA 2.

Following the telephone conversation Mr Wilkinson requested:

“an office solicitor’s opinion” on MAF’s intention to cancel Simunovich’s entitlement to fish scampi on its commercial fishing permit in QMAs 2, 7 and 8 and that this position has statutory support”.

Mr Wilkinson reminded Mr Bishop that Simunovich had spent literally millions of dollars developing the scampi fishery and viewed Mr Bishop’s letter of 22 August with “very severe concern”.

On the same day, Mr Wilkinson wrote to Mr Hore, referring to previous discussions with himself and the Regional Manager, Mr Walshe “over the past few weeks”, enclosing applications for special permits for all New Zealand fisheries waters for the use of 43 mm mesh sized trawl nets for the taking of scampi and deep water prawns. Mr Wilkinson specifically asked that the Northern region’s registry office receive, coordinate and process the applications, treating them as applying to all quota management areas in New Zealand fishery waters and issue them accordingly.

Again, on 22 August Mr Wilkinson also wrote to Mr Brierley, Regional Manager, Central Office, stressing that Simunovich was the company that pioneered and developed the scampi fishing industry in New Zealand, referring to the basis of Mr Wilkinson’s experience in MAF/Fish, perusing the database of all research trawls in which scampi had been accidentally caught, and advising that scampi was the most important area of Simunovich’s business, having more vessels fishing for scampi than in any other fishery. The letter refers to Simunovich’s concerns about the need for a controlled and responsible development of the scampi fishery, which:

“are well known by the minister, Mr Malcolm Craig, Mr Robin Allen, Mr Kim Walshe and all MAF Fisheries North staff.”

This letter accompanied information which was supplied in response to MAF/Fish's request for information in its letter of 11 July and emphasised that Simunovich did not require a special permit for the purpose of conducting investigative research for scampi. Referring to its commercial fishing permit in all quota management areas, Mr Wilkinson described the special permit as being specifically designed for the use of a trawl net of not less than 43 mm mesh size to undertake fishing for deep water prawns and scampi and that such permits have been issued for all of Simunovich's scampi vessels for all New Zealand fisheries waters. Simunovich sought renewal of the same permits for each vessel for the fishing year 1 October 1990 to 30 September 1991.

On 23 August Mr Hore telephoned Dr Knedler of Central region following Mr Bishop's letter to Simunovich the day before. The letter was read out to Mr Hore and subsequently faxed. Dr Knedler's note of the conversation recorded that Mr Hore explained that Simunovich had lodged an application with the Auckland Office and inquired whether it was necessary for it to be received by the Central Office by the due date. Mr Hore had also made it clear that Simunovich was not happy with Central's approach to permitting as they had invested \$6 million in the scampi fishery and felt it was unfair to take their permit off them. He reminded Dr Knedler that Simunovich was prepared to take MAF/Fish to Court and argue commitment and dependence on the fishery.

The file note reveals that not only was there a different view on the use and purpose of special permits between Central and Northern regions, but also the fishing industry perceived there were inter-regional difficulties. Dr Knedler recorded:

"It was evident that there was a different view on the use and purpose of special permits between Central and North Regions ...

Arthur mentioned that it was perceived by industry that there were inter-Regional difficulties. It certainly appears from my communications with fishers registered with North Region that they have such a perception, indicating that they have arrived at such a conclusion from their dealing with the Auckland office."

On the same day, namely 23 August 1990, Mr Bishop for MAF/Fish Central wrote to Sealord, Barine, Amaltal and others referring to their applications for special permits and advising that applications for special permits would only be granted *"for the purpose of gathering information"*.

He warned that fishing under special permits would not establish catch histories and arrangements for future access to this resource would be determined on the basis of current investigations and from information supplied by fishers who are issued with special permits. In this letter, Mr Bishop advised the fishers that applicants for special permits should be under no illusions about the purpose of fishing pursuant to a special permit. He stressed that fishing under special permit would not establish catch histories. Access to fish stocks under special permit was only to be granted for the purpose of gathering information.

"It has come to my attention that people are applying for special permits with expectations that this fishery will be placed under quota and that allocation of stocks will be dependent on gaining access to the fishery by special permit."

Applicants for special permits should be under no illusions about the purpose of fishing pursuant to a special permit.

Access to fish stocks under special permit will only be granted for the purpose of gathering information. As stated in the Ministry's letter of 11 July 1990 sent to all Central Region fishers, special permits carry no right of renewal and confer no right of future access to the fishery. Fishing under special permit will not establish catch histories".

It should be noted that the special permits issued by both Central and Northern contained the clause relating to the inability to use catch to establish a catch history.

It appears from the documents that Simunovich also made a complaint to MAF/Fish Head Office about Mr Bishop's approach to scampi permitting. As a result, Mr Bishop said that Mr Sullivan as office solicitor sent the Director of Compliance in Head Office, copies of the correspondence he had sent to Simunovich together with copies of the special permits that had been issued to Simunovich. On each permit, the clause stating that the permit did not confer any entitlement or advantage to the fishery, is highlighted.

By this stage, those involved in this issue in the Central region discussed the position extensively and resolved to clarify any misunderstanding or confusion that existed as to the issue of special permits, resulting in Mr Bishop's advice that only special permits would be issued for information gathering.

It should be noted that Sealord had written to MAF/Fish Central on 15 August 1990 complaining about the lack of response to its application of 1 January 1990 and applied for a special permit to fish during the 1990-91 year in QMAs 2, 3, 4, 7 and 8. On 21 August 1990, Barine had also filed permit applications for the 1990-91 year with MAF/Fish Central.

In late August/September 1990, each of the regions sent out draft frameworks for their non-ITQ management for the 1990-91 fishing year. The changes for each of the regions are summarised.⁵⁰

6.3.6.1 Central Region

Central region based their framework on the 1989-90 version and restricted consultation to the main changes. The proposed changes for the management of the scampi fishery, (as contained in the correspondence to the fishers on 23 August 1990) were:

- Permit endorsements allowing target trawling with mesh size smaller than 100 mm would not be granted.

⁵⁰ We note that the draft management plan of the Central region for Non-ITQ species in July 1989 underwent revision and was still in draft in late August/September 1990.

- Special permits relating to use of mesh less than 100 mm to be revoked on 30 September 1990.
- Use of mesh less than 100 mm to be permitted in conjunction with s 64 special permits issued under re-defined research criteria.

In the section named “*other issues*” Central expressed concern that permits had been issued for QMA 2, 7 and 8 by North

“(? *and South*) without consulting Central”.

6.3.6.2 Northern Region

The Auckland office produced a new framework document, dated September 1990, which included the principle that development of commercial fisheries be allowed where fish resources are identified as having commercial potential after allocation for non-commercial needs. It also espoused the principle that allocation of fishing access both within and between commercial and non-commercial fisheries, was fair and equitable.

For scampi the proposed management was:

- Open entry to the fishery for the method of potting.
- Applications for a permit to trawl for scampi had to be accompanied by a fishing plan including details of quota holdings in respect of bycatch. A s 64 special permit was required for undersize trawl mesh and the applicant would have to have an appropriate mix of quota to cover bycatch of ITQ species.

Under the proposed management strategy for 1990-91 the intention was to:

- Recognise existing catch histories in the fishery.
- Prevent further expansion of existing fishing effort or new entrants into the fishery until more information could be obtained from investigations under special permits.
- No trawl permits issued unless appropriate ITQ mix held.
- Section 64 special permit required for undersize mesh.

It is appropriate to note the ‘*explanation*’ of the current and proposed strategy in the policy:

“The scampi fishery in the AFMA has recently developed to the extent that there is now concern about the level of information available with which to implement a restriction on catch levels which will ensure sustainable fishing of this resource. Furthermore, trawling for scampi results in a bycatch of hoki and ling, both of which are quota species, and the impact of which is not known. Recently this fishery has attracted a lot of new interest and permit applications. However, crustacean fisheries world wide are known to be sensitive to over-exploitation and therefore a cautious approach to the expansion of this fishery is desired.”

6.3.6.3 Southern Region

In a long term strategy document, MAF/Fish South proposed that the category named “*Prohibited B*” be called “*developmental*” and should be used to develop both sedentary (shellfish) species and finfish species. The Southern region proposed that scampi be placed in this category and managed by fisheries management area. It appeared likely that only special permits would be used to generate information on the fishery. However, the Southern region was clearly dissatisfied with what they termed “*ad hoc decision-making and generally bad management practices*” for the non-QMS species.

The document containing the MAF/Fish South Long Term Strategy is deserving of further attention. Dated 30 August 1990, the document which has no document number nor is described in the lists provided to the Inquiry or listed in the footnotes to the *Non-QMS Policy History in Scampi Management* describes the Southern region’s dissatisfaction. Under a heading called “*Background*” the authors⁵¹ stated:

“Non-QMS (aka non-ITQ) species have historically been dealt with on a regional basis. Over a number of years this has allowed each region to develop its own species lists and loosely categorise species in an apparently ad hoc manner. Traditionally non-QMS species have been given a low priority relative to those under the Quota Management System. Special permits have become the prime mechanism by which the regions have allowed investigational and exploratory work to be carried by fishers on non-QMS species, although the true purpose of special permitting was far more limited than this. The lack of resources allocated to non-QMS management combined with a rapid increase in applications from fishers as traditional species were quotaed, has led to a series of problems as outlined below:

- *Special permits are now being used as a mechanism to develop non-QMS stocks, they are however only a first step toward final commercialisation of a species. There are currently no guidelines as to how species should be developed or what sets of criteria are required to allow a species to pass through various steps in the developmental process.*
- *Regional species lists have become unwieldy and often contradictory. Often no adequate explanation can be given as to why a species appears in a particular category.*
- *Inter-regional conflict is occurring as the status of various species is discussed and different species categories are utilised. This has been worsened by frequent allocation of permits by one region to fish another region’s waters.*

⁵¹ As the document has not been described or listed, it appears to have the same typeface as the document written the following day on 31 August 1990 from Nick Rayns and Mike Beentjes, MAF Fisheries South. The authorship appears to be by the Fisheries Management Officers, Rayns & Beentjes

- *The lack of any development strategies once special permits have been fulfilled has led to frustration on the part of the fisherman and a “what do we do next?” comment from MAF Fisheries staff.*
- *The problem of what to do with new species which are not on any lists currently requires annual redrafting of lists and regulation changes.*
- *No allowance is made for species which may be targetable in some areas but are bycatch in others. At present all appear on the bycatch list.*
- *The urgency to resolve the above issues has been made more pressing through the increase in applications and apparent marketability of many of these species.*

To sum up, the current non-QMS strategy is leading to ad hoc decision-making on species status and generally bad management practices.”

The authors urged that a national Non-QMS strategy was required to maintain consistency in management practices between the regions and that species categories should be developed nationally.

On 31 August, a draft paper entitled “*National Policy on Management of Non-QMS species for the 1990-91 fishing year*”, authored by MAF Fisheries North was circulated to each of the regions for the Non-QMS Species Working Group meeting on 4 September.

On the day of receipt, namely 31 August, the Southern Office Fisheries Management Officers, Rayns and Beentjes, wrote to Ms Osborne expressing their disagreement with sections of the proposal, the comments made and protesting that the paper was prepared without the knowledge or agreement of the MAF/Fish South office. The Southern region did not support the draft policy, as it was prepared without discussion by the Non-QMS Committee which was set up to decide national policy. There were two areas of major concern to the Southern region:

- No provision was made in the developmental category for finfish.
- The needed to be a bycatch and developmental policy that would allow species to be investigated by way of special permit to evaluate methods and highlight bycatch problems.

These three regional perspectives highlight the difference among the regions and this came to a head on 4 September when there was a Head Office meeting with Simunovich.

6.3.7 Head Office Meeting with Simunovich - 4 September 1990

The 4th of September 1990 was a key date.

It was the day that Dr Allen met with Peter Simunovich and Vaughan Wilkinson from Simunovich, Mr Arbuckle and Mr Bishop at Head Office at 9.35 am. At the meeting Mr Wilkinson put the case for Simunovich and its concerns with the Central region's approach to scampi permitting. He stressed that Area 2 was virtually a fully developed commercial fishery as the catch effort information revealed.

This was also the day the Non-QMS Working Group met with representatives from three regional offices, including MAF/Fish South, to discuss the non-QMS policies.

Later that evening at 8.13 pm Dr Allen sent an email to the three regional managers and copied it to Mr Bishop, outlining his wish to coordinate the management of scampi in the next fishing year. He noted the difference in the regions approaches, namely that North was proposing new regulations be made setting TAC and IQs based on the present involvement for the Bay of Plenty and urging that Section 65 should be used to impose a moratorium on the rest of the Auckland fishing management areas until the new regulations were made. Investigative fishing by special permit would be allowed however.

Central, on the other hand, wanted to restrict permits to the method of potting and allowing investigative fishing using fine mesh trawl under special permit.

Dr Allen specifically noted that:

"The Central proposal has upset Simunovich who currently have permits to take scampi by trawl and see it diminishing their level of security in the fishery. They argue that the Ministry has evaluated trawling as a method, has accepted it and on that basis Simunovich developed their fishery."

Dr Allen indicated his preference that the Northern proposal was a reasonable way to proceed. Given the difference between Northern and Central's policies and the problem of whether Northern's proposal would amount to a de facto recognition of special permits as a basis for allocation of quota, he wished to reconsider the position. He also indicated that he was not convinced of the Central region's concerns that bycatch problems were sufficient to prohibit the issuing of permits for trawling for scampi. He asked the three regional managers to consider the issue urgently and for the Convenor to report back to him on 10 September with an agreed position of how the fishery should be managed in the 1990-91 fishing year.

On 5 September Mr Bishop sent a memorandum to Mr Walshe in Northern region in response to Dr Allen's message of 4 September. He explained that he had looked at the special permits issued to Simunovich and that the wording contained in the permits made it clear that the permits were for investigative research and provided no rights or entitlement to the fishery. He specifically sought anything, which was not contained in the permits, between Simunovich or Northern region's staff, which may have had a bearing on Simunovich's entitlement or purpose to fish under these permits. Mr Bishop was clearly seeking confirmation as to whether there was any other verbal assurances or written assurance that may have been given to Simunovich, over and above the issue of the permit.

Mr Walshe responded that there was nothing over and above the wording in the permit.

On 6 September Mr Bishop wrote to Mr Wilkinson in relation to Simunovich's special permit application asking for further information, as the application sought to use fine mesh trawl nets pursuant to s 64 (1)(c) which was for reasons other than research or investigative fishing. Mr Bishop indicated that he required more information before such an application could be processed.

On receipt of Mr Bishop's letter, Mr Wilkinson phoned Mr Bishop on 7 September. From files notes taken of that telephone conversation, Mr Bishop recorded that the reason Simunovich had applied under s 64(1)(c) was to enable the Minister to consider allowing the 43 mm mesh size for purposes other than s 64 (1)(a) and (b). Mr Wilkinson stressed that Simunovich was not a research organisation, there was no prescribed form for the information that MAF/Fish were requesting and that Simunovich were not going to undertake research fishing. Mr Wilkinson then said Simunovich had not made any request to Central region for permits but rather made a request of the Northern region for permits throughout New Zealand. Mr Wilkinson raised the issue of relevant statutory delegation to Mr Bishop to undertake the decisions and asked for his delegations.

Mr Wilkinson confirmed that he raised the issue of delegations with Mr Bishop as he was confident that Mr Bishop held no delegations pursuant to s 64(1)(c) but that he wanted copies of the guidelines which had been issued to him in respect of the delegations he held. The purpose in seeking the guidelines was to check whether Mr Bishop could revoke Simunovich's commercial permits for the taking of scampi by bottom trawling on the basis he proposed.

Following the telephone conversation with Mr Wilkinson, Mr Bishop sent him a copy of Central's Non-QMS policy document, which contained the requirement that further investigation be undertaken into the use of fine mesh trawls and a list of his delegations. Mr Wilkinson responded on 10 September 1990 with a nine page facsimile, which was addressed to Dr Allen. Mr Wilkinson asserted that following his telephone conversation with Mr Bishop on 7 September, he dealt with Head Office on the issue.

On the same day, 10 September 1990, Mr Wilkinson also sent a seven page fax to Mr Bishop, copied to Dr Allen. The central theme of the letter to Mr Bishop was that Simunovich had built up a commercial fishery based on commercial fishing permits and they were entitled to have these re-issued. Essentially, other entrants should not be allowed to enter the fishery and that any attempt on behalf of MAF/Fish to revoke the s 63 commercial permit was legally flawed. He also asserted that Simunovich's level of capitalisation was sufficient to harvest the entire New Zealand scampi stock.

In his letter to Dr Allen, he thanked Dr Allen for the opportunity to discuss the management of the scampi fishery in the Central and Challenger Fisheries Management Areas on 4 September and expressed concern about the correspondence Simunovich had received from Mr Bishop following the meeting. He referred Dr Allen to Simunovich's response to Mr Bishop of 10 September and challenged MAF/Fish about its attempt to manage the fishery by s 64 permits. He requested either the Director-General to take a judicial review application together with Simunovich, or provide Simunovich with an independent legal opinion from a leading authority on administrative law.

Simunovich also urged that new entrants to the fishery be stopped and stated that Simunovich had relied for three fishing years on its commercial fishing permits for scampi, involving millions of dollars and that MAF/Fish should not with only a few weeks notice, withdraw commercial permits from a fishery that had been fished in this way previously, on a few weeks notice.

In fact, as at 10 September 1990, the commercial permits had only been issued for just under two fishing years, namely part way through 1988-99 and 1989-90.

Once Mr Bishop received a copy of Mr Wilkinson's letter, he sent a memo to Dr Allen and explained the Central region management of the scampi fishery. Central considered that they were taking rational steps to ensure effective management of the scampi fishery; that they had acted in accordance with the statutory provisions of the Fisheries Act and the guidelines on the issue of special permits. Because of the "*insufficient scientifically valid information*" to manage the fishery effectively, Central had reached the view that more information was required before long term management regimes could be put into place.

Central did not accept Simunovich's claim that they had an entitlement to the scampi fishery. In Central's view no full commercial permits were in existence. Fishing was carried out under s 64 research and investigation and by Simunovich's own admission, the fishery was currently under stress and there were problems in the fishery associated with bycatch. Central strongly expressed to Dr Allen that s 63 commercial permits using a 100 mm mesh could not efficiently target the scampi and that s 64 special permits should be issued in order to gather the detailed information required.

Mr Bishop was concerned that Simunovich's proposal required the Minister recognise and endorse through a special permit process, an expectation and access claim to the scampi fishery for "*the primary benefit of Simunovich Fisheries Limited*" despite the fact that s 64 permits were issued on the basis of investigation and research. He stressed:

Simunovich had brought to a head this Ministry's management of Special Permits and what must now be decided is whether this Ministry will recognise, commitment, entitlement and dependence under a s 64 permit regime. In Central Region's view it is not possible to fudge this issue and it must be confronted directly".

He referred to a further scampi meeting of 11 September. He also communicated with Mr Wilkinson, advising him that he had forwarded his fax to Dr Allen and also enclosed a copy of his delegations under s 63 and 64 of the Fisheries Act.

It appears that a meeting took place between Mr Bishop and Dr Allen and possibly other personnel as well. Mr Bishop had understood that the meeting took place on 18 September. It appears that Mr Bishop's recall of 18 September was the meeting of 4 September which was attended by Mr Wilkinson, Dr Allen, Mr Bishop and Central region staff. From Mr Bishop's memo to Dr Allen, it appears the further scampi meeting was held on 11 September but in any event, Mr Bishop forwarded a draft response to Mr Wilkinson's letter to Mr Arbuckle and Dr Allen for perusal and comment. This draft was completed by Mr Bishop after "*discussing the matter with people of the Central Region and receiving further legal advice*".

Essentially, in the draft response Mr Bishop reiterated the position that Simunovich had been operating under a special permit regime which conferred no future benefits. He advised that commercial permits under s 63 would not be renewed for the 1990-91 fishing year for all New Zealand fishery waters, as MAF/Fish's scientific advice was that scampi could not be realistically targeted using mesh of 100 mm or more and that there was insufficient information available to properly manage this fishery under a commercial fishing regime.

For this reason, a limited number of s 64 special permits would be issued in each area for investigative fishing using fine mesh trawls or potting. He reminded Mr Wilkinson of the conditions on the special permits that they do not provide any guaranteed access to a fishery. He concluded his letter, by noting Simunovich's concern about the management of the scampi fishery, given the large investment that the company had made in the fishery, but reinforcing MAF/Fish's primary concerns about sustaining the fishery:

"... for the sustainable management of the scampi fishery and for any possible effects that the development of this fishery will have on other fisheries, including any effects that may compromise harvesting rights that have been guaranteed under the quota management system".

The draft letter was sent to Dr Allen under cover of a facsimile from Mr Arbuckle dated 18 September 1990.

Dr Allen did not agree with Central region's approach. In his response by email of 20 September to Mr Bishop at midday he recognised the problem with s 64 permits but did not approve of Central's proposal for management of scampi. He said:

"The basis of my concern for the d/r you gave me and your management proposals is that I do not think it is fair and reasonable to change a management regime for scampi abruptly in a way that changes in an unpredictable way the circumstances under which Simunovich (and others) have been operating. I recognise the difficulty posed by the use of s 64 permits, but don't think your proposal is the best way out of that.

6.3.8 The Scampi Fishery Moratorium

Dr Allen wished to finalise the s 65 notice for the 1990-91 fishing year that day and he planned to tell the Operations section *"to go ahead with the s 65 Scampi Notice [at 1.15 pm] unless there were persuasive arguments not to."*

Following Dr Allen's email, Mr Bishop was clearly unhappy. He discussed it with others in the Central region, took further legal advice and responded to Dr Allen in this email:

"we will comply with your requirement and regard it as a formal direction".

He recorded his advice that the proposal was in contravention of scientific advice, had wider implications for management under the Fisheries Act and warned that Dr Allen be aware of any legal ramifications before he made his decision. Mr Bishop further asked Dr Allen for the

guidelines/conditions for receiving a s 63 permit considering there were a number of historical permit holders in the fishery.

Following Dr Allen's direction, Mr Bishop redrafted a reply to Mr Wilkinson and this was signed and sent by Dr Allen on 27 September. The response, sent to Simunovich only and not to other fishers, confirmed that Simunovich was issued with a fishing permit pursuant to s 63 to take scampi by method of trawl and the use of mesh less than 100 mm was permitted under s 64(1). Dr Allen formally notified Simunovich that the regime that would be used during the scampi fishery for the 1990-91 fishing year was:

"A section 65 moratorium closure on the scampi fishery

Exemptions to the restrictions will be given to those who hold commercial permits under s 63 of the Act."

He specifically noted that as MAF/Fish's scientific advice was that scampi could not be targeted realistically using mesh of 100 mm or more, s 63 commercial permits would be conditioned to allow use of mesh of not less than 43 mm.

A limited number of special permits under s 64 would be issued in each area for investigative fishing using fine mesh trawls or potting where it was considered more information for an area was required. Dr Allen further advised Simunovich that the s 65 moratorium was preliminary to longer term management measures which would be introduced as soon as possible. He advised that with this regime in place, Simunovich's application for special permits for scampi fishing were unnecessary and MAF/Fish did not intend to proceed with them.

Dr Allen advised that he was awaiting a legal opinion on the correct provisions for the management of the fishery taking into account

"in particular, your comments relating to Part I of the Fisheries Act, 1983"

and acknowledged Mr Wilkinson's concern about the direction MAF/Fish was taking in managing the scampi fishery

"given the large investment that your company has made in the fishery."

On the same day, 27 September 1990, a number of species were put under moratorium by declaration under a new s 65 Notice. The Notice⁵² was published in the Gazette and is signed 24 September 1990 by Mr Shallard Director of Operations. The declaration included the scampi fishery in respect of all quota management areas. It was a general declaration for all non-QMS species being placed under the moratorium, and did not contain the details of the new scampi management regime which had been provided to Mr Wilkinson in the letter that day.

⁵² The Fisheries (Species and Area Prohibition) Notice 1990 (No. 2) Notice No. 5037 (164.35)

The effect of the s 65 moratorium was that from 1 October 1990 to 30 September 1991 it was a condition of all fishing permits issued or renewed during the period, that the permit holder was prohibited from fishing in the scampi fishery throughout New Zealand. In order to fish, an exemption had to be granted under s 65(2).

6.3.9 The Non-QMS Working Group - Ongoing Regional Differences

Following the circulation of the draft paper on the National Policy on Management of Non-QMS Species for the 1990-91 fishing year and the responses from the regions the Non-QMS Working Group met with the three regional offices representatives.

The response from the regions was not unanimous, with Central and Southern regions disagreeing with the draft policy.

Following discussion at the meeting, the Southern region's proposals for a different approach to the management of Non-QMS species were to be incorporated into the draft papers as separate strategies which were to be discussed by the Senior Fisheries Management Committee (SFMC). As the memorandum notes, most of the differences amongst the regions relate to closing non-sedentary fisheries to fishing and allowing controlled development by way of a special permit or investigatory process.

Following the meeting, the regions forwarded a work plan and/or strategy for dealing with s 65 species in their respective areas for the paper which was to be submitted on the non-QMS species to the SFMC.

On 18 September Mr Bishop received a fax from Mr Hore addressed to the Regional Managers with Northern's proposals, which summarised the differences in approach among the regions, the confusion that had been caused and the proposals made by the Northern region.

The paper commenced with the permitting regime which was amended in 1988 to bring it into line with guidelines for exercising sub-delegations under the Fisheries Act. Referring to subsection (e) of those guidelines, the paper asserts that

“subsequently all applicants for scampi were issued fishing permits to cover the species, method and area of fishing and a special permit was issued only to permit the use of less than 100 mm mesh.”

In the paper Mr Hore noted that this had the advantage that the relevant sections of the Fisheries Act applicable to commercial fishermen applied to scampi fishers by dint of their holding of commercial fishing permits. In addition, a condition was included on all special permits requiring permit holders to cover the bycatch or quota species.

In describing Central region's wish to revoke existing fishing permits, he confirmed that the Central and Southern regions adopted the same policy.

“For the 1990 fishing year, Central proposed revoking all existing fishing permits that authorise the use of bottom trawling. Southern Region also proposed prohibiting fishing for scampi within their fishery management areas and undertaking exploratory fishing entirely by special permit.”

By contrast, Northern region proposed to limit further expansion of the scampi fishery within the Auckland fishery management area by either using regulation (if it were legally appropriate) or restrict entry to the fishery by allocating TACs as individual quota.

Most pertinently, the paper recorded the confusion which had resulted from the regional differences in managing the scampi fishery and concluded that the lack of a policy on future allocation of fisheries was creating difficulties:

“The differences in proposed management regimes between fishery management areas led to some confusion and concern amongst members of the fishing industry. MAF Fisheries representatives from each region met to consider whether the management regimes could be reconciled to provide a consistent approach in managing scampi fisheries throughout New Zealand ...

In attempting to resolve differing proposals for scampi management between regions, it became apparent that the lack of a policy in future allocation of fisheries was creating difficulties in determining interim management regimes. There was concern from Central that the regime proposed in the Auckland fishery management area may set a precedent and that had involved allocation of longer term access to the fishery based on the use of special permits. This was despite the counter argument that the fishery had in essence been an open access fishery and that a commercial component to the permitting system had been recognised in the policy for the issue of s 64 special permits. It was a common view between all regions that there was still insufficient information on scampi fishing throughout New Zealand, however, the fishery had progressed to different stages of development in each fishery management area. It was the conclusion of the regional representatives that one option for reconciling management approaches to scampi nationally would be to prohibit the fishery in all management areas. Fishing for scampi would thereafter be entirely controlled by special permit if this option were to be adopted.”

The paper concluded by recommending that in the interim, scampi be managed on the basis of the “status quo” with both commercial fishing permits and special permits to allow the use of mesh size less than 100 mm and to approve the proposal to prohibit fishing for scampi throughout New Zealand, adopting a management system involving special permits for all aspects of the fishery.

The evidence before the Inquiry was that Central were not happy with the management approach adopted by Head Office. A file note records that the regional manager of Central region was frustrated with the management approach of Head Office, as in his view:

“Central had things under control with its special permits”.

Mr Bishop also told the Inquiry that he disagreed with Dr Allen's decision to take the management from the regions and pursue the Northern region's response.

On the publication of the s 65 Notice declaring the moratorium on the scampi fishery, Head Office announced the regime that would apply for the 1990-91 fishing year, although there is no documentation recording the announcement. There were however, a series of memoranda and papers from 1 October to January 1991 detailing the questions that required clarification and problems in processing permits, following the declaration of the moratorium. The problems highlight the lack of a coordinated approach to permitting prior to the moratorium and the issue needing to be resolved was how to deal consistently with fishers who had s 63 permits together with s 64 permits, as against others who fished with special permits.

It was noted that none of the provisions for management of the scampi fishery addressed the problem of limiting effort and there was no restriction on catch. As one memorandum noted, the scampi fishery was an example of where a special permit was issued as an endorsement for investigative fishing using a prohibited method. In the case of scampi, fishing under the special permit for a prohibited method led to a permit allowing commercial access. The s 65 restriction in the fishery excluded a number of potential scampi fishers and that in turn raised a number of important questions that had implications for the scampi fishery, namely:

"If fishers who fished pursuant to a s 63 permit, who held a s 64 endorsement to use a particular method, are considered to have a demonstrated history in the fishery, does this mean that ALL fishers who hold a s 63 permit to take a particular species that is fished by way of the s 64 endorsement can claim a fishing history for that particular species (and if so what constitutes a history and if a fisher demonstrates a history while fishing under special permit from prior years should this be considered)?"

If the s 63 permits are issued for the purpose of selling the fish and the s 64 special permits are issued for the purpose of using a particular method then does this mean that fishers fishing pursuant to a s 64(1)(a) special permit which is not accompanied by a s 63 permit are not to be permitted to sell the fish?

If special permit holders are to be permitted to sell fish, what was the purpose of issuing a s 63 permit to fish for scampi prior to the s 65 prohibition?

On what grounds can special permits that are issued as endorsements to s 63 permits be differentiated from special permits that are not issued in conjunction with a s 63 permit?"

Where a permit may be issued for species under moratorium such as scampi the following additional questions posed were:

"(5) If a s 65(1) prohibition is introduced in order to stop expansion of effort in the fishery and hence no more s 63 permits are to be issued, does this mean that any new fishing permits found by fishers fishing under special permit (who do not hold a s 63 permit) cannot be fished commercially by that fisher in the future?"

- (6) *Given that some special permits are to be issued in fisheries under moratorium (eg scampi) and that fishers will have an expectation that these special permits will become commercial permits if significant fishing grounds are found, on what basis can applicants be excluded from the fishery after the investigation phase?*

Conversely, if the fishers fishing by special permit are to be allocated commercial access, if significant fishing grounds are found, on what basis can fishers be declined the initial special permits (assuming that there are multiple applicants)?”

Following the moratorium announcement, s 63 commercial scampi permits were issued immediately to those that held scampi commercial permits in the previous year, while criteria were being developed.

Throughout October 1990, working groups were established to discuss management options for scampi, along with “*other pressing non-QMS management issues.*” The critical issue confronting the working group was developing suitable criteria for considering exemptions to the s 65 prohibition and a unified approach in dealing with applications that had been received prior to the introduction of the s 65 permit moratorium.

By 24 October 1990, seven of the 30 applicants for s 64 permits, which were received before the moratorium was introduced on 1 October 1990, had already been authorised to fish for scampi for the 1990-91 fishing year. The exemptions had been granted under s 65(2), because they held commercial permits during the 1989-90 fishing year. Thus, all fishers who held commercial permits, prior to the moratorium, were authorised to fish scampi pursuant to s 65(2).

The Non-QMS Working Group decided that the way to deal with the problem of s 63 and 64 permit applications that were received but not issued before the moratorium was introduced was to assess each application for a permit to fish for scampi on its merits and whether it met the following criteria:

- Was an application for a s 63 permit received for the 1989-90 fishing year?
- Was an application for a s 64 permit received for the 1989-90 fishing year?
- Were there any commitments to scampi fishing, i.e. or previous involvement?
- Was there appropriate quota for bycatch?

The Non-QMS Working Group noted that to be consistent with the guidelines for issuing special permits, all special permit applicants should have been issued with a s 63 permit during the 1989-90 fishing year. Further, since all prior s 63 permit holders had been authorised to fish under the moratorium, it would have been consistent to similarly authorise the special permit applicants.

During November, various memoranda were circulated from the regions. From these, it was evident that the different approaches that were applied among the regions was still causing

concern and the need for a national policy on permitting for non-QMS species and their allocation was urged.

The request to MAF/Fish Policy to provide a policy framework to allow proper and planned management and development of non-QMS fisheries was actioned by engaging two consultants in consultation with MAF/Fish Policy and members of the Non-QMS working group to undertake an investigation and report on developing the policy framework.

6.3.9.1 The Hide/Ackroyd Report

The two consultants, R Hide and P Ackroyd, undertook a three-fold task:

- To review the experience and problems of allocating non-QMS fisheries;
- To provide a policy framework for allocating non-QMS fisheries;
- To explain and test the policy framework with selected case studies.

One of those case studies was the scampi fishery. Several aspects of their report are worth noting. They observed that no consistent approach had been applied to non-QMS fisheries and no clear policy direction for non-QMS fisheries had been established. The lack of consistency and overall policy direction is noted as creating difficulties and some non-quota species were being over-fished, while others had considerable potential. The lack of allocation and policy guidelines was seen to be hindering their development. Further, the authors note that:

“fisheries management through licensing and effort and control, was mostly ineffective and is proceeding ad hoc.”

The report made significant observations on the introduction of the quota management system for the major fisheries in New Zealand. One of the consequences was the encouragement to fishers to fish non-QMS species, resulting in the problem of over-fishing that followed from non-exclusive rights to fish and the waste that could occur in establishing exclusive rights as fishers compete for quota and “*race for property rights*”.

The report summarised the policy development from 1986 to the authors’ reporting date of January 1991. Following the national policy of placing non-QMS species into five categories, the authors noted for the fishing years 1986-87 and 1987-88 each of the three fishing regions listed non-QMS species that were open to permitting and placed conditions upon permits to control fishing. As a result of a “*legal interpretation*,” s 63(2) of the Fisheries Act was interpreted as applying to non-QMS species as well as those within the QMS in 1988. Section 63(2) provides:

“The Director-General shall grant an appropriate fishing permit to any person who makes an application and who has the right to take fish under a guaranteed minimum individual transferable quota or an individual transferable quota or a guaranteed minimum transferable term quota or a transferable term quota”.

Thus, the report noted that any quota holder applying to fish a non-QMS species must be granted a permit. For applicants without quota, the granting of s 63 permits however, remained discretionary.

The report noted that in 1988 the other development was to replace conditions upon individual permits with general regulations applying to all permit holders in line with s 63(9) which stated that conditions placed on permits be substantially the same.

In summarising the directions from May 1989 to the regions and the regions response, the report canvassed the difference in approach among the regions. It specifically noted that the Southern region's approach was to decline all s 63(4) applications for non-QMS species unlisted in regulations and allowed investigatory fishing by way of s 64 permits. The Southern region's concern was to avoid subjecting fisheries of unknown potential to uncontrolled fishing pressure and were also concerned that s 63 permits were difficult to revoke. It is pertinent to note at this juncture, that the authors had not checked the permitting practices of the Invercargill Office in the Southern region.

In contrast to the South, the Central and Northern regions were described as granting s 63 (4) permits for unlisted non-QMS species as a matter of course. If the development of a fishery was so rapid as to preclude the establishment of an appropriate management regime, a s 65 moratorium was to be used while a suitable management regime was put in place.

The report then critiqued the Non-QMS Working Group's September 1990 proposed national policy.

The report recommended that scampi as a Category A species and the fishing years 1988-89 and 1989-90 should be established as the years for which catch histories would be assessed. The scampi fishery could then be moved into the QMS, with the TAC being taken as the previous year's catch and then set at the level suggested by the quota holders. It warned that special provision would need to be made for existing fishers to hold more than the permitted percentage of the TAC and noted that in QMA 2 for example, one firm would hold virtually all the quota initially. If that was considered to be a problem, the firm could be required to reduce its quota holding to a given percentage of the TAC within five years of scampi being moved into the QMS.

6.3.9.2 The Moratorium Exemptions Criteria

The information obtained by the Hide/Ackroyd report was principally from the collation and evaluation of all applications for permits to fish scampi by Mr Arbuckle of Wellington Central, who obtained the relevant information after the moratorium had been declared. By

27 November, Mr Arbuckle had confirmed that 14 permits⁵³ had been issued and recommended three additional authorisations to be approved pursuant to s 65(2). They were:

- Amaltal Fishing Co. Ltd, Port Nelson.⁵⁴
- B-line Enterprises Ltd, Napier
- Sealord Products Ltd, Nelson

Mr Arbuckle's memorandum formed the basis of advice to the regions and the Minister by Mr Shallard, the Director of Operations.

The Director of Operations, following legal advice (which has remained privileged and not available to the Inquiry) advised that Option 1 as proposed by Mr Arbuckle should be adopted. The option suggested:

- that all fishers who fulfilled the non-QMS species working group criteria should receive permits
- withdraw six of the ten permits already issued for the method of trawl
- approve authorisations pursuant to s 65(2) for all fishers who applied for permits to fish for scampi using the method of potting
- approve additional authorisations pursuant to s 65(2) for Amaltal Fishing Co. Ltd, B-line Enterprises and Sealord Products Ltd.

Mr Shallard noted that the current authorisations of permits could not be withdrawn, as it was not appropriate and could not be legally sustained and that the three additional authorisations should be approved, together with one further authorisation, Mr C O'Connor, who appeared to meet the criteria. This observation was also made by Hide and Ackroyd that there was no legal mechanism which allowed cancellation of permits already granted.

On 28 January 1991, Mr Arbuckle forwarded a memorandum to the office solicitor and the Regional Manager for Central. He referred to Mr Shallard's advice and drew attention to a number of issues which he believed needed to be further considered. The 14 scampi permits already issued had been authorised through the North and South regional offices but none had been issued through the Central office. Southern region had approved them, because permits had been held in previous years but there was no prior commitment and dependence on the fishery as there were no known landings of scampi catch.

⁵³ These were to Aitken P; Barine Developments; Johnson W E; Kincaid B D; McLellan N E; Montgomery R J; Mount Fish Markets; Mountfort Fishing Co. Ltd; Roderique T I & W F; Simunovich Fisheries Ltd; Sanford Ltd; Steffins J; Subritsky, C & R; Whiting A R; & Roderique M J.

⁵⁴ The Reviewers note the submissions in response to the Draft Report of MFish, Simunovich and V H Wilkinson, that Amaltal Fishing Company received a scampi endorsed commercial fishing permit for the 1989/90 fishing year. We have considered the evaluation of scampi permit applications of 26 November 1990, dated 4 January 1991, letter B Shallard to Regional Managers, Central and South, and Memorandum 5.2.91 M Arbuckle to B Shallard and conclude that although a permit appears to be signed, no such permit was issued.

He noted however, that a number of applications had been declined for the 1990-91 fishing year, where fishers had held permits or had applied for permits and were declined in previous years. He raised the question as to whether all fishers with permit histories should be issued with a permit and why were permits declined, when permits made later in the same fishing year were also declined because they had no demonstrative commitment to the fishery.

Given that Mr Arbuckle was the one to evaluate the scampi permits, it is notable he concludes:

“I am unable to apply the proposed criteria consistently to all permit applicants and, consequently, have not attempted to provide a list of fishers who qualify accordingly.”

From January 1991 to 22 April 1991, the issues on how to deal with non-QMS species policy frameworks was discussed at a SFMC Board meeting; Senior Fisheries Management Committee, a scampi taskforce meeting, the attendance on the Minister of Fisheries, and further correspondence by the Director of Operations to SMOs, RFMOs and the Non-QMS Working Group.

A task force on scampi management was convened by Dr Allen at the invitation of the SFMC. The two pressing issues in scampi management to be resolved were:

- To determine which permit holders would be authorised to fish scampi; and
- The development of a management regime to replace the current s 65 Notice and possibly to propose management measures additional to the s 65 notice.

It is pertinent to note that in his discussion paper for the Task Force on Scampi Management, Dr Allen informed the Task Force that the Minister of Fisheries had directed that any management proposals should be fully discussed with all those affected and they should have an opportunity to present their views to him.

“The Minister has made it clear that any management proposals we develop should be fully discussed with all those affected and they should have an opportunity to present their views to him. Thus I expect the process we will follow will be to develop a paper containing a MAF proposal and seek views of interested parties before taking it to the Minister.”

Dr Allen then suggests that Mr Hore should ask Simunovich if they had any additional material that would be useful in determining sustainable yields; the Greta Point Research Team should collect all the catch and effort data and any additional research should be obtained with views on likely yields. The Discussion Paper highlights the letter from Simunovich in which Mr Wilkinson urges that the scampi fishery cannot be managed and conserved within New Zealand fishery waters without there being a restraint on fishing effort and ultimately, the total allowable catch.

On 22 April 1991, after receiving Ministerial approval, Mr Shallard signed off his final decisions on scampi permitting. At the time of his advice to the Minister, 15 scampi fishers

had been granted exemptions under s 65(2) for the 1990-91 fishing year; four by bottom trawl and six by the method of potting. The methods were unknown for the other fishers.

By 22nd April 1991 the criteria for eligibility to fish scampi had changed. For exemptions to the moratorium, the criteria now were:

- A s 63 or 64 permit application had to be received for the method of bottom trawling for the 1989-90 fishing year;
- A s 63 or 64 permit had to have been issued for potting for scampi during the 1989-90 fishing season; and
- If the application was for bottom trawling, the fisher had to demonstrate a commitment to scampi fishing (i.e. financial or previous involvement); such commitment to be assessed as at 30 September 1990; and
- The fisher must hold appropriate quota lease arrangements to cover probable bycatch; and
- Any permit issued should be tied by condition on permit to the vessels that were used by the fisher as at 30 September 1990.

Although Mr Shallard's memorandum specifies that there was only one marked difference in the criteria, there were actually two. They were:

- That a fisher's previous involvement "in the fishery" had to be assessed as at 30 September 1990 and in Mr Shallard's own words: "*should be deemed to be that the permit holder actually fished for scampi during the 1989-90 fishing year*"; rather than a commitment, and
- That a condition of a permit must specify the vessel permitted, which had to be the vessels that were used by the fisher as at 30 September 1990.

This meant that no new fishing vessels could be used in the scampi fishery.

Both these criteria were backdated to 30 September 1990. As will be explained in the "Vessel Policy & Application" section, the permit condition regarding vessels was effectively a de facto moratorium, preventing any additional vessels into the scampi fishery after 30 September 1990.

Seven exemptions to trawl for scampi, already issued under s 65(2) of the Act for the 1990-91 fishing year, did not meet the new criteria. After the criteria for scampi permitting were announced, the seven permit holders were advised that MAF/Fish was intending to revoke the exemption but they had two weeks to make submissions on this course of action.

The seven exemptions were revoked, seven months into the 1990 fishing year, and three⁵⁵ additional fishers were approved on the basis that their applications were received in 1990, but no permits had been issued although they met the new criteria listed above.

6.3.9.3 The Introduction of Regulations and Catch Limits

It should be noted that during April 1991, Dr Allen was recommending to the SFMC that where practical, management measures for non-ITQ species should be by regulation rather than by decision to issue or condition permits. He also recommended that s 63 permits should be freely available unless the regulations (or other legislation) prohibit fishing or the method to be used. Only those management requirements which could not be implemented by regulation should be imposed by condition on permits.

Given the conservation issues in granting commercial permits, Dr Allen was recommending that MAF/Fish should reconfirm the policy that management decisions relating to non-ITQ species should be effected by regulation rather than by withholding or conditioning permits. Special permits, on the other hand, should only be used for the purposes specified, such as investigation, and must not be used as an alternative to issuing s 63 permits for commercial fishing.

By July 1991, there were more than a hundred commercial fish species managed outside the QMS by restrictions in the commercial fishing regulations. A few fisheries, including scampi, were restricted under s 65 but this was an interim emergency measure only. MAF/Fish knew that those fisheries, including scampi, required urgent change to management. The Minister of Fisheries had asked to see draft plans of regional management actions for all non-quota species, and work was undertaken by each of the regions in drafting policies and regulations.

On 13 June a scampi management meeting was held at MAF/Fish Head Office in Wellington with participants from the scampi fishery. A number of scampi fishers were not present, including Mr Penwarden, whose vessel, the Bilyara had been seized three days before.

Mr Shallard advised the meeting that there were less than 14 permits, (15 initially issued, seven revoked and three additional added, total therefore 11 permits) all of which were s 63 commercial permits, but some were restricted to certain areas and some were in the process of being revoked. He confirmed that no more scampi permits were to be issued. Mr Wilkinson for Simunovich, is recorded as expressing his view that the developed scampi fishery in Areas 1 and 2 should have individual quota issued, or something similar, based on catch history. For the non-developed scampi fishery in the remaining areas, he advocated that further research should be done to investigate the scampi fishery and the effects of trawling.

⁵⁵ Amaltal Fishing Limited, Sealord Products Limited Vautier Shelf Co. No. 14 Limited.

In March 1991, Greenpeace wrote to the Minister, warning of the dangers of over-fishing for scampi. As a result, a Greenpeace representative was present at the Scampi Management meeting on 13 June. Greenpeace's concerns were supported by the Minister for the Environment and were of concern to the Minister of Fisheries.

Each of the regions were still required to provide draft plans of regional management for all non-quota species in their regions. In the Northern region, scampi was included as part of the Auckland and Kermadec Commercial Regulations No. 5.

By mid-July, of the seven scampi s 65(2) exemptions which had been revoked, two had been returned and one further permit was also under consideration for re-instatement. There were then 14 scampi permits in total nationally.

The Southern region provided background information as to their handling of the scampi permits from March 1990 to the present. Scampi were not listed in the Southland/Sub-Antarctic or South-East Area Commercial Fishing Regulations and the region would not issue s 63 (4) permits prior to investigative fishing being undertaken.

The region acknowledged that this was against the prevailing "open fisheries" policy at the time and to clarify its legal position, the regions sought legal advice as to how species not listed in Regulations could be managed and whether the issuing of s 63(4) permits was discretionary. The legal advice confirmed the Southern region's approach as being correct. Scampi permits under s 63(4) were issued for QMAs 3, 4 5 and 6 by the two other regions, North and Central, during the 1989-90 fishing year, without the knowledge of the Southern region.

The Central region included Scampi in Category A of the Fisheries (Challenger Area Commercial Fishing) Regulations 1986, being the category of fish prohibited unless specially authorised.

As the moratorium was due to expire in September 1991, MAF/Fish was moving to control the fishery by Regulation under s 89(d) and (g). Each of the region's Regulations were vetted by Head Office and were introduced, prior to the 1991-92 fishing year.

On 10 September 1991, Greenpeace wrote to the Minister of Fisheries regarding further concerns held by the environmental group's over the management of the scampi fishery. A report which had been prepared by Greenpeace and the Maruia Society, accompanying the letter, expressed concern over the lack of information available on the scampi fishery and the impact of scampi fishing on other areas of the marine environment.

Despite the request to halt the roll-over of existing fishing permits for scampi for the 1991-92 year, the Minister advised Greenpeace that he had approved an interim management plan for the 1991-92 fishing year, namely that in QMAs 1 and 2, the scampi fishery would be managed through the use of a competitive catch limit which was designed to prevent any increase in catch in those areas. The catch limits in QMAs 1 and 2 were to be based on catch levels in the 1990-91 fishing season. For QMAs 3-9, conditions would be attached to fishing exemptions, requiring information collecting, monitoring and analysis of catch data to assess the impact of scampi fishing in the future.

On 16 September, all registrars were notified that because of impending legal action, no scampi permits should be re-issued for the 1991-92 fishing season until further notice.

A management report on the scampi fishery was sent to a number of industry participants for comment. The options included:

- Option A advocated retaining the status quo, with the present level of fishers and effort through current permit conditions;
- Option B involved a dual management between the introduction of an individual quota regime in QMAs 1 and 2, which were considered to be developed, whilst the remaining areas 3 to 9 would allow exploration;
- Option C envisaged dual management within all QMAs by the introduction of an individual quota regime which would allocate part of the total catch limit with the remainder managed through a competitive catch system to allow exploration;
- Option D was to allow a competitive catch limit for all areas including both developed and non-developed areas, to be used in conjunction with observer information from the scampi vessels; and
- Option E was to suspend the fishery until such time as more detailed analysis of the scampi fishery and its impact on other species has been completed.

Following receipt of comments from the Federation of Commercial Fisherman, Vautier, Sanford, Sealord Products, Messrs Kincaid, Napier Fishermen's Association, Simunovich and Greenpeace, MAF/Fish provided briefing papers to the Minister recommending Option B. The Minister approved the recommendations.⁵⁶

For the scampi fishery, the existing permitting procedures and current conditions on permits were to continue with an additional condition that observers must be carried on certain nominated vessels in the fishery. More importantly, competitive catch limits were approved for QMA 1, being 100 tonnes (amended from 120 tonnes) and in QMA 2, 200 tonnes (amended from 250 tonnes). For QMAs 3-9, no limit was set but the fishery was to be monitored to enable a limit to be introduced if the data analysis demonstrated a need. The Minister also communicated with Greenpeace advising them that the interim management arrangements were put in place and in view of these arrangements, no suspension of permits for the fishery was needed.⁵⁷

⁵⁶ Shallard B as Director of Operations 26 September 1991, with Minister's approval dated 30 September 1991

⁵⁷ Kidd, D as Minister of Fisheries, 30 September 1991 (173.52)

By 27 September 1991, Simunovich had just become aware that its scampi permit might not be renewed for the fishing year beginning 1 October. Through its Counsel, Simunovich threatened MAF/Fish with injunction proceedings unless it received advice by 30 September that the company would be able to continue scampi fishing. On the same day, namely 27 September, Simunovich sent a letter to the Minister with its concerns about the scampi fishing for the forthcoming year and enclosing the letter which was sent by its Counsel to MAF/Fish.

Following the morning meeting on 30 September, when the Minister reached his decision, the scampi fishers were notified of the Minister's decision in the early afternoon. After the faxes had been transmitted, the Minister's private secretary contacted Mr Shallard by phone and advised that the Minister had reflected on his earlier meeting and MAF/Fish should reconsider the agreed catch limits because the conservation issues had not been fully taken into consideration. A second facsimile message was sent to permit holders revoking the earlier message and advising that the decisions regarding permitting for scampi were being reconsidered. The fishers were advised that they should take no action based on the earlier letter, that permits would not be issued, until they received further advice from MAF/Fish.

Amid the threats of Court action and demands that individual catch entitlements (ICE) be set, MAF/Fish convened an urgent meeting with the scampi fishers to discuss the delay in issuing permits and proposed changes to the previous management proposals. These were:

- The catch limit to be imposed on QMA 1 was reduced to 60 tonnes;
- The catch limit to be imposed on QMA 2 to be reduced to 120 tonnes;
- There would be a review of mesh size, completed by January 1992, with an aim of increasing mesh size to the highest level such as 60 mm.

Following the meeting, Simunovich wrote to MAF/Fish on 3 October 1991, demanding an urgent review under s 63(11) Fisheries Act and threatening High Court judicial review of MAF/Fish's various decisions.

Following the meeting of 2 October, MAF/Fish decided on the permitting conditions for the ensuing fishing year and advised both the Minister and the scampi fishers what their decisions were. The effect of MAF/Fish's decision was to allow commercial fishing for scampi for a six month period from 1 October 1991 to 31 March 1992. The permit holders permitted to fish in QMAs 1 and 2 were to be given individual allocations by conditions placed on their fishing permits, which would limit their catching rights to their catch history (pro-rated as necessary to fit within the TACC) for the 1990-91 fishing year. For QMAs 3-9, a competitive fishing regime with a total catch limit of 25 tonnes for each QMA was imposed. The TACC for QMA 1 was adjusted to 60 tonnes and 120 tonnes for QMA 2. The TACCs were also for a six month period.

As a result of the pressure on MAF/Fish and the Minister from the scampi fishers, the conservationists and potential Maori claims, Mr Major prepared a paper to the Minister on authorisations to fish non-quota species. The paper contains the following observations:

“(8) Although it has always been true, it is now more widely appreciated, that the allocation of a fishing permit or authorisation to take fish commercially is, in effect, an allocation of fishery rights to the holder. This is because of the requirement under the Fisheries Act 1983 that ITQs must be allocated on the bases of catch history/commitment/dependency. Once fishers have a permit and use it, they have a foot upon the property rights “conveyer belt” which ends with the allocation of ITQs ...

(9) Until the criteria for granting ITQs set out in s 28E are withdrawn, the Crown is vulnerable to legal challenge from Maori that the allocation of permits embodies a legal claim to quota rights which might be subsequently issued in the fishery. The consequential effects of the initial permit allocation may therefore potentially interfere with Maori fishing rights secured by the Treaty.

...

(11) As soon as commercial potential is evident in a fishery, fisheries managers consider themselves “obliged” to issue permits to allow its exploration and exploitation. If the permit holder then establishes a catch history, the Crown is “obliged” to deliver ITQ to the permit holder, should it wish to bring the species into the QMS. ...

(12) In recognition of the problem that the Crown may be required to buy back what it has just been required to give away, MAF has added a condition to special permits stated that holding the permit does not lead to any claim upon rights in the relevant fishery. The condition therefore attempts to circumvent 28(e) of the Act. It is a moot point that such a condition can over-ride that section completely”.

The significance of this recognition is that MAF/Fish gave fishers with exemptions under the moratorium commercial permits for what eventually became the first catch-history year, which would ultimately count for quota allocation.

Having informed the scampi fishers of MAF/Fish’s proposal to allocate individual catch limits in QMAs 1 and 2, Dr Allen proposed the allocation of ICE in the scampi fishery on 15 November and the proposal was notified to the fishers on 25 November. They were advised that the catch limit was to be imposed as a condition of the permit under s 63(4) and that allocation of ICE was to be based on the fisher’s catch history for the 1990-91 fishing year. As the permits were only issued for a six-month period, the catch limits would be halved. The letter of advice from MAF/Fish contained the following paragraph:

“Under the provisions of s 63(9) of the Act, any conditions placed on permits shall be substantially the same for all permits for a fishery management area or quota management area unless the Director-General is satisfied, on stated grounds, that different conditions are reasonable. Although the individual catch limits which MAF Fisheries proposes to allocate are different, the Director-General is satisfied that, as the mechanism used to allocate these catch limits is the same in each case, the requirements of s 63 (9) are fulfilled”.

On 27 November the Director-General, Dr Ballard wrote to the Minister of Fisheries after being informed that the Minister was commencing negotiations with Maori over fishing rights for the non-quota species. To ensure the processes for issuing permits and authorisations did not impact upon negotiations with Maori, the Director-General withdrew all delegations for issuing permits to the Deputy Group Director level, and advised the Minister that MAF/Fish policy would keep him regularly informed on the progress of negotiations so that appropriate adjustments to permitting and authorisation criteria could be made.

As a result of the Director-General's decision, Mr Shallard as Acting Deputy Group Director actioned the permits that were supplied to Head Office, as the delegations to issue non-ITQ permits had been withdrawn from the regions.

Despite complaints from some scampi fishers that the proposed allocations were unfair, illegal and unreasonable, the allocations were made on 6 December 1991 and permits re-issued containing ICE for the first time.

The response from Mr Shallard to the Independent Scampi Group's submissions (which protested against the introduction of a Simunovich vessel the *Petersen* after the moratorium), defends MAF/Fish's decision by saying:

"5. *Whilst acknowledging your statement regarding the commercial prejudice to the Independent Scampi Group (ISG) and other fishers, MAF's Fisheries role is in the management and conservation of fisheries, not the commercial position of individuals or companies. Should any other fishers wish to transfer effort from Quota Management Areas (QMAs) 1 and 2 to QMAs 3-9 and they are permitted for Areas 1-9, I am sure that the Ministry will look at this. ...*

I would draw to your attention that any catch history developed in areas 3-9 will confer no future right or expectation of access to the fishery and no guarantee as to the level of any future allocation should individual catch limits be imposed in these areas".

As Ellis J observed in the *Vautier Shelf*⁵⁸ decision, although all fishing was done at this point on permits issued under s 63 and 65, MAF/Fish was still confirming that catch would not result in quota. During this period, all scampi fishing was governed by permit issued under s 63 with conditions imposed under s 63(4). These included an exemption from the regulatory prohibition about the use of mesh size, being a departure from the way in which previous permitting had occurred under special permit. The permit conditions also restricted the vessels to be used and the quantities which could be taken in each area. In QMAs 1 and 2, the quantities were prescribed by the allocation of ICE and in the remaining areas, by TACC in a competitive fishery. Once the TACC had been caught, the fishery was then closed for the rest of the year.

⁵⁸ *Vautier Shelf Co. No. 14 Ltd & ors v Chief Executive of the Ministry of Fisheries & ors*: (Unreported: Wellington High Court, CP 20/97: 24 July 2000)

In a report to the Director-General on the scampi fishery undertaken in January and February 1992, information on scampi catches up to the 1990-91 year was collected, and options for future management of the fishery considered. Comments were received from the three regions and from fishers. Following the report, Dr Allen decided the TACCs for the scampi fishing areas for the full year for QMAs 1 and 2 were set at 120 and 240 tonnes respectively (double the six month TACC), for Area 4 at 250 tonnes, and for Area 6 at 300 tonnes. The other areas remained at 60 tonnes except for a small increase in Area 7.

In April, Dr Allen decided that QMA 6 should be closed to scampi fishers using the bottom trawl method, because the 300 tonne limit had been reached. The closure of QMA 6 was recorded in a memorandum on 25 April 1992 and was effected by changes to the conditions on the s 63 fishing permits. By letter dated 27 April 1992, the affected scampi fishers were notified that for the second half of the fishing year, from 1 April 1992 to 30 September 1992, QMA 6 was to be closed to vessels taking scampi by the method of bottom trawling. The Registrar of Fisheries was to contact each of the scampi fishers to effect this measure.

Simunovich was still taking legal action to challenge MAF/Fish's decisions. Following the decision to increase the TACC in QMA 6 from 60 tonnes to 300 tonnes in February 1992, Simunovich sought a review of that decision pursuant to s 63(11) on the basis that it believed the limit should have been set considerably higher. This review was undertaken by the Director of Fisheries Policy at the Director-General's request.

Following the notification that QMA 6 was closed, Simunovich took injunctive action on Tuesday 5 May 1992, obtaining an ex parte order setting aside the Director-General's closure of the Area 6 scampi fishery, in order to allow their vessel the *Petersen* to continue fishing without limit in that fishery. The order was sought on the basis that Simunovich did not believe the 300 tonne limit was reasonable and that MAF/Fish had not completed the review of setting the TACC and should not have closed the fishery in the meantime.

On 10 July 1992, 92% of the catch level for scampi in QMA 4 was reached. Dr Allen approved the closure of QMA 4 for the remainder of the 1991-92 fishing year to scampi fishers who used the method of bottom trawling.

The scampi fishers were notified of this decision by letter dated 14 July 1992 and as before, the closure was effected by way of a condition on the fishing permits.

Following its successful injunction action, Simunovich continued to fish Area 6 with its vessel the *Petersen*. MAF/Fish continued to receive submissions from scampi fishers, resulting in a decision by the Director-General on 19 September 1992 to approve the catch limits for the 1992-93 fishing year and, among other things, approve QMA 6 to be divided into 6A (50 nautical miles around the Auckland Islands) and 6B (for the balance). The TACC for QMA 6A was 250 tonnes with individual catch limits based on each permit holder's catch history in the 1991-92 fishing year, and 6B to have a TACC of 50 tonnes. In addition, the catch by Simunovich in its vessel the *Petersen* after the official closure of the scampi fishery in QMA 6 on 27 April 1992 was not to be used in the individual allocation for Simunovich in this area.

The scampi fishers were notified of the Director-General's decisions on 21 September 1992. The fishers were notified that MAF/Fish was finalising the proposed individual allocations of the overall catch limits for QMAs 4 and 6. The fishers received their allocated ICE for areas 4 and 6A on 26 September 1992. Fishers were also advised that the ICE QMAs 1 and 2 were to remain the same and their allocations for 4 and 6A were calculated on the catches for the 1991-92 year.

6.3.9.4 Inconsistent Approach to Catch Limits

It has been submitted that the decisions outlined above were inconsistent in comparison with the approach MAF/Fish took to decisions Area 3 and 6B in 1993. The Inquiry accepts this submission.

The decisions to introduce ICE into Areas 1 and 2 in 1991-92, and particularly that for 4 and 6A in 1992-93, contrast with the decision not to introduce ICE in 3 and 6B in 1993-94. TACC limits were reached in each of the last four areas during the year prior to consideration, and the ICE for individual fishers was based on the catch history in the preceding year. Reaching the catch limit was taken as an indicator that the fishery was "*developed*", and Mr Penwarden had been advised that "*the Director-General has considered that catch history is the most appropriate mechanism for individual allocations in the developed areas of the scampi fishery.*" The same approach should have been taken for Areas 3 and 6B.

Following the Scampi Fisheries meeting of 13 June 1991, (at which Mr Penwarden for Barine was not present because his vessel had been arrested in Napier in relation to the undersized mesh incident) MAF/Fish produced a paper for the Minister on 6 August 1991 supporting the suggestion that there be separate management options for the developed areas QMA 1 and 2 from the non-developed areas, being Mr Wilkinson's proposal at the meeting.

It is noted that between 27 September and 5 November 1991, Simunovich wrote to MAF/Fish no less than 14 times, mostly to Dr Allen but also to the Minister (four times), to Mr Shallard and to the Auckland Registry.

During this time the decision on scampi management was made, communicated with the fishers and then recalled and permits continued to be withheld all on 30 September 1991, as described above, because of the intervention by Greenpeace to the Minister.

In November 1991 individual catch limits were imposed in QMAs 1 and 2 based on catch history from the 1990-91 fishing year.

A year later, Simunovich sought individual catch limits in QMAs 4 and 6A. This received opposition from other fishers who had not had the same opportunity to fish there and who had not been able to bring in additional vessels as Simunovich had: The ICE allocations were introduced for those areas in September 1992.

In order to establish catch history in Areas 3 and 6B, four scampi fishers, including Barine, decided to concentrate on these areas from the beginning of 1992-93.

In spite of this action at the end of 1992, and the TACC for those areas being achieved during 1992-93, MAF/Fish did not decide to allocate ICE in Areas 3 and 6B in 1993-94 and later years. In a later 1999 assessment MFish acknowledged that these fisheries were just as “developed” in 1992-93 as Areas 4 and 6A had been a year earlier.

“In hindsight MinFish concludes that SC1 3 and SC1 6B were fully developed within the catch limit after the 1992-93 year and this should be the year used to allocate individual catch entitlement in these stocks if a consistent policy position is considered desirable.”

6.3.9.5 The Statutory Moratorium

The Finance Bill No. 6, enacted ss 13 to s 63 of the Fisheries Act 1983. This came into effect as from 18 December 1992 and provides:

(13) Notwithstanding any other provision of this section, [on and after the 1st day of October 1994] the following provisions shall apply:

(a) No fishing permit shall be issued in respect of any species of fish (other than tuna), aquatic life, or seaweed, that is not for the time being subject to a quota management system (being established by or under Part 2A or Part 2B of this Act), except to a person who held a fishing permit that was in force on the 30th day of September 1992 and [lawfully took] fish, aquatic life, or seaweed under a fishing permit held by that person at any time during the period commencing on the 1st day of October 1990 and ending with the close of the 30th day of September 1992:

The effect of this amendment was to exclude all fishers from a fishery, other than those who held permits as at 30 September 1992 and had caught fish under a permit during the previous two years 1990-91 and 1991-92. Thus, any fishers, such as Sealord, who had a permit but had not fished, were therefore excluded. All fishers who had been identified as falling within the terms of s 63(13) had their permits revoked and they were notified of their revocations on 29 March 1993.

Once the legislation was passed in December 1992, a statutory moratorium was imposed on the issuing of new permits for non-QMS species except to those fishers who had taken that species, lawfully, in the 1990-92 catch history years. (The catch history year runs for the same period as a permit year, which is from 1 October to 30 September in the next calendar year.) Special permits could be issued by the Minister, if the imposition of the moratorium resulted in unfairness. Such permits can be converted into standard commercial permits.

The non-QMS moratorium is still in place for species which remain outside the QMS, and this includes scampi.

6.3.10 Factors Affecting Entry and Extent of Participation by Scampi Fishers

The decisions which influenced which fishers are allowed to catch scampi, and the amounts they have been and will be permitted to catch, are canvassed in more detail in later sections. At this point it suffices to note:

- Whether fishers were permitted to trawl for scampi in 1990-91 and all subsequent years depended on whether they had permits and caught scampi in 1989-90, or otherwise showed sufficient “*commitment*” to the fishery by 30 September 1990. By mid-July 1991, as a result of those requirements, there were only 14 permits nationally to fish for scampi.
- The amounts they will get in quota (subject to passage of legislation by Parliament) will be strongly influenced by the amounts they caught in the catch history years of 1990-91 and 1991-92, as a result of a series of policy and legislative decisions.

As from October 1991 individual catch limits were introduced for scampi in scampi management areas SCIs 1 and 2, based on the amounts caught by individual fishers in each of those areas in 1990-91. Similar individual catch limit decisions, based on 1991-92 catches, were introduced in SCIs 4 and 6A from October 1992. No such decisions were made in respect of the next prospective scampi areas SCIs 3 and 6B in 1993.

The individual catch limits in those four SCIs became individual catch entitlements (ICE) for a period following the passage of the 1996 Fisheries Act, but this is no longer the situation. The Act provides that when non QMS species are brought within the QMS system, the allocation of individual transferable quota (ITQ) to individual fishers is to be based on the ICE held by that fisher, if the fishery is controlled exclusively by ICE.

If the fishery is not allocated by ICE, the quota allocation will be determined by the catch history of the fisher in the best consecutive 12 months of the two catch history years 1990-91 and 1991-92.

Thus whether the route to quotas comes through ICE or through the catch history provisions of the 1996 Act, the catch levels in 1990-91 and 1991-92 would be crucial in determining the amount of quota. The precise outcomes would differ somewhat, depending on which approach is used.

The scampi fishery was managed under an ICE regime established under the 1996 Act until October 2001, when the Court of Appeal in *Vautier* declared the ICE regulations made for scampi under the 1996 Act to be ultra vires. Since then individual fishers compete to catch scampi in each SCI until the total allowable commercial catch (TACC) for that fishing year is reached in respect of the area. If the competitive management regime is in place at the time of the allocation of scampi quota pursuant to the 1996 Act, the quota allocation would be based on the catch history of each fisher in the best consecutive 12 months of 1990-91 and 1991-92.

As noted above specific legislation has recently been introduced into Parliament to determine and allocate scampi quotas. As the Reviewers understand it, the proposed allocation is still based on the 1990-92 catch history.

6.4 PART IV: IMPACT OF POLICY ON FISHERS

6.4.1 Application of the Regions' Permitting Practices

The way in which the three regions processed permit applications had an impact on whether fishers could target scampi, either by bottom trawling or potting. To obtain a permit by bottom trawl, a scampi fisher needed to use mesh, less than 100 mm, which required an exemption from Regulation 47(1)(d).⁵⁹

The Northern and Central regions issued special permits, to enable the fisher to use 43 mm mesh. The Northern region however, for the fishing year 1988-89 issued commercial permits together with a special permit, whilst other regions issued special permits only. The Southern region had issued two commercial permits for scampi trawling: the Dunedin office added scampi to United's commercial permit for other species in 1987 and Invercargill had issued a commercial permit to Roderique for trawling and potting in 1989. The Southern region never issued any more scampi permits until after the moratorium.

The differences in the regions permitting practices and applications of policy can be seen more readily, on an examination of each of the individual fishers. We examine these, region by region concentrating on some of those who applied before the s65 moratorium.

6.4.2 Northern Region

6.4.2.1 Mr Jose

Mr Jose was an established fisher from Whangarei, who had been awarded a Fishing Industry Board scholarship to study deep water trawling and had ten years experience in fishing for hapuka, in the gut of which he had observed prawns or scampi.

In early 1987, Mr Jose met the fishermen operating Kiwi Prawns, who had a current scampi fishing permit. He discussed with them the potential development of a local scampi fishery and they provided him with information and documentation of research they had completed in the fishery. Mr Jose sold his vessel the *Trinity 1* to Kiwi Prawns and it commenced fishing for scampi in 1987.

Interested in the potential to fish scampi, Mr Jose went to Australia and undertook research into the deep water prawn fishery there. On his return to New Zealand, Mr Jose completed and lodged a s 63 permit application to fish scampi at the Whangarei office on 23 April 1987.

As there was no delegation to the Whangarei office to sign special permits, it was normal for permits to go to Auckland, notwithstanding that there was a previous special permit issued to Kiwi Prawns.

⁵⁹ The Fisheries (Commercial Fishing) Regulations 1986

Although Mr Jose had made application for a commercial permit, the requirement to use undersized mesh required, in the Northern region's practice, a special permit to be issued.

There is a permit checklist generated with comments by the Registrar of Fisheries and the Supervising Fishery Officer dated 23 and 24 April 1987 to the effect that the application had been treated as one for experimental prawn trawling. The note states that Mr Jose was to buy a suitable boat if approval was given and that he would be calling personally at the Auckland office on 29 or 30 April. The application is annotated that no money had been paid because Mr Jose was waiting until he had purchased a boat.

On 12 May 1987, the Auckland Office recommended the application be approved. The special permit was signed by the Auckland Regional Fisheries Officer on 22 June 1987.

The special permit allowed the taking of 20 tonnes of deep water prawns; was restricted to the fishing vessel "*Larina*"; 43 mm net size restriction was imposed and fishing was allowed in any area of the EEZ that the vessel was permitted to fish.

Even though the special permit was approved, no-one contacted Mr Jose about payment and it was never sent to him. Consequently, despite his frequent phone calls and repeated visits to MAF/Fish, both in Auckland and Whangarei, he assumed his application would not succeed and he looked at alternative methods of making his income.

After making his application for a scampi permit, Mr Jose never heard from MAF/Fish, which resulted in his telephoning, attending in person in Whangarei and, in desperation, travelling an hour to Auckland to see Mr Wilkinson, whom he had been told was dealing with the permit.

He describes his frustrations as follows:

"Over a four month period between March and June 1987 I had repeated visits to MAF in Whangarei, phonecall after phonecall after phonecall, to try and progress my application and each time getting the answer that, "No, Auckland does the sign off. It will come through when it's ready."

I got back with extra information. I did what I believed everything necessary to have that application processed. I even at one stage travelled to the Auckland office of MAF to try and get further answers and was basically, in my words, fobbed off by a junior assistant down there. I couldn't get past the door... I'm a fairly stubborn person and I spent quite a bit of time trying to get answers and I couldn't get it.

At the end of about a three and a half to four month period I reached an impasse and I was losing an option on a vessel which I considered I could afford and which I considered would be suitable for the fisheries, so financially I had to make a decision. I then had to make the assumption that my application was not coming through. So, I then looked at other methods of making an income in other fisheries.

There was no further communication from the regional fisheries officer or MAF on this application. To date I have had nothing since then. This led to a further

decision by myself in late 1987 to actually leave the New Zealand fishing industry and the country because I was totally disgruntled with the industry, and being a career fisherman this was the ultimate insult, in my opinion.”

At the time Mr Jose gave evidence to the Inquiry, he had made application under the Official Information Act to obtain the documents and information which he had supplied to MAF/Fish at the time of his permit. Just before the Inquiry hearings finished, some cartons of documents, including documents from Auckland and Whangarei, were made available to Mr Jose, his advocate and the Inquiry.

It was only on discovery of these documents, it was revealed that Mr Jose’s special application had actually been granted, although he was never aware of that and that he was required to pay the permit fee. No-one from MAF/Fish, either in Auckland or in Whangarei contacted Mr Jose or informed him that the permit fee was the only outstanding requirement before he was issued a permit.

Although this occurred in October 1987, no-one within the registry office in Whangarei made the connection between the refund of a permit fee for the scallop application and the outstanding requirement for a fee in respect of the scampi permit. This inexplicable failure by MAF/Fish is compounded, when the recently discovered files reveal that on 22 May 1987 Mr Jose had made an application for a fishing permit for scallops and paid the relevant permit registration fee. The ROF signed the fishing permit in Whangarei on 18 June 1987 but an undated filed note stated the permit was ready for issue, subject to Mr Jose’s proposal to lease a vessel. It transpired that Mr Jose had transferred the permit to Mr Mason and the application was withdrawn on 7 October 1987, the fishing permit was stamped “*cancelled*” and the fee was refunded.

As Mr Jose was not notified that the scampi permit had been approved, he was ignorant of the requirement to pay the permit fee and received instead a refund from a scallop application.

On Mr Jose’s behalf, Mr Carter, a former registrar in Whangarei gave evidence to the Inquiry that as there was no delegation in Whangarei to sign special permits, it was normal for permits to go to the Auckland office and it would take four to six weeks for Auckland to deal with a special permit. If an application was made without the permit fee being paid, the process used was to tell the applicant that the application could not go ahead or would only get to a certain point until it was paid.

Until Mr Jose gave evidence at the Inquiry, none of the parties, including MFish were aware of his circumstances or his concerns.

MFish’s response was that as there were no records of any permits issued in Mr Jose’s name alone, and as MFish had no records of any of the matters raised by Mr Jose, including his visit to Auckland or telephone calls to the Auckland office, MFish denied that any of those matters, including the application for the permit “*actually occurred*”. Following discovery of the relevant documentation, MFish conceded in its final submissions that Mr Jose did apply for a special permit in April 1987, which was approved on 22 June 1987. As to the failure to communicate with Mr Jose, the submission from MFish is:

“It is unclear why the special permit was not ever sent to Mr Jose but the file indicates that the required special permit fee was not paid. The file indicates that the fee was not to be paid until after Mr Jose purchased a suitable fishing vessel.”

MAF/Fish’s failure to communicate with Mr Jose in relation to his scampi permit is inexcusable. We accept Mr Jose’s evidence that he made the visit to Auckland as he described and made frequent telephone calls. The only outstanding requirement when the permit was approved in June to be met in relation to Mr Jose’s scampi permit was the payment of a fee, not the acquisition of a vessel. The acquisition of a vessel was in relation to his scallop permit.

Nevertheless, it was incumbent on MAF/Fish to at least inform Mr Jose that his scampi permit had been approved in principle, which would have given Mr Jose a clear indication that he could proceed to acquire the vessel upon which he had an option, in the knowledge that he was permitted to fish for scampi.

Mr Wilkinson has submitted that at the time of Mr Jose’s visit to the Auckland office, he was engaged in Quota Appeal Authority hearings for the Ministry. He approved the special permit in the normal way and it was ultimately forwarded to the Whangarei office. Any delay or failure lay with the Whangarei office.

We were impressed with the evidence of Mr Jose, who travelled from Whangarei to Wellington to tell his story. Mr Jose’s case is significant, in demonstrating the stark difference in communication and treatment by MAF/Fish between individual fishers like Mr Jose, compared to the treatment received by Simunovich. In Mr Jose’s case, this resulted in his leaving the fishing industry completely.

6.4.2.2 Mr Howell

Mr Howell and Mr Walker received a special permit in May 1989 from the Regional Manager, Auckland, valid until 31 May 1990. On 16 August 1989, Mr Howell made application for a commercial permit for scampi by bottom trawl in Areas 1 and 9. This permit was granted on 1 October 1989 by the Whangarei office, for the year ending 30 September 1990 and endorsed bottom trawl for scampi in Areas 1 and 9.

Mr Howell then made application for a commercial permit for the 1990-91 fishing year including scampi. This was issued on 5 October 1990 from the Whangarei Office, without a scampi endorsement.

Mr Howell then moved to Tauranga and around February 1991 requested the commercial permit be amended to include scampi. This request was forwarded by the SFMO, Tauranga to MAF/Fish, Wellington who was also advised that a special permit was held. The correspondence attached a copy of the special permit granted and the application for the commercial permit.

The request was declined by MAF/Fish, Wellington. They found it did not meet the criteria for exemption on the mistaken assumption that Mr Howell had not applied in 1989-90, had no financial commitment and no previous involvement in the fishery.

In March 1991, Tauranga office reviewed Mr Howell's 1989-90 commercial permit because Mr Howell had brought in his 1989-90 permit to the office. A memorandum was sent to MAF/Fish Wellington asking that Mr Howell's case be reconsidered. The memorandum also noted that Mr Howell had quota for barracuda, gurnard and snapper.

In the same month Simunovich contacted the DCM Tauranga, to advise that Howell was using his vessel the *Jay Linley* to take scampi without a permit. Subsequently the DCM advised Auckland that he had interviewed Mr Howell and sighted the commercial permit for 1989-90. After checking the file and the note declining the request to amend the permit, the DCM advised Howell that he could not fish for scampi.

This caused great upset to Mr Howell who had invested up to \$60,000 in the industry after he obtained a permit in 1989-90 and was in financial difficulty. Mr Howell then questioned why it had not been granted for 1990-91. He had noted that other fishers had received permits and cited Mount Fish Markets as an example.

In Appendix I of the Arbuckle Memorandum of 27 November 1990, Howell and Walker are recorded as having a commercial permit in 1989-90. No commercial permit for Mr Howell is recorded as being issued for this period despite his notification in August 1989 that he would be taking over the permit.

Mr Howell was granted an exemption to s65(2) in 1990. However, on 19 April MAF/Fish decided to revoke the permit, subject to receiving submissions, because it was considered that Howell did not meet the criteria formulated in February 1991 despite his information forwarded to Wellington in March.

Mr Howell availed himself of the opportunity to make a submission but it was not accepted and the revocation of the permit was confirmed on 22 May 1991. Subsequently after legal representations from Mr Howell's solicitors on 25 June 1991, MAF/Fish finally granted him an exemption on 18 July 1991 under s65(2) for scampi fishing in QMAs 1-9 but limited to the *Jay Linley*.

6.4.2.3 Barine Developments Limited

Mr Penwarden and his wife are New Zealand citizens. Mr Penwarden had experience in New Zealand fisheries and gave evidence that from 1970 he was aware that there was a prawn or scampi resource in New Zealand, having lived and worked in the Australian prawn fishery from 1970.

Mr Penwarden made at least four visits to New Zealand during 1988 and 1989, discussing scampi fishing with MAF/Fish. He received a special permit dated 19 September 1989 to fish for scampi in the name of "N.H. Penwarden," for the *Bilyara*. The permit included the following paragraph:

"The taking of any fish while fishing under this permit shall not entitle the holder to any advantage or privilege with respect to any of the species taken".

In January 1990 the *Bilyara* and Mr Penwarden arrived in New Zealand to commence fishing for scampi.

He believed that it was clear from the day he arrived in Auckland that he was coming into a fishery that was dominated by Simunovich, which had four vessels in the fishery and was purchasing a fifth. The *Bilyara* fished primarily in QMA2 for the first year.

Mr Penwarden explained his understanding of the likely development of the fishery as follows:

“We expected that the Ministry of Agriculture and Fisheries would first manage the scampi fishery through an exploratory phase to at least get an indication of the size of the resource. We expected that once this information was available the Ministry would then announce a commercial phase and use something like future catch history to determine future access rights. Our understanding was consistent with the terms of the fishing permit that we were issued with and the supporting letters from the Ministry.”

Mr Penwarden added that in the 1989-90 fishing year his fishing was exploratory and he had a belief that his catch history was not going to be the basis of any future entitlements.

In relation to permits he said:

“I did not follow the legal detail of how the permitting system worked and it did not occur to me at the time to research it. I simply applied for the permits I was told I needed and accepted what was issued.

That is not to say that I was blind to the overall practical effect of the permitting regime. I had spent nearly 15 years in the Australian fishery. Although I was new to the New Zealand legislation and found it complex, I was very used to fisheries industry and to the stages a fishery goes through and the general concepts that go with the administration of fisheries. I knew very well the difference between exploratory or developmental fishing, and fishing to establish a catch history that might be the basis for the allocation of rights in the future.

I read my fishing permits. Condition 17 of the Special Permit meant something to me. It meant I was not fishing for catch history. It meant I could not rely on my catches to give me future rights to the fishery, and – presuming we were all working under the same system - nor could anyone else. Condition 17 was consistent with what the Ministry were telling me about the stage the fishery was at.”

When Mr Penwarden received the notice dated 11 July 1990 from the Central Regional Office setting out the proposed management strategy for QMAs 2, 6 and 8 and a letter dated 6 August 1990 from Mr Bishop inviting him to reapply for a special permit for those areas. He responded making applications. Mr Penwarden was not aware of the dispute between the Northern and Central regions relating to permitting.

When the moratorium was declared, Barine was authorised to continue fishing.

Mr Penwarden did not receive any specific response to the applications made in the letter of 21 August 1990 and is of the view in the general confusion at that date and following the Gazette Notice the administrative functions of the Minister were not completed until a later date when it was thought that there was no point in advising Barine.

Mr Penwarden gave evidence that he was not advised that the basis of fishing was anything other than exploratory and that they continued to fish on the basis that catch history would not be relevant to the allocation of future entitlements.

During the 1990-91 fishing year the *Bilyara* fished mainly QMA2 until March 1991. During April and May 1991 the *Bilyara* did little fishing. Mr Penwarden says that, if they had had any idea that they might be fishing for catch history, they would have minimised non-fishing time.

The *Bilyara* was arrested on 11 June 1991 and released on 14 June 1991.

On or soon after 24 June 1991 the *Bilyara* left for Australia and did not return to New Zealand until January 1992. Mr Penwarden maintains that he would not have taken the vessel out of New Zealand if he had thought that the 1991-2 fishing year would be used for catch history purposes.

He received a letter dated 30 September 1991 from MAF/Fish setting a TACC for QMA1 and 2 and advising that QMAs 3-9 were to be fished competitively.

On 2 October 1991 Mr Penwarden attended a meeting of scampi fishers and the Minister. The minutes recorded the following:

“Mr Penwarden stated that the industry had come up with a number of positive initiatives including a code of practice which would help to alleviate some of the environmental concerns with the fishery. The issue of allocation of catch must rest with MAF. Catch history needs to be recognised in that plus the rights of others. MAF have issued permits with multiple boats under some permits. Fishing capacity has therefore been created through these permits and boats. The solution has to lie with MAF and industry can only provide limited assistance in this area.”

By letter dated 7 October 1991 MAF/Fish advised Barine of the permitting and authorisations for the 1991-92 fishing year (ie. the first six months). The Independent Scampi Group was formed and Barine was a member.

On 25 November 1991 MAF/Fish wrote to Barine advising that individual catch limits were to be set for QMA1 and 2 and setting out Barine's proposed catch limits.

On 9 December 1991 MAF/Fish wrote to Barine advising of its individual catch limit for Area 1 of .096 tonnes and Area 2 of 25.253 tonnes for six months. On the same day, a solicitor on behalf of the Independent Scampi Fishers, including Barine, wrote to MAF/Fish objecting to the introduction of the *Petersen*.

On 17 December 1991 MAF/Fish replied indicating that should other fishers wish to transfer effort from Areas 1 and 2 to Areas 3 to 9, MAF/Fish would “look at this”. Mr Penwarden’s view was that the indication from MAF/Fish was nonsensical. He told the Inquiry:

“It’s absolutely nonsense because in respect of area 1 and 2 where he’s proposing to reduce effort. Effort by way of vessel numbers is now historical because ICE has been allocated. So, they (Simunovich) could take, say, for example, two elements of their fleet and dedicate them to that fishery and still have the rest of their fleet to develop the other fishery. People with one vessel still have to service area 1 and area 2 as they’ve been allocated and then take that vessel elsewhere.”

On 1 February 1992 *Bilyara* returned to New Zealand. By that time the TACC in Area 4 had been reached and was close to being reached in other relevant areas.

On 26 February 1992 Barine was advised of individual catch limits for the 1991-92 fishing year, which were double the six month limits referred to above.

Barine received a special permit from MAF/Fish North on 19 September 1989 to undertake fishing for scampi and deep water prawns from the vessel *Bilyara*. The permit was for the use of a 43 mm net size.

A commercial fishing permit for scampi bottom trawl areas 1-10 was also issued on 1 October 1989, which was conditional upon the special permit being held and was valid until 30 September 1990. The special permit was valid only until 15 June 1990.

On 19 January 1990, a further special permit valid to 30 September 1990 was issued allowing bottom trawl for scampi in Areas 1 to 10 with additional landing points.

Despite difficulties over the registration of its vessel, Barine continued to receive fishing permits and special permits valid until 30 September 1990. After the moratorium was imposed, Barine were one of the seven applicants found to meet the criteria of the non-QMS working group. It received a fishing permit under s65(2). This permit had been issued in the name of N H Penwarden and was transferred to Barine Developments Limited on 9 January 1991.

Mr Penwarden considered that not all fishers were treated fairly.

“We also assumed that all fishers would be treated fairly ... and that the rules would be applied equally to all.”

When asked by the Inquiry to identify the basis upon which he was alleging that he was not fairly treated and to highlight inconsistency, Mr Penwarden answered that there were the following issues:

- He understood for a considerable period, perhaps to the end of 1991, maybe longer, that the scampi fishery was an investigative fishery and that no rights would be conferred and no catch history would count. He was reliant on what the permit said.

- Simunovich had easy access to MAF/Fish but Barine was going to have difficulty in accessing MAF/Fish.
- Barine took its own advice, did not push issues which might have exposed more of the unfair treatment. Barine went fishing and it was over time that the inequality was exposed.
- The difference between the correspondence received by Barine and the correspondence received by Simunovich.
- There were issues over the time taken to make decisions.
- Decisions were taken and policies were formulated or enacted without Barine being advised (or being advised too late).
- Policies and decisions were created under influence.
- Mr Wilkinson had extraordinary access to information from MAF/Fish that should have been confidential.

6.4.3 Central Region

6.4.3.1 Vautier

Mr Mark Barham on behalf of B-Line Enterprises Ltd applied in March 1990 to MAF/Fish in Napier for a special permit for the fishing of scampi. He was informed by the Fisheries Monitoring Officer in Napier that the application could not proceed because of the requirement to have ITQ for bycatch. Mr Barham was advised to approach the Nelson office, which he did by fax of 16 March 1990 to Mr Arbuckle.

On 20 March Mr Barham informed the Nelson office that he was prepared to purchase 25 tonne of deepwater species quota so as to be eligible to hold the research permit for the fishing of scampi. Mr Barham also advised that he would be operating a purpose- built fishing vessel from Napier.

On 24 April 1990 Mr Barham again faxed Mr Arbuckle inquiring about the progress of his application to fish for scampi. He advised that he had been pursuing various vessels but that the successful application was needed for a successful purchase to go ahead. On 5 May 1990 Mr Barham faxed Mr Arbuckle referring to a prior telephone conversation in which he had been advised that his application had been approved. He advised that he would concentrate on purchasing a suitable vessel. He also advised that he had approached Fletchers who had agreed to provide available quota for bycatch. He expressed the desire that MAF/Fish would find this suitable.

On 12 June 1990 by fax, Mr Barham advised that he had found a suitable boat and requested a decision regarding the bycatch being covered by an existing quota holder (Fletchers). He further advised that he was extremely anxious about receipt of the permit.

Mr Barham then received a request to make a special permit application by letter of 11 July 1990 from the Nelson office although the application was not attached to the letter. An application for QMA 2, 7 and 8 was forwarded on 13 August 1990. In an accompanying letter to the application, Mr Barham noted that he had been told verbally by Dr Ron Blackwell and Mr Arbuckle that the application for a permit had been successful in April but that MAF/Fish was reviewing the scampi fisheries. Letters also accompanied the letter from three fishing companies outlining their ability to supply the bycatch quota for the QMA areas applied for.

On 16 August 1990 Mr Barham informed MAF/Fish Nelson that he had access to 5.300 tonnes of quota for stargazer in Area 2. Further communication was made to MAF/Fish on 20 August 1990 and confirmed that he had access to 17.200 tonnes of quota for stargazer in Area 2 and other species that they were likely to catch.

On 23 August 1990, Mr Bishop advised Mr Barnham along with the other scampi fishers, that the scampi fishery in Central was to be subject to detailed investigation prior to issuing of permits. All applications for 1989-90 in the Central region would be treated as applications for a special permit to fish in the 1990-91 fishing year. The letter also advised that a special permit would carry no right of renewal and confer no right to future access to the fisheries nor to establish catch histories.

On 30 August he received a letter from MAF/Fish Central advising that applications for Areas 1 and 9 would be forwarded to the Auckland office and Areas 3, 4, 5 and 6 to Dunedin.

In September Mr Barham wrote to the Minister of Fisheries expressing concern about the lack of progress on his applications and advised that another company appeared to have received many permits in a very short space of time. The Minister responded on 23 October 1990 advising that there would be a meeting scheduled in October to consider issuing special permits for investigative scampi fishing.

On 27 December 1990 Mr Barham forwarded a summary of events regarding his application to Mr Shallard in Wellington. Included in this summary were Mr Barham's dealings with MAF/Fish Dunedin in August 1990 and September 1990. Mr Barham also detailed a meeting he had with MAF/Fish Napier in November and that he was advised on 7 December 1990 that the permit would be signed on that day.

However, by 14 December the permit had not materialised and he was advised that a further opinion would be sought by MAF/Fish about the scampi fishery. Mr Barham had rung again on 24 December 1990 and was informed that a further legal opinion had been required.

Mr Barham contacted Mr Shallard in January 1991 and received a response from the Minister on 28 January 1991. This advised that the moratorium had been in place since 1 October 1990 and that a review of permit applications had been initiated. Mr Burnard further advised him on 30 January 1991 that the Minister had sought a further report before making a decision on scampi.

Mr Barham responded in February complaining that he had been negotiating the application for a permit for the last 11 months and offered to attend MAF/Fish in Wellington if necessary.

At the beginning of March, Mr Barham advised Central (Wellington Office) that the company was bringing a scampi trawler to New Zealand for operation in April and requested that the permit to be ready by that time.

After correspondence from its lawyers, Vautier are finally advised on 22 April 1991 that it had been successful and a scampi permit was issued on 13 May 1991 for Areas 2-9.

Because Vautier were dealing with the Central Office whose approach was different to that of the Auckland Office, significant disadvantage accrued to Vautier. Central Office did not issue commercial permits, but Auckland did.

The delay experienced by Vautier between its application and receipt of the permit, compounded the problem and had a significant impact on Vautier. When ICE was allocated in QMAs 1 and 2, it was based on fishing history during 1990-91.

Vautier received ICE of only 5.197 tonnes in Area 2 for the six-month period that it was able to fish in 1990 and 1991. The allocations for Areas 1 and 2 in 1992-93 remained the same and ICE was issued for 4 and 6A. Because MAF/Fish had advised that ICE conferred no right or expectation of future access to the fishery, Vautier claimed it was misled and would have concentrated on catching in Areas 4 and 6A instead of spreading its effort into Area 2.

Dissatisfaction with the allocation of ICE resulted in proceedings for judicial review⁶⁰ with the court holding that up until 1 October 1992, MAF/Fish was wrong to delay issuing permits to fishers and that when allocating ICE, each fisher had to be treated fairly and reasonably. The failure to issue permits prevented some fishers from fishing during periods when catch history was in fact being established. The MAF/Fish permit conditions to the effect that fishing in 1989-90 and later would not go to quota were misleading and resulted in unfairness. Ellis J. further stated that two things were obvious:

- MAF/Fish Regional Policies were conflicting; and
- At the critical time from 1989 to 1991, MAF/Fish had failed to manage the developing fishery in such a way that was fair to all fishers.

6.4.3.2 Amaltal

The information made available by MFish for the Amaltal Fishing Company Limited in the fisher file provided is an incomplete picture of the permitting for Amaltal.

Following release of the Draft Report, Simunovich supplied the Inquiry with four permits for Amaltal, one of which was an incomplete fishing permit for Amaltal. The Inquiry sought further information from MFish and a full permit document was received by the Inquiry on 20 May 2004, which had been obtained from Simunovich.

⁶⁰ Vautier Shelf Co. No. 14 Ltd & ors v Chief Executive of the Ministry of Fisheries & ors: (Unreported: Wellington High Court, CP 20/97: 24 July 2000)

From the permits supplied to the Inquiry, without further explanation, it appears that a commercial fishing permit may have been issued from 23 June 1989 to 30 September 1989, for four months prior to the end of the 1988/89 fishing year. However, the application for a commercial fishing permit was accompanied by payment for a special permit.⁶¹ The permit was signed by Ms Foster-Barham, Registrar of Fisheries in the Nelson office, who had been the Registrar of Fisheries in the Northern region's Tauranga office in 1988. A special permit was issued on 13 July 1989, valid until 31 May 1990, signed by the Central's Regional Manager. For reasons we have already noted in this report, we are not satisfied that the commercial permit actually issued. For one month out of the four, there was no special permitting which allowed the fisher to use 43 mm mesh.

The next permit appears to be a commercial fishing permit on 1 October 1989, valid to 30 September 1990, endorsed with "*scampi and prawn by bottom trawl*" but no conditions include the use of undersize mesh. The special permit to use under-sized mesh expired on 31 May 1990 and there was no special permit approval after May 1990, to enable the fisher to trawl for scampi from June 1990 to September 1990.

A further commercial fishing permit appears to be signed on 21 December 1989 to 30 September 1990 (which overlaps with the previous commercial permit) and this was conditioned for scampi, prawn and skipjack tuna in all New Zealand fisheries waters. There were no permit endorsements for the use of undersized mesh and there was also no accompanying special permit. Without permit approval, Amaltal could not bottom-trawl for scampi after May 1990.

A fourth commercial fishing permit dated 2 February 1990, valid to 30 September 1990 was also conditioned for bottom-trawl scampi, prawn and skipjack tuna and there are no conditions endorsed on the permit to allow the use of under-sized mesh. Again, there was an overlap in the months approved in the previous two commercial fishing permits and no special permit to approve trawling for scampi with undersized mesh from May 1990.

The computer print-out of 19 November 1990 records that Amaltal has a commercial permit granted for the year ended 30 September 1989, but not granted for years ending 30 September 1990, and 30 September 1991. Mr Arbuckle in his scampi evaluations, which were the basis of the advice to the regions, to MAF/Fish Head Office and to the Minister, did not include Amaltal as one of the fishers who had received permits prior to the moratorium coming into effect. However, Amaltal is referred to as one of the six, or alternatively seven, fishers who met the criteria for an exemption, namely that there was either an application for a s 63 or s 64 permit for the fishing years 1989/90 and/or various levels of commitment.

We specifically note that the evaluation of Mr Arbuckle of 26 November records that there are inconsistencies between the quota monitoring system-computer print-out and the regional records of s 63 permit holders. This has become apparent on analysis of the fisher files and the computer print-out available to the Inquiry. We are not satisfied that the commercial permits ever issued for Amaltal.

⁶¹ This mirrors Mr Okey's application fee, described below.

The Amaltal Fishing Company Limited had applied for special permits on 6 June and 16 July 1990 for scampi bottom trawl Areas 1-10. A s 63 fishing permit had also been applied for in 1989-90 and 1990-91.

In the Arbuckle memorandum it is recorded that Amaltal's s 63 permit had not been granted and that the s 64 application had not been processed. It was proposed that Amaltal should receive a s65 (2) exemption and be permitted for Areas 1-9.

A fishing permit dated 9 October 1991 was issued from the Nelson office with conditions attached that permitted bottom trawl for scampi in Areas 7, 5, 6, 3, 4, 8 and 9. Endorsements on the permit restricted scampi fishing to the vessel *Amaltal Voyager* with minimum mesh size of 43 mm for the purpose of taking scampi was imposed.

6.4.3.3 Mr Okey

The permit position of Mr Okey had not become an issue until the draft report was circulated and submissions were received from Simunovich. There had been no fisher file produced to the Inquiry and no party ever produced or referred to Mr Okey's permit. He is a fisher shown on the M/Fish's Quota Monitoring System computer print-out but no further specific reference was made to him.

Following receipt of submissions, Mr Okey's fisher file was finally received by the Inquiry on 20 May 2004. Of relevance, is the application for a commercial permit dated 4 May 1989, which notes that only a special permit fee was paid. The special permit appears to have been signed for scampi trawling using 43 mm mesh dated 29 May 1989, valid to 30 September 1989, limited to Areas 1, 2, 3, 4, 5, 7, 8 and 9. A signed commercial fishing permit for scampi dated 31 May 1989 to 30 September 1989 was signed by Ms Foster-Barham, the former Registrar from the Northern region's Tauranga office⁶².

There is also a letter dated 12 September 1989 enclosing a scampi special permit application for the year 1989/90 and a file note dated 14 April 1990 stating "*found in files on SFMO (previous) desk not ever issued*".

A commercial fishing permit dated 1 October 1989 valid to 30 September 1990 for bottom trawl scampi fishing is on the file but there is no attached condition for mesh. Further, there is no special permit issued for the same period. A letter dated 9 May 1990 records that permits were delayed for a study of effects and a substitute commercial fishing permit dated 18 May 1990 to 30 September 1990 does not contain approval for scampi fishing.

It is noted that on 24 May 1990, Mrs Okey noted that the method of bottom trawl was omitted on the replaced permit and the file is annotated "*ring back, should have received letter, no-one has scampi by bottom trawl at the moment. Investigation at moment.*"

⁶² She is the same Registrar who signed the commercial permit for Amaltal as noted above.

We note that the computer print-out has a permit granted to Mr/Ms Okey expiring on 30 September 1989. In his evaluation of 26 November, Mr Arbuckle noted that a permit for Okey was “*not granted for 1989/90 and 1990/91*”. From the Arbuckle evaluations, Okey was noted as “*no permit granted*”. He is recommended to receive an exemption for potting in QMA 1-9. In the 19 April 1991 decisions of the Director of Operations and the advice to the Minister of 22 April 1991 Mr Okey is not recorded as having received any exemption.

Although the commercial permit and special permit for four months from May 1989 to 30 September 1989 appear to be signed, in September 1989 a letter was sent requiring a special permit application from Mr Okey in order to complete the 1989/90 fishing permit application. We are not satisfied that the commercial and special permit for the last four months of the 1988/89 fishing year actually issued. We are satisfied however, that no permit, either commercial or special, was issued for the 1989/90 fishing year.

6.4.3.4 Sealord Products Limited

In January 1990 Sealord made an application for a fishing permit for scampi and prawns in Areas 7, 3A, 3B and 4. In May 1990 the company was advised that the application was currently with MAF/Fish but that MAF/Fish was studying the overall affects of targeting the fisheries and a decision would be made on the issue of the permit as soon as the results of the study were known.

In July 1990 Sealord received the “*Notice to fishers on scampi fishing in QMA 2, 7 and 8*”. This advised that existing special permit holders would be able to fish until the end of the current fishing year at which time all special permits would be revoked. Applications for further special permits for the remainder of the fishing year would be accepted but the notice advised that only a limited number of additional permits were likely to be issued.

Sealord advised the Nelson office in August 1990 that it had made an application for a special permit in January, and although it had pursued the matter on several occasions, there was still no permit for the 1989-90 fishing year. The letter also made an application for a special permit for the 1990-91 fishing year.

In August 1990, Sealord was in receipt of the letter from Mr Bishop, that advised that all applications in the Central region for the 1989-90 year would be treated as applications for special permits in the 1990-91 fishing year.

In February 1991, Sealord advised MAF/Fish that a fishing permit to catch scampi was granted to Fletcher Fishing Ltd in 1989-90 and that Sealord had purchased the company. The company’s name changed to Fyfeshire Fishing Ltd which continued to operate in the 1990-91 fishing year and Sealord’s letter requested that the permit to fish scampi in QMA 2-7 be allocated to Fyfeshire Fishing Limited because that company held a fishing permit in QMA 2 in the 1989-90 fishing year.

In April 1991 Sealord was advised that it was to receive an exemption to the s65 moratorium introduced on 1 October 1990. A fishing permit restricted to the *Fyfeshire* and for scampi bottom trawl areas 3, 4, 5, 6, 8 and 9, was issued on 4 June 1991, valid until 30 September 1991.

To fish effectively in these areas, Sealord would need to acquire a larger vessel, but the decision in October 1991 to establish low TACCs initially delayed negotiations for a vessel. By August/September 1992 Sealord had the opportunity to fish using the *NR Francis*, but initially MAF/Fish indicated it wanted to revoke Sealord's permit. Areas 1, 2, 4 and 6A were by October 1992 subject to individual catch limits based on previous catch history, which excluded Sealord from those areas. In December 1992 s 63 (13) was enacted, excluding Sealord from the remaining areas because it had not fished in the 1990-92 fishing years.

6.4.4 Southern Region

6.4.4.1 Goodship

Mr Goodship was an experienced fisherman and netmaker and had fished for flatfish and prawns in the English Channel. He also fished in New Zealand and was relieving Master on the *M V Tangaroa*. He came to New Zealand in 1983 and became interested in fishing for scampi.

He approached Mr Wilkinson, a senior Ministry official, with detailed proposals in 1988 and was enthusiastically received. He understood an "experimental permit" was needed to start fishing, and he applied in areas 1 to 9. MAF/Fish responded by letter dated 17 May 1988 saying his application for a Special Permit had been approved, but would not issue until he provided details of a permitted fishing vessel. Mr Goodship negotiated to purchase one boat, the *Lady Kay*, but his financiers required that he take a three month lease of it first to test the viability of the fishery and the purchase was lost.

Mr Goodship told the Inquiry he was advised that there would be no more permits for the Auckland area and that his best chance of obtaining a permit would be from the Nelson Office. In 1989 Mr Goodship moved to Christchurch and during 1989-90 he unsuccessfully attempted to enter into fishing partnerships. He also made a commitment valued at \$40,000 to the fishery by accumulating equipment and constructing nets and further negotiations to purchase a suitable vessel were entered into.

A lease and agreement for sale and purchase were prepared for signature, which depended on Mr Goodship obtaining the necessary permit to fish. Pranfield Holdings Limited was incorporated and the lease purchase and permits were to be taken in the name of the company. Relying on the letter of 17 May 1988, Mr Goodship applied for permits.

On 6 August 1990 he applied to MAF/Fish Nelson for a Special Permit to fish in areas 2, 7 and 8. After encountering difficulties with staff in Nelson, he moved south. And some time prior to 23 August 1990 made an application to MAF/Fish Dunedin, for a special permit to fish in areas 3 and 4. On 3 September 1990 he applied to the Dunedin Office for a special permit for area 5 as well, and also for a commercial permit for all three areas.

In the Dunedin office various officers handled the application and Mr Goodship made many telephone calls to ascertain progress. The lack of information continued until Mr Goodship was advised that the moratorium was in place.

He was then notified on 24 May 1991 that his applications had been refused. Mr Goodship had not been advised that his application was being processed despite his earlier attempts to

gain information on progress, and was finally informed that the applications did not meet the criteria of the Non-QMS Working Party. He responded through his solicitors, who wrote on 7 June 1991 protesting the decision and requesting a review under s63(11). On 3 August 1991 Mr Shallard wrote advising that the review upheld the decision not to grant a permit.

Mr Goodship made a complaint to the Ombudsman. The Ombudsman's Report in 1993 held that Mr Goodship's applications qualified under the Non QMS Working party criteria. This was on the basis that:

- Others who were granted permits had made no greater commitment than Goodship⁶³;
- In the absence of evidence that there were no valid grounds for distinguishing Goodship from 5 other successful permit holders, Goodship *"has been unjustly declined a permit"*⁶⁴;

The Ombudsman held that MAF/Fish had not fairly and reasonably applied its criteria for exemption from the moratorium and recommended financial compensation.

As a result of representations by the Ombudsman, there was a second review by MAF/Fish, which again upheld the decision not to grant the permit.

Mr Goodship issued judicial review proceedings in the High Court⁶⁵ which held that MAF/Fish was flawed in its decisions under s65(2) to deny an exemption. MAF/Fish had failed to take into account the significance of the value of the gear and Mr Goodship's efforts to enter the fishery culminating in the agreement to lease and buy a vessel. The Court however, declined to grant formal relief because of the lapse of time.⁶⁶

Mr Goodship appealed to the Court of Appeal, which gave judgment on 2 October 2003. The Court upheld his appeal as his permit was issued before the moratorium.

"... on a proper reading of s65, persons who held permits for the 1990-91 year issued before 1 October 1990 were not covered by the moratorium. This was because s65(1) imposed the condition prohibiting fishing only in respect of fishing permits "issued or renewed during that period" and "that period" was the period specified in the notice given by the Minister, i.e., in this case, the period commencing on 1 October 1990."

6.4.4.2 United Fisheries Limited

United Fisheries Limited (United) owns 26,500 tonnes of fin fish quota, and following the purchase of Otakou Fisheries Limited in February 2003 just under 8,000 tonnes of crayfish

⁶³ Para 18: Chief Ombudsman's report dated: 24 March 1993

⁶⁴ Para 22: *supra*

⁶⁵ Trevor Phillip Goodship, *Pranfield Holdings Limited v Ministry of Fisheries* (unreported High Court, Wellington CP 185/97, 9 May 2002, Ellis J)

⁶⁶ Trevor Phillip Goodship, *Pranfield Holdings Ltd v. Ministry of Fisheries* (Unreported: CA 236/02, 2 October 2003)

quota and two Foveaux Strait oyster licenses. It owns eleven mussel (oyster) farms in the Marlborough Sounds; three fishing vessels, a coolstorage facility with an 8,000 tonne capacity, its own refrigerated transport fleet and processing plants in Dunedin and Christchurch. It employs about 180 people.

United received a special permit from MAF/Fish South (Dunedin) on 23 December 1986 to catch scampi in Area 3 by using trawl 38 mm mesh size. On 27 July 1986 United Fisheries Limited wrote to MAF/Fish (Dunedin) referring to the limited fishing achieved, time spent, and expense. The letter asked for an extension of the permit for a year until 30 September 1988.

MAF/Fish did not issue the permit but instead transferred permission to trawl to United's existing commercial permit.

United made applications in September 1987 to fish scampi for the period ending 30 September 1988 for Area 3 for a number of vessels. These were granted in March 1988 from the Christchurch office.

United maintains that applications for scampi permits were made for the years 1988-89 and 1989-90 but was unable to produce copies of the applications. MFish's response was that it had no record of any such applications and therefore denied that there were applications for those years.

The managing director of United was advised orally by MAF/Fish that United's applications were refused on the grounds that they had not fished.

United maintained that it had also made an application for the 1990-91 year, which was declined in May 1991 as not meeting the criteria for exemption from the moratorium.

The approach of MAF/Fish to United's assertions about the years in which permits had been filed, was to say that as it had no record of such application, the applications could not have been made. Before the Inquiry hearing began and during discovery in the litigation between United and MFish, a reference and further searches disclosed a signed application by United for a commercial fishing permit for scampi, jack-knife prawns and royal red prawns for the "South East Coast" and other areas dated 27 August 1990.

In its evaluation of 26 November 1990 of applications for permits to fish scampi, prepared by Mr Arbuckle, reference is made to United and a s 64 application lodged on 31 August 1990, described as "*not being processed*".

MFish has submitted that although MAF/Fish did consider an application by United for the 1990-91 fishing year, it was declined in any event in April 1991 because United had not demonstrated a commitment to scampi fishing:

"Whether or not the application considered was a s63 (fishing permit) application or a s64 (special permit) application does not matter in any event as the application was considered, and declined on its merits: that is, in terms of MAF's assessment that United had not demonstrated the requisite commitment to scampi fishing."

In late March or early April 1992, United made an application for a special permit for scampi for areas 3, 4, 5 & 6 and on 15 May 1992 MAF/Fish wrote declining the application.

There were then discussions and correspondence with an application for a special permit being declined on section 63 (13) and other grounds by letters dated 6 and 13 January and 26 February 1993.

On 13 October 1993, United sought the inclusion of scampi fishing by trawl on their permit and its letter was treated as an application for review. Following a meeting on 22 November 1993, MAF/Fish wrote that it had no record of any application for the 1988-89, 1989-90 or 1990-91 years and MAF/Fish denied there was any basis for a claim that United had been unfairly denied a permit.

In summary:

- Similar to Goodship, there was delay in dealing with United's application or applications filed in late August 1990.
- There was a lack of communication by MAF/Fish with United, in particular over the criteria which United failed to satisfy.
- MAF/Fish relied on the fact that United had not filed a 1990-91 application but when it was found, MAF/Fish changed its reason for declining a permit to a "*lack of commitment*" by United.
- MAF/Fish gave no consideration at any time to the possibility that United may have made applications in 1988, and 1989-90 based on its own inability to locate the permit applications in its records. Given MAF/Fish's similar denials that an application was filed by United in 1990-91, when a search of the documents revealed one copy of one application by United for a commercial permit and a reference to an application for a special permit in the Arbuckle memorandum. The first application was not discovered until 2003. We are led to conclude that the state of MAF/Fish's records were in disarray and haphazard.
- Given the above, there is a strong possibility that United's applications were made in 1988-89 and 1989-90.

6.4.4.3 T Roderique

Mr T Roderique had been a fisherman for 48 years, trading as T I & W. F. Roderique of Invercargill.

It appears that the Roderiques were issued commercial permits in the 1989-90 fishing year to fish for scampi by potting and trawl methods for Area 5.

Mr Roderique also applied for a permit in September 1991 and this was granted on 21 October 1991.

From the documents supplied by MFish, Mr Roderique was issued a commercial permit, which permitted scampi fishing in Area 5 by the method of “*pots (unspecified)*” for the period expiring 30 September 1992.

Mr Roderique had equipped a 60 foot steel boat called the *Charles Sydney* for fishing scampi. He also imported pots from Australia for the purpose of scampi fishing and spent a considerable amount of time and money obtaining a New Zealand survey for the boat and altering haulers to suit. Mr Roderique was prepared to fish in the 1992 season and maintains that the permit was renewed.

On 7 April 1993, three months after being granted a permit for the second year in a row, he received a letter stating that his permit had been revoked effective from that date. In this correspondence Mr Roderique claimed that there was no consultation prior to the revocation. Because of a lack of funds and his earlier experience with the rock lobster fishery, no objection to the revocation was made.

Mr Roderique considered that he was treated unfairly as it took considerable time and effort to adapt to the scampi fishery. Revocation of his permit without consultation caused financial disadvantage. As a result he lost the funds spent on upgrading his boat, pots and revenue from the scampi fishery.

At the Inquiry hearing, reference was made to Mr Roderique’s case, as it appeared that he, along with Simunovich and others in the Northern registry, received a commercial scampi permit in the 1989-90 year.

It transpired that, unlike the Dunedin office, the Invercargill office was issuing commercial permits for scampi fishing, without any consideration of the undersize mesh problem in the Regulations. The “*potting*” method did not require any special conditions for permitting, and subject to the regions requirements, a permit could be issued under s 63 to allow scampi fishing by potting. For trawling using undersize mesh, however, a specific condition was required to obviate the requirements of the prohibition⁶⁷ and it appeared that Invercargill issued a commercial permit without regard to this problem.

It appeared also that the Invercargill registrar considered that he could issue commercial permits to the local fishermen and was unaware of any policy directive from Head Office that there had been a change in permitting in the scampi fishery for the 1989-90 year. This contrasts with the letter from Mr Wilkinson in which he had been advised that there had been a change in permitting policy, such that commercial permits could now be issued for the 1989-90 year.

Mr Roderique did not appear before the Inquiry and the information in relation to his circumstances has been obtained from MFish’s “*fisher file*” for Mr Roderique and from the former Invercargill Registrar of Fisheries.

⁶⁷ The Fisheries (Commercial Fishing) Regulations 1986 Regulation 47(1)(d)

6.4.4.4 Mr Tau and Mr Pohio

Mr H R Tau was the first claimant on behalf of Ngai Tahu before the Waitangi Tribunal in respect of claim “Wai 27”. During the Tribunal hearings, a witness for MAF/Fish had given evidence that any individual Maori could apply for authority to obtain an ITQ and go fishing, as Māori had the same rights as any New Zealander.

Mr Pohio, a fisherman in the Southern region, made an application for a non-QMS or special permit for scampi, black coral and gold coral for Area 4. The application form made available to the Inquiry is not signed or dated by Mr Pohio but is date stamped as being received by MAF/Fish on 4 February 1991.

Mr Pohio maintained he filed the application in February 1990 not February 1991, because he was fishing in the Auckland Islands throughout January and February 1991. He believed the reason for the delay in processing his application was that it was “*held on file*” and was only answered after the moratorium was put in place. Mr Pohio estimated that he went to MAF/Fish’s Office about six times.

MFish gave evidence that applications were date stamped on the date of receipt and, therefore, the application was received on 4 February 1991.

On 5 March 1991 MAF/Fish wrote to Mr Pohio advising that scampi was under a moratorium and therefore “*MAF is unable to issue you with a permit at this time*”. The letter also addressed black and gold corals.

On 24 May 1991 MAF/Fish wrote to Mr Pohio advising that there had been a review of permit holders and applicants and of the criteria used to decide who should be granted permits. The letter then reads:

“MAF Fisheries South wishes to advise that you do not meet the criteria and therefore will not be granted a commercial fishing permit to enter the scampi fishery at this time. MAF Fisheries is currently developing a management plan for the scampi fishery and until this is complete, no special permits will be issued.”

Mr Pohio regarded his application as being “*turned down*.” Mr Pohio did not take the matter further because he perceived it would involve litigation and he did not have the resources.

Mr Tau and Mr Pohio then sought assistance and guidance from Mr Coakley of MAF/Fish who advised that they had to apply for a special permit, which was restricted to research.

Mr Tau considered they were entitled to a commercial permit. After some discussions with MAF/Fish where the necessity to apply for a special permit was reiterated Tau and Mr Pohio accepted a special permit. Mr Tau and Mr Pohio requested MAF/Fish to note on the file their view that they were entitled to a commercial permit, because Area 4 was not commercially fished.

Mr Tau and Mr Pohio applied on 8 November 1991 for a special permit for scampi, scarlet prawns, king prawns and tiger prawns. The letter forwarding the application is date stamped

22 November 1991. Mr Tau and Mr Pohio said the application was to “*test the integrity and credibility of the Ministry*”. They considered that if they could not have a commercial permit for the South, “*then no-one else could have one.*”

The documents supplied to the Inquiry include a copy of an application dated 18 November 1991 for scampi, scarlet prawns, king prawns and tiger prawns. The copy document is not signed by Mr Tau or Mr Pohio.

On 13 December 1991 Mr Tau wrote to MAF/Fish South (Dunedin) enclosing a cheque which was said to have been omitted from an “*application in December*”. The documents before the Inquiry do not otherwise refer to a December application.

On 16 December 1991 MAF/Fish wrote, referring to his application to take scampi, scarlet prawns, king prawns and tiger prawns. The letter stated “*If you wish to continue with your application a detailed research proposal must be supplied ...*” and concluded:

“Please note that MAF Fisheries is currently producing a Management Plan in consultation with the Fishing Industry and Greenpeace, which will determine the future management of the scampi fishery, and until such time as this has been developed it is MAF Fisheries’ policy not to issue commercial or special permits for scampi.”

Mr Tau and Mr Pohio had discussions with Greenpeace. Their attitude was:

“As the Ministry has said, no permits would be allowed either special or current until the Management Plan had been produced, the matter went to rest and we relied on the Ministry to advise of the requirements of the Management Plan.”

They considered that their application was:

- at some stage, without their authority “discontinued”;
- South Island fishers were disregarded;
- the process was not well handled;
- the principles of the Treaty of Waitangi were completely ignored; and
- following the letter of 16 December 1991, their application was made subject to the scampi management plan, MAF/Fish had an obligation to advise them of the plan and MAF/Fish failed to do so. Mr Tau says that he chased up Mrs Tierney with no more than two telephone calls about the management plan.

MFish submitted:

“Both Mr Pohio’s permit application of February 1991 and Messrs Tau and Pohio’s special permit application of November 1991 were declined by MAF, with written notification of those decisions given to the applicants They were not “unilaterally discontinued” without notification to the applicants as Mr Hall submits.”

and

“The applications from Mr Pohio and then from Messrs Tau and Pohio were dealt with appropriately (and consistently with other applications), in accordance with law and policy in place at the time of the applications.”

This case demonstrates a lack of communication by MAF/Fish about the criteria for permit issue, and the difficulty in obtaining a cogent MAF/Fish response about its future management of the scampi fishery. The dismissive approach by MAF/Fish resulted in a fisher being excluded from a fishery without adequate reasons or explanation.

6.4.5 Chatham Islanders

6.4.5.1 Tuck – Lanauze

Mr Tuck currently of Auckland marine engineer and his former wife, Ms Lanauze appeared before the Inquiry.

Mr Tuck has been involved in the New Zealand fishing industry for approximately forty years and had qualified as a marine biologist. From 1992 he was employed by Simunovich as a marine engineer and ships husband, leaving their employment in 1987. At that time he also owned his own fishing vessel, “*Bengal Bank*” and between 1993 and 1997 he built for himself a twenty-seven metre fishing/research vessel *Chatham Clipper*.

Mr Tuck and Ms Lanauze together conducted a business of boat building and fishing and in 1986-87 held a scampi permit for all areas in New Zealand, issued from Whangarei. At that time they were operating a trawler out of Auckland. As events transpired, they did not fish for scampi in the 1986-87 year. They applied for a scampi permit for the 1987-88 year but the permit was not “*forthcoming*” or it was “*revoked*.” Mr Tuck and Ms Lanauze maintain they have made applications for scampi every year since 1987.

In the 1987-88 fishing year Mr Tuck and Ms Lanauze returned to the Chatham Islands and applied for a scampi permit for area 4 for the 1988-89 fishing year to the Dunedin registry office. They received no answer at that time despite Mr Tuck making several inquiries, and they perceived they were being disregarded.

Considerable effort was made to obtain a scampi permit because they were aware that scampi was there on their doorstep. They understood how valuable it was to the Chathams. Ms Lanauze considered that she was ignored by MAF/Fish, and when an answer finally arrived in 1992, it was too late to do anything.

Following the oral evidence, MFish discovered additional documents relating to Mr Tuck and Ms Lanauze. Ms Lanauze filed a further submission dated 9 December 2003. The additional documents are of assistance in clarifying the position in relation to applications by Mr Tuck.

It appears that on 6 April 1990 Mr Tuck wrote to MAF/Fish South stating that he wished to apply for a special fishing permit to trawl for scampi and prawns in Areas 3 and 4. Ms

Lanauze says the letter was sent to Christchurch as directed in the Guidelines For Special Fishing Permits. A copy of the guidelines date stamped as having been received in the Chatham Islands on 7 December 1989 was produced.

In his letter, Mr Tuck detailed his experience and the method he proposed to use and advised that he hoped to begin trial fishing in early Spring 1990. The letter is date stamped as received by MAF/Fish on 12 April 1990.

The letter of 6 April 1990 complies with the Guidelines and there was no requirement in the Guidelines for any application form to be completed.

An internal Ministry memorandum addressed to the FMO, Dunedin and date stamped 12 July 1990 refers to *“Prawn/scampi Application, QMAs 3 and 4 Digby Tuck”*. The memorandum appears to treat the letter of 6 April 1990 from Mr Tuck as a valid application and highlights the stark differences in approach between Auckland and Dunedin when the MAF/Fish official says:

“Just imagine - if he had applied through the Auckland Office – he could probably be fishing now.”

The above passage is shockingly frank. Even MAF/Fish personnel perceived that between May and July 1990 Auckland would have issued a commercial permit, compared to the little or no action by MAF/Fish South. The impact on the fisher of this divergent approach is critical.

The letter of 6 April 1990 also appears to have been treated as a valid application in a Memorandum dated 23 June 1991 from Dr Knedler to Mr Brierley which refers to 26 applicants and lists”...

“... Tuck D SCI 34/PRA34 12/04/90”.

Similarly a letter dated 2 August 1991 refers to Mr Tuck having made an application for a special permit to fish scampi and prawns for areas 3 and 4. This application was received at the Dunedin Office on 20.9.90.

No doubt prompted by the memorandum of 12 July 1990, MAF/Fish wrote on 17 July 1990 to Mr Tuck stating that to fish for scampi and prawns *“you are required to fill out both fishing permit and special permit application forms”*. The letter said that the forms were available from your local Fishery Office. Ms Lanauze submitted that the forms were not available.

On 19 September 1990, the Dunedin office wrote to Mr Tuck referring to *“your application for a permit to take scampi and prawns.”* The letter then advised that *“you must apply for a Special Permit if you want to fish for scampi and prawns using an undersize mesh before your special permit can be considered”*. A non-QMS and Special Permit Form was said to be enclosed. The letter also specified that information was required in respect of fishing gear, areas, maps and species of prawn.

Mr Tuck responded by letter 12 October 1990 pointing out the form was not enclosed and that as it was several months since he applied, the matter was urgent.

On 12 December 1990, the Dunedin office sent a fax to the Fishery Officer on the Chatham Islands attaching a Non-QMS and Special Permit form and asking that it be passed to Mr Tuck. The fax notes “*he applied for scampi and prawn*”.

Ms Lanauze told the Inquiry that around 1991, Mr Tuck telephoned the Auckland office to ask what was happening and why he had not had an answer. There was a big argument and he was basically told to “*go away and drop dead*”.

On 24 May 1991 the Dunedin office wrote to Mr Tuck advising him of the scampi moratorium, the review, and the criteria for review. As Mr Tuck did not meet the criteria, he would not be granted a commercial fishing permit. The letter stated that MAF/Fish was currently developing a management plan for the Scampi fishery and, until that was complete, no special permits would be issued. The letter also referred to “*prawns*” and seemed to accept the application made by Mr Tuck as a valid application for a commercial permit.

Prior to the letter of 24 May 1991 Mr Tuck and Ms Lanauze had no knowledge of the moratorium, the review, or the criteria for the review.

On 11 June 1991, Mr Tuck wrote to the Dunedin office stating that he fulfilled all criteria and that it was MAF/Fish which had caused delays resulting in the situation that had arisen. He referred to discussions in 1989-90 with Mr Coakley of MAF/Fish South and the Fishery Officer on the Chathams about prawn trawlers from New Zealand. Mr Tuck set out his experience and other matters and said he was probably the only person who should rightfully hold a scampi permit for the Chathams.

On 27 June 1991 the Dunedin office wrote to Mr Tuck acknowledging its delays. The letter advised that as Mr Tuck was of the view that he complied with all criteria, his letter had been forwarded to Mr Russell Burnard.

On 17 July 1991, Mr Burnard wrote to Mr Tuck stating:

“It is MAF Fisheries belief that your commitment to scampi fishing involved applying for a permit and arranging adequate quota to cover probable bycatch. This is not sufficient to satisfy me that an exemption to the moratorium should be granted to you. Accordingly I am not prepared to reverse MAF Fisheries South’s decision to decline your permit application.”

Ms Lanauze submitted to the Inquiry in respect of the letter.

“If he (Mr Burnard) was suggesting that our actions were insufficient to satisfy criterion (iii) mentioned earlier, there was no possibility for us to satisfy this criterion retrospectively. We were not informed of the criteria until 7 months after the cut off date for the assessment of our commitment to scampi fishing. We were not given the opportunity to prove a demonstrated commitment to scampi fishing over and above our application and arrangement of quota to cover bycatch. There was nothing else we could have done to commit to scampi fishing, unlike other fishers who would have had to obtain vessels suitable for scampi fishing. We already owned and operated a deep sea registered trawler that was wet fishing area 4 at the Chathams. Upon receiving a scampi permit, all we

would have had to do was change our nets to target scampi! We were fully financially committed to fishing in that area. Scampi was a bycatch to our wet fishing. In our view we were unfairly excluded.”

Before the additional documents were discovered from MFish, MFish had alleged that the report from Dr Knedler did not refer to Mr Tuck. The subsequently discovered documents reveals that the report does include Mr Tuck, who is also listed as No. 21 in the letter to Head Office from the RFO in Dunedin.

- It is evident that the difference between permitting from North (Auckland office) and South (Dunedin office) was known to personnel within MAF/Fish. This case also illustrates the difference between the advice given in the Chatham Islands compared to the requirements of the Dunedin office, both offices in the Southern region of MAF/Fish. It also demonstrates non-disclosure of the moratorium to Tuck/Lanauze, non-disclosure of criteria for exemption, questionable application of criteria for exemption, incompetence in not replying to correspondence in a reasonable time, and not forwarding forms.
- It was known there was a difference in permitting between North (Auckland) and South (Dunedin).

6.4.5.2 Clarke – Yellow Fin

Mr Clarke has been a resident of the Chatham Islands since 1971. He has interests in Yellow Fin Holdings Limited and Chatham Islands Seafoods Limited. He has engaged in diving, cray potting, trawling and long lining. His family has a fish factory and employs about thirty people.

Mr Clarke outlined the difficulties of the Chatham Islanders generally and fishermen in particular in conducting a business from the Chathams and in obtaining fishing rights.

Companies in which he has an interest apply annually for fishing permits.

In about 1988-89 an early participant in the scampi industry informed him that the scampi fishery was looking well established and that his companies were looking at the Chathams, inviting Mr Clarke to get involved.

In 1990 there were further discussions involving scampi and he applied for a scampi permit.

Mr Clarke applied through the Fishery Officer on the Chathams who was very helpful and was advised to write a very comprehensive report, which he did.

“The basis of my report to apply for a scampi permit was that I had a factory and that I had a 72 foot trawler which could definitely fish the grounds and bring fresh scampi into the factory where it would be processed every two days.

So I put forward a catch plan which followed up how it would help my factory and become viable to my factory and indirectly to the Chathams.”

Mr Clarke advised he was based in the Chathams, had all of the equipment to catch the fish correctly and that the fishing would be “*inshore*” (ie out to 40 miles).

Within a short period MAF/Fish responded declining the application. Mr Clarke did not respond but considers he was probably also advised that he was declined because of the moratorium.

The final submissions of MFish refer to Mr Clarke’s evidence that he applied, was declined because of a moratorium and did not follow it up. They say MFish has no record of the application and that it is not specified in Arbuckle’s “*evaluation*”.

It appears that an application was made; MAF/Fish was helpful; there was a reasonably timely declining and Mr Clarke did not follow it up.

6.4.5.3 Muirson

Mr Muirson is a director and shareholder of Muirson Fisheries. He is resident on the Chathams and has been fishing in the Chathams since 1966 for paua, crayfish, wet fish and trawling.

Mr Muirson gave evidence of the difficulties Chatham Islands fishers experience in communicating and dealing with the mainland generally and MAF/Fish in particular. He claimed that he first applied for a scampi permit in October 1989 for the 1990-91 fishing year. The Minister of Fisheries had visited the Chatham Islands and discussed scampi with him. The Minister had indicated he would favour Chatham Island fishermen fishing the Chathams for scampi.

Mr Muirson completed a permit application form from the MAF/Fish Office in the Chathams and sent it with a covering letter to MAF/Fish South (Christchurch office). He produced to the Inquiry his copy of his covering letter, which read:

“On a recent visit to the Chatham Is the Minister of Fisheries Mr Kidd⁶⁸ said he would favour Chatham Is fisherman getting scampi licences for the Chathams fishery we have a vessel and the bycatch to operate and would like to have a go. Could you please pass on this application for the ministers consideration.”

He told the Inquiry that he received a letter from MAF/Fish declining his application. MFish has no record of Mr Muirson’s application or his covering letter.

Mr Muirson became aware that the TACC for the Chatham Islands area was raised from 25 tonnes to 65 tonnes, which combined with other factors, caused him to make a further application for a scampi permit. He completed an application dated 1 February 1992 for a

⁶⁸ We note that Mr Kidd became Minister of Fisheries in November 1990 which suggests Mr Muirson’s recollection of an application in October 1989 about the time of that visit appears to be mistaken.

commercial to fish scampi in Area 4. The application was date stamped 14 February 1992 by MAF/Fish Christchurch.

On 21 February 1992 the SFMO Christchurch recommended that the Deputy Group Director decline the application. MAF/Fish documents include a Background Information Sheet dated 23 April 1992 in which the Regional Manager recommends “*decline (because of Regional Policy)*”. On 4 May 1992 the Deputy Group Director approved the recommendation of the Senior Fisheries Monitoring Office to decline the application.

Mr Muirson was unaware of any regional policy as no grounds or reasons were ever specified by the Christchurch office when it wrote to Mr Muirson on 11 May 1992, advising that his had been declined by Dr Allen. He was advised of a right of review.

MAF/Fish’s letter of 11 May 1992 crossed with a letter of the same date from Mr Muirson to the Christchurch stated his case that Chatham boats should be fishing scampi. Mr Muirson also spoke to a Christchurch MAF/Fish officer, Mr Ludecke who advised him it was virtually “*a closed shop.*”

Mr Muirson exercised his right of review by application which MAF/Fish received on 3 June 1992.

On 28 September 1992, Mr Shallard declined Mr Muirson’s review application. He said:

“My decision is that the original decision should stand because I am advised that existing permit holders have sufficient capacity to take the catch limit set. Given our responsibilities for conserving and managing fisheries, I agree with the Deputy Group Director that it would not be good management practice to allow an increase in (competitive) effort for this limited resource.”

Mr Muirson was advised by MAF/Fish South (Christchurch) on 2 October 1992:

“The Group Director of MAF Fisheries has conducted a review of the decision not to approve your application for a fishing permit for Scampi 4.

Unfortunately the result of this review was to uphold the original decision not to issue the fishing permit for Scampi 4.

Please contact me if you require further information concerning this issue.”

Apart from the bald assertion in MAF/Fish’s letter of 2 October, Mr Muirson was never advised of the grounds or reasons for the decision of the Director General. He also told the Inquiry that there was no communication from MAF/Fish in relation to his review from the time he filed the review to the time he received the decision.

Mr Muirson was critical of the Director-General’s reasoning as the permit holders in the previous year had not caught half of the TAC and that was prior to the quota being increased to 240 tonnes.

When Mr Muirson was in Auckland in December 1992, he visited the Fisheries Auckland Office and made a further application. He heard nothing further from MAF/Fish in respect of that application and MAF/Fish says it has no record of it.

MFish's Response to Mr Muirson's evidence is the following:

- It denies the existence of the first application because they have no record of it.
- It believes there is only one application by Mr Muirson dated 1 February 1992.
- It supports its review procedure, but as Mr Muirson did not know of the hearing or have an opportunity to address any matter after he had made his application, no inadequacies could be raised in respect of the application.
- It claims that the undated letter said by Mr Muirson to have been sent in or about October/November 1989 was received on or about 3 June 1992. We find this hard to accept as the reference in C Ludecke's memo dated 4 June 1992, to a letter of 3 June 1992, is a reference to Mr Muirson's letter seeking a review. The letter refers to a MAF/Fish letter dated 11 May 1992 declining the application. Therefore it could not be the earlier undated letter. However as noted above it is not likely that the letter was sent before 1991.
- Finally, it claims that Mr Muirson is mistaken as to the time of his application. This assertion is made on the basis that *"the Ministry has no other record of an application to MAF from this company and the documentary evidence shows Mr Muirson's mistaken in his recollection as to the time of his application."*

In summary, the delays are long, and the documentary record-keeping of MFish, being the only basis upon which MFish is denying that Mr Muirson made his applications (apart from one 1 February 1992) is not robust.

There is a stark difference in treatment in the review process. Mr Muirson's review was considered with no reasons given but the review into Simunovich's application has Mr Major completing a long decision with reasons which were communicated, together with a pre-review analysis by Mr Burnard, dealing with matters in detail and a hearing at which Simunovich attended to give submissions.

The procedure for the review is questionable and the tone of the review is dismissive. It lacks reasoning and analysis. MAF/Fish failed to communicate with Mr Muirson, neither giving him an opportunity to attend the review or giving him the benefit of a reasoned analysis as to why his review was unsuccessful.

6.4.6 Conclusion – Treatment of Fishers

Fishers received disparate and unevenhanded treatment by MAF/Fish which either ignored or mislaid applications or failed to communicate in a timely and effective way.

Fishers were subject to delay in the granting of permits and did not receive information on changes in policy, resulting in some fishers being excluded entirely from the scampi fishery with others being unable to establish catch history in the relevant years, affecting the later allocations of ICE.

The record keeping of MAF/Fish was haphazard and in disarray, leading MAF/Fish to deny the existence of permit applications until discovered years later.

There appeared to be no consistent and transparent process applied by MAF/Fish in s63(11) and similar reviews.

6.4.7 Summary of Permitting Among the Regions 1986 to 1992

The following table illustrates the pattern of permitting among the Northern, Central and Southern regions for the years 1986 through to 1992. Following the moratorium in October 1990, criteria were subsequently developed on the basis of permits issued for the 1989-90 and 1990-91 years.

Thus, if fishers, who had previously been granted scampi permits for the years 1986 to 1988 but had not been granted permits or permits had not been processed in 1989 to 1990, they did not meet the criteria subsequently developed in Head Office during the 1990-91 fishing year.

As described in the history of the policy,⁶⁹ those fishers that received commercial permits prior to 1990 were in an advantageous position, as they met the principal criteria formulated by Head Office in late 1990 and early 1991.

The table also illustrates the difference in approach by the regions, in issuing different permit types around the regions, namely commercial permits in Auckland and Invercargill, but special permits in all the other regions.

⁶⁹ See section : Analysis of Permit Policy and Application

	NORTHERN	CENTRAL	SOUTHERN
	1986		
COMMERCIAL			
SPECIAL	Tuck Lanauze. Scampi all areas	Special permits	Special permits
	1987-88		
COMMERCIAL		No permits issued	United First commercial scampi permit.
SPECIAL	Simunovich 6 Special permits Kiwi Prawns 1 Special permit.	No permits issued	
Not issued	Tuck Lanauze Jose Special permit approved but not notified to fisher		
	1988-89		
COMMERCIAL	Simunovich scampi trawl Areas 1-10 (excluding Area 7) Identical permit issued one month later. Simunovich Area 7 endorsed on commercial permit Simunovich Further commercial permit issued to for Areas 1-10		
SPECIAL	Simunovich 6 Special permits Simunovich 6 Special permits issued later to include requirement to notify Central region of fishing. Simunovich 2 further special permits Simunovich 2 further special permits valid to February 1990		
Disputed			Goodship Tuck Lanauze
Denied			United ?
1989-90			
COMMERCIAL	Simunovich Areas 1-10 Barine Areas 1-10 Howell Area 1 & 9		Roderique potting and trawl Area 5.
SPECIAL	Howell all areas Simunovich 6 permits areas 1-10. Barine Areas 1-10	Fletcher Fishing All areas	
Not issued		Sealord Areas 3,4 and 7 Vautier (B-Line) 2 and 1 or 3 Vautier Areas 2, 7 and 8 and 1, 3, 4 and 5	
Disputed			United?

1990-91

COMMERCIAL	Simunovich	Sealord areas 3, 4, 5, 6, 8 and 9	United Fisheries Christchurch office
	Sanford	Issued 4 June 1991, valid until 30 September 1991	Roderique Continuation of potting - withdrawal of trawling.
	Barine		
	Montgomery		
Not issued		Sealord Areas 7, 3A, 3B and 4.	
Disputed			Clarke Muirson
Denied			Lanauze Tuck Dunedin office Goodship Applied September 1990 Dunedin office. Denied May 1991
SPECIAL	Simunovich	Vautier application March 1990.	Amaltal areas 1, 2, 3, 7 and 8.
	Sanford	Issued May 1991.	
	Barine		
			Roderique
Not issued			
Disputed			Pohio
Denied			United application 31 August 1990 Dunedin. Declined May 1991. Goodship 6 August 1990 Nelson office August 1990 Dunedin office September 1990 Dunedin office Denied May 1991.

The table is a summary of the detail which appears below, being the description of permits issued for each of the respective fishing years.

6.4.8 Permits Issued in Each Fishing Year

6.4.8.1 Permits Issued in 1987-88 Fishing Year

Simunovich

Special permits under s 64 of the Fisheries Act 1983 were issued to Simunovich on 5 August 1987 for the *Donna Maria* and the *Brac*. These were valid until 6 August 1988 and were

limited to 30 tonnes of prawn killers and deep-water prawns. A 43 mm mesh size limit was imposed.

Further special permits under s 64 were issued to Simunovich on 21 December 1987 for the *Alliance*, *Ambition*, *Achiever* and *Advancer*. These were valid until 31 December 1988 and were limited to 50 tonnes. A 43 mm mesh size limit was imposed. These permits also required the permit holder to obtain ITQ to cover bycatch.

The special permits granted to the six vessels allowed for fishing in any area of the exclusive economic zone and were for the purpose of investigative fishing. The permits were endorsed with the condition that:

The taking of any fish while fishing under this permit shall not entitle the holder to any advantage or privilege with respect to any of the species taken."

Applications for a commercial fishing permit to fish scampi in all areas by trawling were made by on 3 September 1987 for the *Brac*, *Lochlein*, *Ana* and *Donna Maria*. Further applications for commercial fishing permits were made on 30 November 1987 for scampi fishing in Area One for the *Advancer* and the *Achiever*. On 10 February 1988, a commercial fishing permit was issued to Simunovich for ITQ species. It did not have a condition for scampi. This permit was valid until 30 September 1988. Certificates of Registry were issued on the same date for the *Advancer*, *Alliance*, *Ambition*, and *Achiever*.

Other Fishers

MAF/Fish Northern also issued a special permit to Kiwi Prawns for the *Trinity I* for the 1987-88 fishing year. This was issued on 8 February 1988. Kiwi Prawns were permitted to fish for scampi on the same conditions as applied to the Simunovich permits of 21 December.

Mr Jose, who had sought a special permit from the Northern Office (Whangarei) in March 1987 received no reply.

In the Southern region, in July 1987 United Fisheries Limited sought an extension to 30 September 1988 of its special permit dated 23 December 1986. This was not granted but in a letter dated 15 September 1987 United was advised that the special permit "*will be replaced by the addition of method of trawling for species scampi in Area 3 on your normal [commercial] fishing permit*". This was finally issued on 29 March 1988.

6.4.8.2 Permits Issued in 1988-89 Fishing Year

Simunovich

On 27 September 1988 Simunovich was issued with special permits for scampi and deepwater prawns for the *Bounty*, *Brac*, *St Peter*, *Waiwera*, *San Alexandra*, and *Donna Maria*. All were valid to July 1989; limited to 43 mm net size; required ITQ for bycatch and an observer to be on board.

On 7 October 1988 Simunovich was issued special permits for scampi and deepwater prawns for the *Brac*, *San Alexandra*, *Donna Maria*, *St Peter*, *Waiwera*, *Advancer* and *Anna*.

The difference between the 27 September special permits and those of 7 October is that the latter permits require the name of the fishing vessel, date and duration of fishing and approximate location to be reported to the Central Management Area. This condition was requested by the RFMO Central on 19 September 1989.

On 12 January 1989 a commercial fishing permit was issued to Simunovich, valid to 30 September 1989 by the Auckland Registry. As a condition, it allowed bottom trawl of Areas 1-10 (excluding 7) for scampi. Certificates of Registry for the *Christmas Creek* and the *Red Bluff* were issued on 1 February 1989.

On 2 February 1989 the Auckland Registry issued another commercial fishing permit. This permit was valid to 30 September 1989 and enabled scampi fishing by bottom trawl in Areas 1-10 excluding Area 7. The permit is not described as amending or cancelling the earlier permit. Special permits were then issued on 20 February 1989 for the *Red Bluff* and *Christmas Creek*. These were valid until July 1989 and limited to 43 mm net size. The requirement to notify the Central region is absent. These permits required quota for bycatch, entitled fishing in any area of the EEZ where a current fishing permit was held. The permits state that taking of fish does not entitle the permit holder to any advantage or privilege with respect to any species taken.

On 15 March Simunovich requested that its commercial fishing permit be endorsed to enable scampi fishing in Area 7. The letter notes that Mr Wilkinson had understood

“...from Arthur that special permit conditions for the taking of scampi in Area 7 had not been approved by CFMA at the time of the issue of the permit but that this issue has now been resolved in favour of approving scampi fishing in Area 7.

The endorsement to the permit was granted on 23 March 1989.

On 22 June 1989, a commercial fishing permit was issued to Simunovich, valid until 30 September 1989. It allowed bottom trawl for scampi in Areas 1-10. SPECIAL PERMITS to fish scampi and deepwater prawns were issued on 13 July 1989 for the *Red Bluff* and the *Christmas Creek*. These were valid until 20 February 1990 and had identical conditions to those of 20 February 1989.

Other Fishers

United Fisheries sought a scampi permit from Southern region (Christchurch) office and was declined.

6.4.8.3 Permits Issued in the 1989-90 Year

Simunovich

Simunovich was issued with a commercial fishing permit on 1 October 1989 valid until 30 September 1990. It was conditioned for bottom trawl for Scampi in Areas 1-10. A special permit for the *Enemelay* to fish scampi and deepwater prawns, valid until 20 February 1990 is issued on 24 November 1989. Conditions as to net size and advantage remain the same. Further special permits are issued for the *Christmas Creek*, *Red Bluff*, and the *Enemelay*, valid until 30 September 1990 are issued on 23 February 1990. Special permits for the *Albatross II* and the *Mutual Enterprise* are issued on 29 March 1990. These are valid until 20 February 1991.⁷⁰

On 11 September 1990 Simunovich is issued a commercial fishing permit valid until 30 September 1990. It is for bottom trawl scampi Areas 1-10 and is issued in substitution for all previous permits for the 1989-90 fishing year.

Other Fishers

On 19 September 1989 Mr Penwarden for Barine was issued with a special permit for fishing from the *Bilyara*. The permit was valid until 15 June 1990 and is limited to 43 mm net size. A commercial fishing permit was issued on 1 October 1989 conditioned for bottom trawl of scampi and prawns in Areas 1-10. It was endorsed with the requirement that a special permit for net size less than 100 mm must be held. The *Bilyara* received a Certificate of Registry on the same date.

Mr Penwarden arrived in New Zealand on 6 January 1990. MAF/Fish withdrew the permit of October 1989 on the basis that Mr Penwarden did not have the necessary residency qualifications for the vessel. Mr Penwarden formed Barine Developments Limited, to whom he chartered the *Bilyara*. The special permit was reissued on 17 January 1990, again for fishing by the *Bilyara*. The commercial fishing permit was reissued on 19 January 1990 conditioned for bottom trawl scampi in Areas 1-10 and subject to a special permit for net size less than 100 mm.

On 24 November 1989 Fletcher Fishing was issued with a special permit by the Central office of MAF/Fish for QMA2 in respect of its vessel *Jay Belle*.

On 9 January 1990, Sealord applied for a special permit to MAF/Fish Central office in Nelson to fish in Areas 3, 4 and 7.

⁷⁰ The Inquiry has received a submission that special permits were issued for *Mutual Enterprise* and the *Albatross II* for 1989/90. There is no demonstrable endorsement on the permits available to the Inquiry and we cannot take this matter any further.

On 7 March 1990 Vautier (*B-Line*) applied for a special permit in QMA 2 and 1 or 3 from Central Office Napier. The application was declined on 13 March because of quota for bycatch. Vautier was told to apply to MAF/Fish in Nelson and an application is made on 16 March 1990. *B-Line* was advised verbally that they are successful but require a vessel. On 13 August 1990 a further application is made for a special permit for scampi for Areas 2,7 and 8 and 1,3,4 and 5. MAF/Fish Nelson advised on 30 August that the application for Areas 1 and 9 had been forwarded to Auckland regional office and for Areas 3-6 to the Dunedin regional office. The Moratorium was declared from 1 October 1990 and a commercial fishing permit was finally granted on 30 May 1991, for the year ending 30 September 1991 conditioned for bottom trawl Areas 2-9 for the *Venture K* with 43 mm mesh size.

MAF/Fish North issued a special permit to Sanford on 18 June 1990, valid until 16 June 1991. It was restricted to 43 mm net size and one vessel under a current fishing permit.

United Fisheries sought a scampi fishing permit dated 6 April 1990 from Southern region (Christchurch) office for scampi in the South East Coast. The Arbuckle evaluation recorded that United had a special permit application dated 31 August 1990 for scampi trawl in QMA 1-10. In any event a letter from the Regional Science officer dated 24 May 1991 declines the application to take scampi.

Similarly, Ms Lanauze and Mr Tuck sought a permit for Area 4 from Southern region (Dunedin) and this was declined.

On 13 July 1989, a special permit to fish for scampi was issued to Amaltal Fishing in QMA areas 1, 2, 3, 7 and 8 and for trawl nets with cod-end mesh of 43 mm. The permit had an expiry date of May 1990.

MAF/Fish North issued Mr W. Howell and L. Walker with a special permit on 8 May 1989. This was for fishing scampi and deepwater prawns from the *Jay Linley* and was valid until 31 May 1990. It was limited to the use of 43 mm net size and had the requirement to notify the Central region. Fishing was permitted in the EEZ in accordance with a current fishing permit and did not entitle the holder to any advantage or privilege in respect of the species taken. This was a “hybrid permit” namely a special and commercial permit, but no catch limit is described.

6.5 PART V: ANALYSIS OF PERMIT POLICY AND APPLICATION

6.5.1 The Submissions

The Inquiry has received substantial submissions in respect of the permitting policy and decisions by MAF/Fish. We do not propose to set out in detail the submissions received, but essentially the submissions fall into two categories. The first category comprise Barine and the smaller fishers who contended:

- MAF/Fish did not have adequate appropriate or consistent administrative systems and processes in place.

- That MAF/Fish did not comply with the systems it had established and that it did not reasonably administer the grant of permits and other necessary licences to fishers in the scampi fishery;
- The incoherence of policy throughout the regions led to inconsistent treatment of fishers, favouring one fisher Simunovich to the disadvantage of other scampi fishers.

The second category is the response from MFish together with those parties in support. In essence, those submissions acknowledge that in the nine month period between January 1990 and September 1990 there were material inconsistencies in the way access to the scampi fishery was managed, namely that MAF/Fish failed to make decisions on some permit applications but from April 1991 all applications for access to the scampi fishery were dealt with on a common basis.

Having considered all of the submissions received in relation to permitting, we find that the former MAF/Fish did not have adequate appropriate and consistent administrative systems and processes for the granting of permits and licences from the late 1980s to 1992.

Our analysis is based on the following factors:

- Inappropriate Organisational Structure
- Regional Inconsistency
- Inappropriate Management Responses
- Inconsistent Permit Types and Conditions
- Inadequate Office Level Administration.

6.5.2 (1) Inappropriate Organisational Structure

To assist the Inquiry, Mr Laking⁷¹ was briefed to give expert evidence to the Inquiry. Having reviewed MAF/Fish's processes and systems from 1986 to 1992, he could not say that they were "*adequate, appropriate and consistent*" for the granting of permits in the scampi fishery.

Although there was evidence available to him of a clear administrative process for delegations for the period 1988 to 1990, together with the Court decisions which analysed errors over that time, the principal cause of the failures of "*due process*" arose out of the different policies on permitting that were followed in different regions.

⁷¹ A former senior public servant and chief executive, currently a University Lecturer in public management

In addition, some of the errors in his view, resulted from non-compliance by responsible staff with rules and procedures in place, including the granting of permits by one regional office for fishing areas which were another's responsibility and the failure to process permit applications in a timely way, grant permits in open fisheries or to provide equal and adequate information to all applicants. In his view it was likely that some lapses were due to insufficient attention to the different policies in MAF/Fish's procedures and day to day management of particular cases.

During the period 1983 to 1992, a number of problems arose with the administration of the Fisheries Act by MAF/Fish which led to challenges to the legality of decisions made about fisheries management and complaints about lack of due process in administration decision-making.

The problems were caused by the difficulties in the policy environment for fisheries management and in MAF/Fish's organisation and decision-making processes.

Within the regional structure, attempts were made by the Central Regional Fishing Manager to ensure permitting decisions were consistent and repeatable.

As illustrated by the history of the policy development in the scampi fishery and the problems identified in the administrative structure of MAF/Fish, there was no strategy or overview to ensure that:

- The regions were complying with the divisional circulars from Head Office; and
- That permits were being issued consistently within the regions, in accordance with the Regions Fisheries Management Plans and/or the divisional circulars.

The administrative structure devolving the management of fisheries to the three regions led to each of the regions taking different approaches and issuing different types of permits at times, which were crucial to the ultimate allocations within the scampi fishery. The divergent approach by the regions and their inconsistent permitting practices is testament to the frustrations expressed by Mr Shallard, that the regional structures lead to more complexity than a straightforward hierarchy and that he had no authority to tell the regional managers what to do.

Within the management structure, Mr Shallard, as Director of Operations, was on the same third tier as the regional manager. His position in the structure confirms his further description of the problem with the regional structure, being an inability to determine where his responsibility in terms of policy and operational directions finished and the regional manager's responsibility to implement began.

Even in the course of the Inquiry, the senior officials could not agree on how the management structure was described and disagreed with each other over the criticisms that were made. Whilst Mr Shallard had described the management structure as a "matrix" one, Dr Allen disagreed. Dr Allen believed the regional structure was appropriate from 1988 because the organisation needed to communicate easily, such that fishers and organisations around New Zealand had good access into the Ministry.

Dr Ballard saw the differences in permitting or treatment of fishers stemming from the traditional regional management approach which gave considerable discretion to regions and their management practices but by 1990 he believed there was an effort to bring a common approach to policies and systems. He acknowledged that during the period 1989-94, fisheries administration was frequently confrontational, not assisted by the complexity and vagueness of the legislation and the inadequate information for sound decision-making.

The most glaring example of the failure to oversee the implementation of a change in policy, was the change from the granting of special permits to commercial permits for the 1989-90 fishing year.

As described earlier in July 1988, the RFMO Northern region had signalled to Simunovich that there had been a policy change relating to the use of special permits and commercial permits could now be issued for the scampi fishery.

During the Inquiry, we attempted to pinpoint when and how this change was signalled to other regional RFMOs or fishers. Apart from the letter dated 26 July 1988 from Mr Wilkinson to the Registrar of Fisheries in Auckland the document which we have identified, was the Circular dated 29 August 1988 to the regions advising of the policy for the issue of permits for non-ITQ species for the 1988-89 year.

Buried in Appendix B, the regions were being advised that where an application for a special permit relates partly to a commercial fishing operation, “the applicant should be advised to take out a commercial fishing permit for that part of the operation which does not necessarily require a special permit” and a special permit should be issued for the exceptional aspect of the proposal.

Essentially, this was a direction to issue hybrid permits where in the case of scampi, the special permit would cover the undersize mesh required. However, this direction was only taken up by the Northern region.

There are three issues arising from this direction:

- It is relegated to the back of the 33 page document as Appendix B.
- What is “*partly a commercial fishing operation*” is undefined.
- The applicant “*should be advised to take out*” a commercial permit.

Firstly, neither Central nor Southern regions implemented this policy. Even when the Invercargill office issued Mr Roderique a commercial permit to pot and trawl for scampi, the registrar was unaware of any change in policy and did not address the issue of undersize mesh. The signal to the regions that there had been a change was unnoticed by all, except Northern.

Secondly, it was unclear who was to define “*partly a commercial fishing operation*” and what that meant.

Thirdly, an applicant was to be advised that a commercial permit could issue. On the evidence before the Inquiry, none of the scampi fishers were given advice at the time of the policy change about the type of permit they could apply for, except Simunovich, and the circumstances and timing of that advice were not adequately explained to the Inquiry.

The Head Office policy was issued on 29 August 1988. In his letter, Mr Wilkinson referred to information received from the RFMO that there was a change in policy in July. This prompted the Simunovich letter of 26 July, telling the registrar commercial permits could now be issued. This occurred a month before the policy was issued. At the same time, the other scampi fishers were still making application for special permits, unaware of the change of policy and without any advice to the contrary.

It has been submitted that Simunovich was not the first to benefit from the change in policy and that it was not alone in being given s 63 permits pursuant to a divisional circular in March 1988. The divisional circular in March 1988 did not change the policy for scampi. The policy change was contained in the document dated 29 August 1988. In July 1988, Mr Wilkinson, alerted to a change in policy by the RFMO, wrote to the Registrar in the Auckland office requesting that commercial permits be issued and the first commercial scampi permit issued after the August 1988 document was the permit in January 1989 to Simunovich.

Although United Fisheries was granted a s 63 permit in March 1988, the genesis for that approval is contained in a letter of 15 September 1987 from the Regional Manager, MAF/Fish Dunedin to United, advising that the special permit application would not be renewed but would be replaced by the addition of a method of trawling for species on the normal fishing permit. We note that this occurs prior to the actual policy change in August 1988, and contrary to the submissions, the asserted “*policy change*” in March 1988.

The Simunovich submissions refer to Kiwi Prawns as another example and no permit has been produced. A special permit was issued from 8 February 1988 to September 1988 for Kiwi Prawns from MAF/Fish north. In the computer print-out there is reference to a permit for the year ended 30 September 1988, not 30 September 1989, as submitted. The reliance on the computer print-out proved problematic for Mr Arbuckle.

Reference and submissions are also made to Sealord and a reference to a handwritten note by Mr Patchell in his affidavit of 28 January 1990. This handwritten note records that Central office advised Sealord in February 1990, that it could have its s 63 permit alone for scampi fishing. The handwritten note does not appear to be that of Mr Patchell who became re-employed with Sealord in October 1990, and conducted a review of the files. We note that irrespective of whether Sealord received oral advice to that effect, the handwritten note refers to Regulations allowing the proposed s 63 permit to issue. There were no such Regulations at the time and Sealord did not in fact get a permit.

In the case of Barine, the Northern office did issue Barine a commercial and special permit in line with the policy direction of August 1988. The commercial fishing permit was issued to Barine on 1 October 1989 for the 1989/90 fishing year.

It has also been submitted that a letter dated 14 June 1989 was written by Ms Foster-Barham (formerly a Registrar at Tauranga in 1988, then at Nelson in 1989, before becoming a SFMO in Nelson during 1989). The letter encloses an application for a fishing permit and for a

special permit and advises that both applications will need to be completed as scampi may be taken under a commercial permit but a special permit for scampi fishing gear is also required. This letter was sent to Mr Inkster who does not appear on any of the computer print-outs or the scampi evaluations taken by Mr Arbuckle in 1990-91 and does not appear to have received a scampi permit.

For the reasons already detailed, we cannot safely conclude that any of the late permits disclosed for Amaltal or Okey were actually issued in that form, particularly the commercial permits and for the year 1989/90 as these were not confirmed as having been issued by Mr Arbuckle.

The only implementation of the policy appears to be the Northern office. We note that the former Registrar who signed the commercial permits for Okey and Amaltal had previously come from a Northern Region office, namely Tauranga, and she was the author of the letter as SFMO in Nelson in 1989. We note that there was correspondence from the Central region, including the advice from Dr Knedler in March 1990, that four special permits had been issued by the Central region in the 1989/90 years. The evaluations by Mr Arbuckle of 27 November 1990, January 1991, and February 1991 confirmed that Amaltal had not received a s 63 permit for the 1989/90 year and its special permit had not been processed. Mr Okey is noted as having no permit “*granted for 1989/90 and 1990/91*”. We also note that in September 1989, a letter was sent to Mr Okey requiring a special permit application in order to complete his 1989/90 application. The permit was never issued and in May 1990 a substitute fishing permit was issued which did not include scampi.

It appears to the Inquiry that the only office which implemented the change in policy in 1988 was the Northern region.

As we have already noted, the change in permitting was critical, allowing those with a commercial permit to “*have a foot in the door*” in the fishery and once granted, a commercial permit had to be reissued, unless for good cause. The advantages to those that were granted commercial permits has already been described in this report and serves to illustrate the failure of MAF/Fish to ensure that such a critical policy change was clearly signalled and understood by all the regions.

Without any overview or strategy to ensure that regions were following Head Office direction, the promulgation of circulars from the Director of Operations was meaningless. The devolution of power to the regions without any system of accountability or control by Head Office gave unrestricted power to the regions. This allowed regions complete control and without adequate line responsibility vested in the Director of Operations, there was no mechanism to ensure implementation of Head Office policy direction.

6.5.2.1 Conclusion – Inappropriate Organisational Structure

The regional organisational structure devolved the permitting and licensing powers to the regions with no effective system, structure, or accountability from Head Office to control or manage inappropriate, inconsistent or divergent permitting practices among the regions.

Policy direction to the regions from Head Office was ineffectual and inadequate as there were no systems to ensure implementation or compliance, leading to inconsistent permitting practices, which resulted in considerable benefit to some fishers and to the detriment of others.

6.5.3 (2) Regional Inconsistency

From 1985 to October 1990, the regions were in control of their own fisheries management plans and allegedly, their own fisheries. It was as Dr Allen described:

“we intended that the regions would be focused on their own region because the regions were different, they had different issues, the fish stocks were different in different areas, so it was appropriate the regions had a focus on their own areas ...”

Dr Allen gave evidence that there was “no doubt that some procedures on scampi permitting were applied inconsistently in regional offices in the late 1980s and early 1990s.” The principal issues of difference with respect to the scampi fishery in particular were:

- The use of commercial permits
- The use of special permits.

This was still being commented on by Dr Allen in February 1991.

From mid-1990, Central region were concerned about the rapidly developing fishery in scampi and it decided to continue issuing only special permits for investigative fishing. The Southern region also adopted the same approach. The Northern region policy however, was to limit the commercial fishery (which was commercially permitted from 1988) to existing fishers and to expand into new areas with investigative fishing by special permit.

The Fisheries Act provided that special permits were primarily intended for investigative fishing and/or to trial new methods. In the scampi fishery, the use of special permits was to overcome the undersize mesh restriction. As we have described above, in September 1988, the Northern region began issuing special permits together with commercial permits under s 63.

The Central region viewed these “hybrid” permits as being legally unjustifiable because special permits were not supposed to generate future entitlements to the fishery, particularly if the fishery was to be brought under the QMS.⁷²

The inconsistent approach in regions was identified by a number of MAF/Fish personnel in the years preceding the moratorium.

Reference has already been made to the Southern regions dissatisfaction with the ad hoc decision making and bad mismanagement of the non-ITQ policies as they saw it. Mr Shallard circulated a memorandum to regional fishery management officers on 17 May 1989 reminding them of the policy for the 1989-90 fishing year, which was to replace:

“the previous reliance on extensive conditions on permits to control the taking of the non-ITQ species. The previous policy was, and is, considered to be legally indefensible. It was also found to be administratively cumbersome and subject to individual variation, contrary to s 63 (9).”

In the policy documents revealed to the Inquiry, there are further references to concerns about the ad hoc decision making in policy formulation. They include:

- On 21 July 1989 an official within the Auckland Fisheries Management Group was urging a review of the existing conditions on permits for ITQ species, noting that “*the conditions have evolved over the years in an ad hoc manner.*”
- On 28 July 1989, Mr Hore records in a letter to his regional manager, Mr Walshe, a number of concerns about the management for non-ITQ fisheries. He advocated an amendment to s 63 to provide the Director-General with discretion to decline permits on stated grounds, as it would become extremely difficult to manage non-ITQ fisheries.

While Mr Shallard recognised that the use of permit conditions to exercise extensive control over fishing was of questionable legality, the two key problems arising from the regional inconsistency were:

- The use of commercial v. special permits
- The cross-permitting problem.

We have addressed the disparity in the issuing of commercial permits above and below. We now address the cross-permitting problem.

⁷² Refer Footnotes 43 on page 19 and 49 on page 19

6.5.3.1 The Cross-Permitting Problem

One of the many issues that has vexed the management of the scampi fishery has been the regions cross-permitting other regions fishery management areas.

The intention to devolve regional control over fish stocks and management of local fisheries, accorded with the statutory intention in s 63(1) that any person who applied for a fishing permit should do so to the registrar at the:

*“registration office nearest to the area where the applicant wishes to take the fish
...”*

The practice in some of the regions was contrary to that intention. Northern region permitted fishers in the northern region to fish in other regions fishery management areas. Thus, Simunovich, Barine, and Sanford were all permitted to fish for scampi in QMAs 1 and 9 (Northern region), 2 and 8 (Central region) and 3-7 (Southern region).

This permitting practice was one of the issues which upset the Central region before the commencement of the 1990-91 fishing year, when Central realised that permits had been issued for its area, without any notification or approval by Central.

Mr Bishop had described Central’s shock at the realisation that not just permits, but commercial permits had been issued by the Northern region for the Central region’s areas, when Central wanted to conduct investigative and research-based fishing before such permits were approved. Described as a “bomb-shell”, Mr Bishop responded to this discovery by sending a letter in which he stated that:

*“Central Region manages QMAs 2, 7 and 8 and applications for other regions
(even if on the same application) are referred to the appropriate regional officers
for decisions.”*

When questioned about cross-permitting, he confirmed that applicants would apply to the registrar nearest to their area to be fished and specifically referred to “*the Act*.” If Auckland were to issue the permit, in areas other than the Northern ones, Auckland would have to check with Southern or Central to ascertain the relevant policy and the conditions which may be needed on the permit to target a species of fish in that particular area.

It appears however, that Mr Bishop and others in the Central region were alone in their understanding of permitting processes and the requirements of the Fisheries Act.

The issue of cross-permitting was put to Mr Shallard with the specific example based on the Chatham Island fishers, who made approaches or applications to either Christchurch or Dunedin offices in the Southern region. Dunedin had a policy of not permitting through the late 1980s/beginning 1990s, while the Northern region was permitting vessels from Auckland to target scampi in the Southern region’s waters, particularly the Chatham Islands. Mr Shallard acknowledged this was an ongoing problem, but it was not outside the law.

He replied:

“The concept of the question of people from elsewhere, and particularly that come from Auckland ‘fishing in our patch’ was an ongoing problem but it wasn’t outside the law. It was certainly quite within the Fisheries Act and it was the way it was designed, was to allow, if you were domiciled in a particular port and you were fishing anywhere in New Zealand, you got your permit application through that particular region.”

The wording of the Fisheries Act requires a fisher to apply to the registrar nearest the target fishing area for a permit. Even if the Northern region physically issued a permit to a local fisher who resided in that region and wished to fish elsewhere, it was incumbent on the Northern region to have contacted the other regions as Mr Bishop described, to check on the policy operating in that region and the conditions to be applied to the permit before issue. To do otherwise makes a nonsense of the regional fisheries management plans, which were being put in place by the respective regions, and the statutory requirement of s 63(1), which reinforces the importance of regions having control of their own fisheries management areas⁷³.

As can be demonstrated by the way in which the permits were issued in the scampi fishery, the Northern region was permitting fishers to target scampi in the Central and Southern regions, without checking or contacting those regions about the relevant policy applications. This allowed Simunovich in particular, but also Barine and Sanford to fish in areas, where the local fishers were either still awaiting their permits (as in the case of Sealord, Vautier, Goodship, Lanauze/Tuck) or were not being issued permits at all (as in the case of Muirson and United Fisheries).

During the Inquiry hearings, the position was even more confused, when it transpired that the Invercargill office, in the Southern region, was issuing permits to target scampi, when the Dunedin Office was not. Mr Henderson, formerly the Registrar of Fisheries for Invercargill, gave evidence that he regularly authorised large companies or Southland fishers to fish for tuna in the Central and Auckland Fisheries Management Area. He told the Inquiry:

“40. This was normal practice and in accordance with the non-ITQ permitting policy. The permitting process required each registration office to process the applications received from its own fishers, regardless of where they wanted to fish.

⁷³

It has been submitted that the delegation of the authority to issue permits to registrars entitled a registrar to issue a permit for any quota management or fishery management area. The requirements in s 63(1) which requires the application to be filed nearest the target fishing area reinforced that the region should maintain control over the fishery in its fishery areas. The delegation to issue permits relates to the physical issue of permits. An example of a region following the process contained in s 63(1) is in August 1990 when Central checked with North and South about a Vautier application. Vautier was subsequently caught by the moratorium and did not receive a permit until May 1991. Other regions did not appear to follow this process and issued permits without checking with the relevant management plan.

41. *Applications for special permits would have been made by fishers directly to the Regional Fisheries Management staff in Dunedin. This process was completely independent of the commercial fishing permitting process.”*

It appeared, that until this Inquiry, no-one had realised that Invercargill was permitting in the way Mr Henderson described, apart from a reference in Mr Arbuckle’s evaluation of scampi permits, that a commercial permit had been issued to a fisher to target scampi by the method of potting.

This issue not only highlights the divergent and confused approach by MAF/Fish and the regions, but it underscores the grievance of those fishers who were excluded from the fishery. The complaint from the Chatham Islanders has force. They are not permitted to fish the Chatham Island waters, yet Auckland fishers can.

More concerning is the internal memorandum of 12 July 1990 in the Dunedin office commenting on Mr Tuck’s application.

“Just imagine - if he had applied through the Auckland office - he could probably be fishing now”

The perception from outside and within MAF/Fish was that the Northern region fishers gained considerable advantage. They could fish commercially for the fishing years 1988-89, and 1989-90 and in all fishery management areas throughout New Zealand.

6.5.3.2 Conclusion – Regional Inconsistency

The regions had divergent permitting practices with no consistent approach to implementing Head Office policy or directives.

Contrary to the policy of regional control for each region’s area and the statutory framework, one region cross-permitted for other regions’ areas, without consultation or approval, resulting in inconsistency in permitting, exclusion of local fishers from a fishery in their area, and unfairness.

The two contrary views of s 63(1) and the regions’ inconsistent practices, has led in the scampi fishery to fishers in one region receiving substantial advantages over fishers in other regions.

Delegations themselves were generally clear. However, widely delegated authority in combination with a regionally-based administrative system and complex directives and guidance, contributed to uncertainty, delays, and inconsistencies in the treatment of different fishers.⁷⁴

6.5.4 (3) Inappropriate Management Action

A recurrent theme in the scampi fishery administration is the complaint about ad hoc decision making. During the period 1990-92, a number of decisions were made in response to crises or demands. The reactive response by MAF/Fish was often “*knee jerk*”, in nature, rather than planned or managed decision-making. There are three examples of inappropriate management responses. They were:

- The reaction to Simunovich’s complaint and Central’s refusal to issue a commercial scampi permits;
- The imposition of the s 65 moratorium, without preparing criteria beforehand;
- The inconsistent approach to the ICE allocations in the scampi fishery.

6.5.4.1 Simunovich Complaint About Central’s Refusal

As a result of persistent complaints by Simunovich during August 1990 about Central’s refusal to issue commercial permits which is described earlier, and a request for a meeting,⁷⁵ Dr Allen in Head Office responded by setting up a meeting on 4 September 1990 with Mr Wilkinson and Mr Simunovich. At the same meeting, Dr Allen’s officials, Mr Arbuckle, and Mr Bishop were also present.

Mr Bishop expressed his surprise at attending a meeting with Dr Allen over the escalating issue of Central’s position in relation to commercial permits in the scampi fishery, to find that Mr Wilkinson and Mr Simunovich were present when the MAF/Fish officials had not met to discuss the issue beforehand. His evidence before the Inquiry was:

“... I thought the Ministry had to get its act together before it started meeting with the industry and I was quite surprised to see – that was my expectation of that meeting, that it was more of a meeting of Ministry minds to sort out the difference in the management philosophies. So that’s why I was quite surprised to see Vaughan at that meeting ...”

⁷⁴ Refer Appendix 8: Delegations

⁷⁵ Refer to Head Office Meeting with Simunovich : 4 September 1990

As we have described,⁷⁶ Dr Allen, having attended on Simunovich, then corresponded with the three regional managers, noting the difference in the regions approaches and urging that a s 65 moratorium should be imposed until new regulations were made. This followed the submissions and urgings Simunovich made to him directly at that meeting and in subsequent correspondence, that MAF/Fish should

“restrain any further catching effort from entering the scampi fishery than is already fishing and the Minister should invoke emergency restrictions in the scampi fishery under s 12 Part I of the Fisheries Act before a plan was introduced in Areas 1 and 2 at least”.

When the managers responded to Dr Allen, he ultimately advised that he preferred the Northern region’s approach. This resulted in Dr Allen writing directly to Simunovich and to no other scampi fisher, advising Mr Wilkinson of MAF/Fish’s decision to impose a s 65 moratorium and expressing his concern about the direction MAF/Fish was taking in managing the scampi fishery *“given the large investment that your company has made in the fishery”*.

Although Mr Wilkinson’s views that a Part I s 12 emergency restriction on fishing and vessels was not followed, Dr Allen advised him specifically that the management regime of placing this fishery under a s 65 moratorium *“will accommodate your concerns”*. Dr Allen explained the decision to Wilkinson as follows:

“Regarding your suggestion that the Minister restrict the number of vessels and catch in the scampi fishery, the management regime of placing this fishery under s 65 moratorium will accommodate your concerns. I do not consider the Minister ought to be advised to make emergency measures pursuant to s 12 of the Act.”

While many non-QMS species had been placed under a s 65 moratorium since 1988, the immediate decision to impose a s 65 moratorium on the scampi fishery was also driven by Simunovich. As a result of the pressure brought to bear by Simunovich, Dr Allen responded by withdrawing delegations and imposed a moratorium on the scampi fishery. MAF/Fish issued 15 permits for the 1990-91 fishing year to fishers who already had either commercial or special permits in the fishery.

Only after the moratorium was imposed, did MAF/Fish undertake an evaluation of the scampi fishery. This was completed by Mr Arbuckle in or about 26 November 1991 and as a result, eight scampi permits, which had just been issued for the fishing year, were identified and recommended as permits which should be revoked. These revocations took place in May 1991, eight months into the fishing year. This was financially ruinous for one fisher, Mr Howell and prompted strong submissions and ultimately, legal action on his behalf.

The scampi evaluation reviewed only the years 1989 to 1991. By not reviewing the 1987 – 1988 years, the true picture of permitting was not obtained. Such an evaluation or proper review, may have highlighted the inconsistencies in permitting much earlier to Head Office. These inconsistencies are highlighted in the next section under impact on fishers.

⁷⁶ Refer to The Scampi Fishery Moratorium

6.5.4.2 No Criteria Before the Moratorium

Secondly, at the time the moratorium was declared, no criteria had been established to assess eligibility to fish scampi. These were not developed until 22 April 1991, seven months after the commencement of the fishing year and after the moratorium had been declared. On the basis of these belated criteria, several of the nominated fishing permits were revoked. It was one of the belated criteria which led to the vessel restriction being imposed on 22 April 1991, backdated to 30 September 1990. We deal with the vessel restrictions separately.⁷⁷

From a management and administrative perspective, it is inappropriate and unacceptable for MAF/Fish to make licensing decisions, reverse them some months later, after accumulating information and formulating criteria belatedly, which should have been done at the time the licensing decisions were made.

In canvassing the history of the non-QMS policy in the preceding section, it is evident that tensions mounted among the regions and their respective personnel as to the development of the non-QMS fisheries, particularly scampi.

The tension became pronounced in 1990, when the central region discovered that commercial permits had been issued by the northern region for fishing in the central region's area.

During the course of the Inquiry, this discovery and the resulting tension was described by MAF/Fish as "*Central turning back the clock*" and the focus was on the differences between the northern region and the central region in permitting practice.

Having considered the policy papers and material made available to the Inquiry, it is clear that there was considerable dissatisfaction by not only the central region but the southern region at the approach northern region and Head Office were taking and the consequences for the fishers in the central and southern regions as a result. We have already observed that the 1988 circular went largely unnoticed, except by northern, as to a change in permitting policies.⁷⁸

As already described, Dr Allen intervened in September 1990, once the disparate approach had been the subject of complaint by Simunovich. Dr Allen favoured the approach by the northern region and accepted a request to meet with Simunovich, together with personnel from the central region, before he withdrew the delegations to the regions and decided to impose the s 65 moratorium.

Having met with Simunovich on 4 September 1990, the same day as the non-QMS working group met with the three regional officers, Dr Allen advised the group that the central proposal had upset Simunovich, that he preferred the northern proposal as the reasonable way to proceed and that the three regional managers should consider the issue urgently and report back to him by 10 September. The sequence of events has already been described under the section 'Head Office meeting with Simunovich'. Essentially, Dr Allen did not accept the central region's response or approach on the basis that it was not:

⁷⁷ See Vessels: Vessel Policy & Application post

⁷⁸ Refer to footnotes 43 and 49 "The Central v. Northern crisis"

“fair and reasonable to change a management regime for scampi abruptly in a way that changes in an unpredictable way the circumstances under which Simunovich (and others) have been operating.”

At the time of writing that email, full details of the scampi fishery other than the proposals from the Northern and Central regions, and the views of Simunovich, were not available to Dr Allen. No evaluation of the scampi fishery or scampi permits had been undertaken at that time; the views of the southern region did not appear to be transmitted to Dr Allen and the dissatisfaction and resentment from both central and southern regions does not appear to be addressed or factored in Dr Allen’s thinking.

Even at this Inquiry, the dysfunction was seen to exist between central and northern, with no reference to the southern region’s views at the time (or any witnesses being called from the southern region’s Dunedin office). This confirms the evidence of Mr Bishop when he deposed, *“that throughout this period of time, the southern region was effectively excluded from the debates that were occurring”*.

The documentation reveals that the southern region had the same approach as the central region and was expressing serious concern about the ad hoc decision making and bad management practices within MAF/Fish. In the section marked southern region, we have set out the terse response from the Dunedin office expressing their dissatisfaction with the way in which non-QMS policy and management was being carried out.

The Inquiry considers it pertinent that as at 30 August 1990, the southern region’s managers were listing the following concerns:

- Each region has developed its own non-QMS species lists and categories in an ad hoc manner.
- Non-QMS species have been given a low priority relative to those under the QMS.
- Special permits have become the prime mechanism to develop non-QMS stocks but they are only a first step towards final commercialisation of the species. There are currently no guidelines as to how species should be developed or sets of criteria to enable a species to *“pass through various steps in the developmental process”*.
- The regional species lists were unwieldy and often contradictory with no adequate explanations for categorisation of the species.
- Inter-regional conflict was occurring as the status of various species was discussed and different species categories were utilised by different regions. They specifically noted:

“This has been worsened by frequent allocation of permits by one region to fish another region’s waters.”

- The lack of any development strategies once special permits have been fulfilled.

Having identified the ad hoc decision making on species status and the general bad management practices, the southern region's managers urged that a national QMS strategy was required to maintain consistency in management practices among the regions and a national development of species categories.

Even as late as 12 December 1991, the Regional Fisheries Management Officer in the southern region wrote to Mr Shallard expressing further dissatisfaction about the limited information available to the southern region. Ms Tierney wrote:

“MAF Fisheries south's ability to comment on such an application has been hindered by the limited availability of information to this region regarding developments in the management of the scampi fisheries. MAF Fisheries south has not been party to any decision making on competition quotas or negotiations between industry, MAF Fisheries and conservation interests. This being the case, the comments below are made on the information provided along with Mount Fish Markets application by MAF Fisheries north only.”

It is also relevant to note that on 10 March 1992, Ms Tierney wrote to Mr Arbuckle expressing the following sentiment:

“Here is our brief and rather insubstantial response to the Scampi management plan. I hear Robin was in Auckland all day this week. Just hope there is some flexibility left in this issue. Our fishers are pretty mad...”

MFish, in its submissions, has identified that once the management of scampi was taken over by Head Office, no further inconsistent permitting or practices occurred.

We have difficulty in accepting this submission. It is plain that MAF/Fish reacted to the strong Simunovich complaint, without considering the position of other regions and other fishers and the history of what had occurred in the previous four years.

The s 65 moratorium was declared and the criteria were developed into the 1990-91 fishing year, without an understanding or a knowledge of the scampi permits which had been issued from 1986 to 1990 and the effect of each of the region's approaches on the ability of fishers to acquire permits for the scampi fishery.

By focusing only on the tension between central and northern regions, Dr Allen was led to believe that there was a change in scampi management by central, without factoring in the approach by the southern region, which corresponded with that of the central region. While Dr Allen's evidence was that he had frequent communications with regional managers, it is not at all clear how much information he had at that date about the current issues in the scampi fishery, or the impact on scampi fishers other than Simunovich.

6.5.4.3 The Inconsistent Approach by MAF/Fish to ICE Allocations in the Scampi Fishery

As already described in the history of non-ITQ policy development, we have recorded the decision by MAF/Fish to allocate ICE in certain areas and not in others.

ICE was allocated in SCIs 1 and 2, 4 and 6A but not in SCIs 3 and 6B.

It appears that again, influenced by the Simunovich submissions in relation to whether ICE should be allocated in these respective areas, MAF/Fish appeared to support and follow Simunovich, which opposed the allocation of ICE in 3 and 6B.

In our view, MAF/Fish should have ensured its decision-making was consistent. If ICE had been allocated in four areas, and fishers urged that ICE should be allocated in two further areas, this should have raised the question with MAF/Fish as to why it was taking a different or inconsistent approach.

6.5.4.4 Conclusion – Inappropriate Management Actions

In response to the refusal by Central to issue commercial permits and the complaint by Simunovich, MAF/Fish acted inappropriately by attending on Simunovich immediately, without undertaking a proper investigation of how the regional approaches had differed, taking advice from its officials and considering the impact on other scampi fishers.

The s 65 moratorium decision and permitting exemptions made by MAF/Fish in 1990-91 was implemented, without adequate preparation, relevant information or planning. MAF/Fish imposed a moratorium and subsequently developed criteria for entry to the fishery during the fishing year, revoking eight permits already issued.

The decision-making and allocation of ICE in SCIs 1, 2, 4 and 6A but not in SCIs 3 and 6B was inconsistent and reflected the wishes of the predominant fisher in the scampi industry.

6.5.5 (4) Inconsistent Permit Types and Conditions

6.5.5.1 Different Permit Types

The differences in the types of permits issued and the contradictory conditions within them were a consequence of the regions exercising sole control over their permitting processes. The type of permit issued, namely whether it was a commercial or special permit, gave distinct advantages to those fishers that received commercial permits as opposed to those that received special permits. Although we have dealt with how the differences arose in the previous section, the impact on fishers is also noteworthy.

The legal significance of issuing a commercial permit was never realised by MAF/Fish, until Mr Wilkinson of Simunovich challenged MAF/Fish, when the Central region refused to issue commercial permits in September 1990. This was the catalyst for Head Office to become involved, and it was after Simunovich's demands that commercial permits be issued and the scampi fishery be closed, that Dr Allen of Head Office took control of the direction of

management of the scampi fishery, withdrew the delegations to issue permits from the regions and declared a moratorium.

Whilst the commercial permit conferred substantial benefit on the fishers of the Northern region, including Barine and Simunovich, those fishers in other regions who had applied to fish in the Central and Southern regions were disadvantaged.

The delays in issuing permits by Central are illustrated by the examples of Vautier and Sealord and the non-issuing of permits by the Southern region disadvantaged other fishers, such as United Fisheries and Goodship/Pranfield.

Similarly, Invercargill, one Southern region office, was issuing commercial permits, when the principal regional office in Dunedin was not. Thus fishers, even in one common region, were being treated differently, depending on the office to which they had made application.

The way in which types of permits was issued was haphazard and ad hoc. Whilst Northern and the Invercargill office of the Southern region issued commercial permits in 1988 and 1989, and Christchurch issued one commercial permit to United in March 1988 on a “one-off” basis, the other regions did not do so. For reasons already addressed, the possible issue of two commercial permits in Central region cannot be relied on, but if they were issued, showed an inconsistent approach within the Central region itself.

6.5.5.2 Misleading Permit Conditions

The wording of the permit conditions has also been problematic. The condition appearing in the special permits conferred no entitlement of future rights or benefits. The clause frequently appearing was:

“The taking of any fish while fishing under this permit shall not entitle the holder to any advantage or privilege with respect to any of the species taken.”

The contrary proved to be the case. As outlined earlier, exemptions under the moratorium were based in part on special permits, and fishers with exemptions who fished for scampi in 1990-92 would become entitled to future ICE and quota allocations.

Even when the moratorium was declared from 1 October 1990 and exemptions were granted through MAF/Fish Head Office, Mr Shallard warned that catch history obtained under the exemptions to the moratorium would not confer any future entitlement. In a letter dated 19 December 1991 and in his response to the ISG’s complaint about the *Petersen*, Mr Shallard advises that any catch history developed in Areas 3 to 9 will confer no future right or expectation of access to the fishery and no guarantee as to the level of any future allocation, should individual catch limits be imposed in these Areas.

Again, despite the assertions by MAF/Fish, allocations were made on the basis of catch history obtained under the exemptions to the moratorium.

6.5.5.3 Contradictory Conditions

As the United Fisheries permits demonstrate, permits could be issued with contradictory wording.

United Fisheries was one of the first fishers to apply and be issued a special permit to fish for scampi by the Southern region. In July 1987, United Fisheries sought an extension to 30 September 1998 of its special permit, previously issued on 23 December 1986.

MAF/Fish Southern (the Dunedin office) did not extend the special permit but transferred permission to trawl for scampi to the existing section 63 commercial permit to enable United Fisheries to fish in Area 3. The commercial fishing permit with the scampi endorsement was issued on 29 March 1988 and, from the records available to the Inquiry, appears to be the first commercial permit approved for a scampi fishery.

On the commercial fishing permit granted to United, the endorsements included conditions that fishing for scampi could be undertaken only in Quota Management Area 3 and in waters with depths between 350 m and 550 m. Among other conditions, three conflicting conditions related to the use of mesh nets. They are:

“(c) *Where a net with a mesh size of less than 100 mm is to be carried on board, the vessel to which the permit applies, the permit holder shall notify the Regional fishery officer in writing, of its intention to undertake fishing activities*”

...

(i) *the minimum mesh size of the net concerned shall not be less than 38 mm*

...

Unless all of the conditions listed, are fulfilled, the permit holder shall not be entitled to carry on board or use from any vessel, a net which has a mesh size of less than 100 mm.”

Unlike the Auckland office, the Dunedin office, whilst appearing to be cognisant of the regulatory requirements of trawl net restrictions, issued a commercial permit, not a special permit, but with contradictory conditions.

If the minimum mesh size of the net to be used by United was to be no less than 38 mm, as provided for in condition (i), the commercial permit was approving a non-regulatory trawl net mesh size. By comparison Auckland and Central offices permitted the use of a trawl net with a cod and mesh size of not less than 43 mm which required a permit exemption and Auckland issued a special permit.

The United Fisheries permit had three conflicting conditions relating to the use of mesh nets contained within one permit, and was one of the first commercial permits issued for trawling.

6.5.5.4 Conclusion – Inconsistent Permit Types and Conditions

The differences in the types of permits issued and the contradictory conditions within them were a consequence of the regions exercising sole control over their permitting processes. The type of permit issued, namely whether it was a commercial or special permit, gave distinct advantages to those fishers that received commercial permits as opposed to those that received special permits.

Despite the wording on the special permits that no assurances were being given on future access and allocation levels, access to the scampi fishery was based in part on those permits, and later allocations were based on the catch history achieved following such access.

To issue permits, stating that no future entitlements can be acquired by way of catch history and the contrary occurs, is misleading, inappropriate and administratively inconsistent for two reasons:

- The permits were never issued for investigative purposes.
- The permits contributed towards conferring valuable property rights and entitlements.

6.5.6 (5) Office Processes

A wide range of documents contributed to the overall administrative systems used by MAF/Fish. Key among these were the annual guidelines on permitting and vessels registration, contained in the “*Divisional Circular*” series sent out to Fisheries offices each year. These have been described in detail under the section “Policy Environment 1983-92”. For non-ITQ species such as scampi, the circulars described the various categories into which these fisheries could be placed such as open, developing, fully developed, over developed and protected.

Supporting and extending these national documents were regional documents, notably the regional non-QMS species management documents. From 1987 on each region developed the practice of issuing these documents, which advised staff which category particular species were placed into (e.g. open or developing).

Depending on the catch situation in each region’s fishery management areas, the same species such as scampi could be placed in different categories in the various areas. These documents also repeated and extended the information in the annual national circulars, and became quite detailed documents by 1989-90 (50-70 pages). These regional management documents were developed because the administrative staff did not have adequate access to the information on individual species, which was often held by scientists in the regional offices.

There were many other documents such as memoranda and emails which advised staff of changes to operation policies and processes. These were often done under acute time pressures as issues arose during the annual round of permit applications. Mr Shallard

accepted that it was not always possible to advise such changes by way of formal amendments to manuals, or new circulars. In his view, this fast moving information was acceptable if *“they retained and acted on it.”*

In addition there was the QMS manual, which first appeared in 1988 after a training workshop for experienced staff to achieve greater consistency of administrative practices in the various offices through New Zealand.

The version made available to the Inquiry is the 1988 version, and changes to legislation and policy in 1990-91 meant that revisions to the manual were needed, and a new version was completed and distributed in 1992.

The QMS manual was at the bottom of the hierarchy of administrative directives and guidelines, containing prescriptive information and detailed processes and standards for permitting, registration and catch-return data entry.

As an example of such standards the QMS Manual from 1988 contained a basic timeliness requirement which was as follows:

“No permit application can remain unactioned for more than 14 days. It must be approved or declined within that time.”

The QMS manual also prescribed how Fisheries personnel should alter a quota management return and the circumstances in which such a change could occur, as the example involving Mr Nalder demonstrates.⁷⁹

The prescriptive office administration level of the QMS manual contrasts with the information on how a discretion should be exercised when issuing permits or registering vessels, and such information was contained in the divisional circulars and regional non-ITQ species management documents previously described.

At the office or micro-level, there was poor administration or administrative processes in place.

Firstly there was no central collation of instructions in an office system, and no procedures in place to ensure that divisional circulars, emails or directives were centrally placed within an office for easy access.

The description of *“scraps of paper lying around”* from Mr Sullivan, the former Nelson office solicitor, is exemplified by Mr Nalder’s experience when he consulted with the Registrar of his office about altering a QMR, and neither Mr Boyle, the Registrar and Senior Monitoring Officer, nor he, knew of the process contained in the QMS manual. It was only when the matter came to the attention of Head Office, that the Head Office solicitor contacted Mr Sullivan, who sent him an early print-out copy, which Mr Sullivan had retained.

⁷⁹ See Term of Reference 3 QMR Incident

The frequency of circulars, emails, memoranda and policy documentation which occurred in the late 1980s/early 1990s and the lack of a coordinated collation of such documents explains how offices within the same region, such as Invercargill in the Southern region, were issuing permits on a different basis to the Dunedin office in the same region. Unless there were clear directives, either nationally or regionally, each Registrar of Fisheries had considerable power to issue permits as s/he saw fit, unless policy directives were clear and available. Similarly, the cross-permitting by one region into another regions fisheries areas and the issuing of the types of permits are the results of inadequate information and management control.

The second factor which emerges, is the haphazard office processes, which do not ensure compliance with Head Office directives. The obvious example is the direction from Dr Allen to the Registrar of Fisheries in Auckland advising that Simunovich could replace the *Drysdale* with the *Mutual Enterprise* until the *Drysdale* was recommissioned. Dr Allen's directives were clear that the *Mutual Enterprise* was not to be an additional vessel in the fishery. As the Vessel Policy section reveals, there was no monitoring of, or requirement to comply with, this direction and the *Mutual Enterprise* as well as the *Drysdale* fished during the 1991 year.

The third factor, which is also indicative of poor administrative systems, is the loose wording on permit conditions. We have already highlighted the contradictory wording on United Fisheries permits, but the way in which the permit conditions were worded for the Simunovich permit for the *Petersen* illustrates the point.

The permit of 9 December 1991, approving the *Petersen* to fish in the scampi fishery had the condition:

"The permit holder shall ensure that no more than five (5) vessels are targeting scampi concurrently".

A few days later, a permit was re-issued stating that the permit holder shall ensure that "*no more than six (6) vessels are targeting scampi concurrently*".

This condition did not effect a restriction on vessels to just six. By wording it this way, Simunovich had access to seven vessels and provided six at a time were fishing concurrently, it complied with the permit.

When one contrasts this with the letter from Dr Allen on 17 February 1991, expressly stating that the *Mutual Enterprise* was only ever a replacement for the *Drysdale*, not an additional vessel, it makes a nonsense of the vessel restriction moratorium that was supposedly in place.

It appears that no person ever checked that Dr Allen's directives were pursued or complied with and nor was the wording on the permit for the *Petersen* cross-checked to ensure that it complied with the restrictions placed on the scampi fishery at the relevant time.

Two other examples from 1991 and 1992 indicate that there were still concerns from time to time expressed by MAF/Fish staff about the inadequacies of administration and communications between head office and regional offices.

In a memo from Senior Fisheries Officers to the Director of Operations in August 1991 the group put in writing their concerns as follow:

“Some senior monitoring officers were never informed and were therefore unaware, that new sets of regional non QMS regulations were being drafted. Their first advice of this was in your fax of 23 August 1991.

The officers that were aware of the above, only discovered this fact as result of recent, incidental conversations with regional science staff.”

This memo was as a result of an update provided to regional staff by the Director of Operations outlining preparations for permitting arrangements for the 1991-92 year, which was to start a month later on 1 October. It is evident that communication about the processes and the impact that this might have on permitting arrangements and delegations as a result of the new regulations had not been conveyed to administrative staff at the time the annual permitting round was due to begin.

The second example relates to the implementation of what came to be know as the “Director-General’s policy” for the 1991-92 year.

“In preparation for this 1991-92 fishing year, the permitting policy was made transparent in the “schedule” of particulars of powers sub-delegated by Group Director MAF “Fisheries” and “the guidelines for the exercise of sub-delegations” for all the regional commercial fisheries regulations. Since then, the release of the Director-General’s policy on non-QMS permitting has resulted in a major change in the factors to be taken into account when evaluating permit applications Also, sub-delegations have been withdrawn so that only the deputy group director can approve permits.... It is considered that to maintain transparencies the documentation (especially the guidelines) will need to be revised immediately to reflect the additional considerations that are now required to be taken into account, i.e., Director-General’s policy.... In its current form as a memorandum to the Minister of Fisheries the Director-General’s policy lacks clarity and precision.”

Again this concern from a regional office about lack of clear guidelines from head office or administrative staff illustrates that practices and procedures were still not at an acceptable level of quality in 1992.

6.5.6.1 Conclusion – Office Processes

The office administrative procedures and systems within MAF/Fish were inadequate in that:

- there was no compliance with or monitoring of manual instructions on fees and timeliness of permit issue;

- there were inadequate information retrieval systems
- no adequate monitoring of compliance with national directives or guidelines within the scampi fishery; and
- haphazard office processes contributed to permit applications either being mislaid or lost, and led MAF/Fish and MFish to deny the existence of permit applications until discovered years later.

6.6 PART VI: VESSELS

6.6.1 Vessel Policy and Application

The registration of vessels was a process distinct from the issue of fishing permits. No person can use any vessel for commercial fishing unless it is registered⁸⁰ and every certificate of registry is valid for the period specified on it, being a period of not more than five years.⁸¹ A foreign owned vessel could be registered with the prior consent of the Director-General who may either refuse consent or grant it unconditionally or on such conditions as he thinks fit.⁸²

A New Zealand resident was defined as being:

“a person who has resided in New Zealand for not less than 2 ½ years in the three year period just prior to the application or the Director-General is satisfied that the person is likely to continue to reside permanently in New Zealand”.

A New Zealand citizen who had a legal or equitable interest in a foreign fishing craft or a commercial fishing business outside New Zealand fisheries waters was not deemed to be ordinarily resident in New Zealand.⁸³ Commercial fishing in New Zealand required “a New Zealand fishing vessel, which was registered”⁸⁴ and a fishing permit.

It appears that Certificates of Registration of vessels were issued commonly for a 12 month period and required to be renewed, usually at the commencement of the fishing year.

The application for a fishing permit also contained the option of registering a fishing vessel.

⁸⁰ S 57 Fisheries Act 1983

⁸¹ S 57(4) Fisheries Act 1983

⁸² Section 57(8) Fisheries Act 1983

⁸³ Section 57(8) Fisheries Act 1983

⁸⁴ S 63 Fisheries Act 1983

When a section 63 commercial fishing permit was issued, the permit was not issued in respect of a specified vessel. However, special permits issued under s 64 required the fisher to use the fishing vessel named in the permit.

In the scampi fishery, one of the first applications to register a vessel for scampi fishing was Simunovich on 24 April 1985, which was unsuccessful.

With the introduction of the Fisheries Amendment Act 1986, some significant changes were introduced for fishing vessel registration as well as eligibility for fishing permits:

- a fishing vessel could only be registered by “a commercial fisherman” being a person who has a fishing permit.
- vessels could be registered by MAF/Fish without having to meet the requirements of The Shipping & Seamen Act 1952 which had specific requirements as to manning and surveys.
- more than one fishing permit could be issued in respect of the same vessel at any one time.
- a person was entitled to a fishing permit whether or not they had the right to take fish under a guaranteed minimum ITQ.

A company called Kiwi Prawns Fishing Industries Limited (Kiwi Prawns) was granted a scampi special permit using the *Trinity* during the period 1986 to 1988.

6.6.1.1 Simunovich Vessels

By the end of the 1987-88 fishing year, six boats owned by Simunovich and the *Trinity*, formerly owned by Kiwi Prawns and subsequently bought by Simunovich, were fishing under special permit. It appears that Simunovich sought both special (s 64) and commercial (s 63) permits but was only issued with special permits.⁸⁵

On 26 July 1988, Simunovich wrote to the Registrar of Fisheries, Auckland, noting that there had been a change in Fisheries policy for special permits and requesting that scampi be condition as a non-ITQ species on its commercial permit. In an undated handwritten note sent to MAF/Fish Simunovich notes that the request to have scampi included in the 1987-88 commercial fishing permit had been inadvertently excluded. The note requests that scampi be included for the 1988-89 permits by the method of bottom trawl for all New Zealand Fisheries waters. The note goes on to state:

⁸⁵ *Vautier Shelf No. 14 Limited & ors v. Chief Executive of Ministry of Fisheries & ors* (Unreported Ellis J, High Court, Wellington 20/97 24 July 2000)

“Please note this is not a new application for a non-ITQ species. It merely formalises the company’s previous arrangements made under the special permit provisions. Please see A Hore, RFM for details and letter to Registrar 26.7.88.”

For the 1988-89 fishing year, Simunovich had a commercial fishing permit for scampi for all areas (Area 7 was added in March 1989).

Special permits were held for Brac, San Alexandra, Donna Maria, Bounty, St Peter, Waiwera, Advancer and Ana. Red Bluff and Christmas Creek were added in February 1989.

The vessels with special permits in 1989-90 were *Red Bluff*, *Christmas Creek*, *Enemelay*, *Mutual Enterprise* and *Albatross II*. The special permits for *Mutual Enterprise* and *Albatross II* were not made available to this Inquiry. The reference to these vessels receiving special permits is asserted in a letter from Simunovich Fisheries dated 22 August 1990.

6.6.1.2 Goodship

We have been unable to find an application for a permit for Goodship in May 1988. The only reference to a permit is in a letter sent to Mr Menzies from Mr Hore dated 17 May 1988, which Goodship claims was identical to a letter sent to him. MAF/Fish and the Review by Mr Burnard in 1991 accept that Mr Hore approved an application for a special permit from Goodship on 17 May 1988. The permit would not issue until details of a permitted fishing vessel were supplied. A purchase of the *Lady Kay* was lost in 1988⁸⁶ and despite sustained attempts to acquire special permits from Auckland, Nelson and Dunedin offices, no permits were issued before the vessel restriction was in place.⁸⁷

On 1 January 1990, Mr Goodship had acquired the *Westerner*, a vessel based in Nelson. He was advised by the owner to renew the vessel’s fishing permit and registration in Mr Goodship’s name which he did in 1990. He lodged the special permit application to both the Nelson and Dunedin offices under the name of Pranfield Holdings Limited because he had been advised:

“by various officers of MAF (including Arthur Hore ...) that it would not be worth my while pressing for the issue of the permit from the Auckland office (the office from which approval first issued in 1988) because the permits were now being handled regionally and that I would have no difficulty in obtaining a permit from the Southern offices in respect of the Southern fishing regions”.

The special permit however, was not issued and this was fatal to completing Mr Goodship’s negotiations to purchase the *Westerner*. Despite his “urgent representations to MAF”, he had to withdraw from his purchase of the *Westerner* in or about 14 November 1990. At no time during 1990, including October 1990 was he advised of the moratorium in respect of the scampi fishery.

⁸⁶ Refer Section: *Impact of Policy on Fishers*
⁸⁷ Ibid

6.6.1.3 Fletcher Fishing

On 24 November 1989 the Central Office of MAF/Fish issued a special permit for QMA 2 to Fletcher Fishing for its vessel, the *Jaybelle*. There is evidence from Mr Patchell that Fletcher Fishing had tried in 1988 to obtain a scampi permit from the Auckland office but had been frustrated by MAF/Fish. A second permit was issued, but no boat was registered and as a result the permit was not used.

6.6.1.4 Mr Penwarden/Barine

Mr Penwarden arrived in New Zealand on 6 January 1990. On 19 September 1989, he had been issued with a special permit from the Northern region and on 1 October 1989 with a commercial permit. When Mr Penwarden arrived in New Zealand on 6 January, he registered his vessel the *Bilyara*, but on receiving a complaint, MAF/Fish withdrew his permits on the grounds that he did not have the necessary residency qualifications.

After receiving advice, Mr Penwarden acquired the interests in Barine Developments Limited, a company registered in New Zealand, to whom he chartered the *Bilyara*. The permits were reissued to Barine by MAF/Fish on 19 January 1990. It has been a consistent claim by Mr Penwarden that on his arrival in New Zealand, in the Viaduct Basin in Auckland, he was confronted by Peter Simunovich, whom he alleges told him the scampi fishery was “ours”. Mr Penwarden claims it was Simunovich who alerted MAF/Fish to the residency problem and was the reason for MAF/Fish withdrawing the permit.

On 18 April 1991, Barine wrote to MAF/Fish, seeking permission to use four more vessels in the scampi fishery. The details of the response and the imposition of a moratorium on vessels in the scampi fishery will be dealt with in more detail below.

6.6.1.5 Sealord

On 9 January 1990 Sealord applied for a special permit to MAF/Fish Central office in Nelson to fish in QMAs 3, 4 and 7. The delay was significant, in that it was not until April 1991 that Sealord was granted an exemption under s 65 to fish for scampi. However, Sealord’s permit excluded it from Areas 1 and 2. Mr Patchell has described this as meaning that the established fisheries were not longer available to it and that they had to find a different type of vessel to explore the more Southern fisheries. Sealord’s permit however was further delayed until June 1991, at which time Sealord had no option but to nominate its existing vessel, without freezer capability, and could not commit to acquiring such a vessel until it knew it would be allowed to enter the fishery.

A further permit was issued on 16 October 1991 and subsequently cancelled on 10 December 1991 when a further permit was issued until 30 September 1992.

The October 1990 moratorium intervened. Exemptions were to be granted to certain existing permit holders which did not include Sealord. Because of being confined to Areas 3 to 9, it did not have a suitable large vessel available. A joint venture with Barine had been put on further hold.

Sealord protested the treatment it had received from MAF/Fish and campaigned about the allocation of ICE in Areas 1 and 2 based on 1990-91 catch history. It did not have such a history because of the delays in obtaining a permit. The October 1991 permit again excluded it from Areas 1 and 2. This, together with the low catch limits, virtually excluded Sealord from the fishery. By the time Sealord could arrange a vessel, the small catch limit would have been fished by those already in the fishery. The raising of the limit to 60 tonnes in December only made the situation worse.

For the crucial fishing years of 1990-91, Sealord did not have a vessel in place before the moratorium applied. Sealord had taken proceedings in the High court and Court of Appeal in 2000-2001 protesting the allocation of scampi. Ellis J considered that although the allocations were made inconsistently through improper use of conditions on permits, the 1999 regulations validated the allocations. This finding was reversed by the Court of Appeal who held the 1999 regulations to be ultra vires. Thomas J made highly critical observations of MAF/Fish's administration.

The allocations under the regulations were also declared invalid. Sealord then pursued a grant of a special permit under s 64(1)(c) of the 1983 Act or s 97(1)(c) of the 1996 Act. The High Court held that Sealord had not applied for a s 64(1)(c) permit. Further, s 329 which came into force in October 1996 prevented Sealord from raising the failure to issue a permit in 1990, until June 1991.

The Court of Appeal agreed with the High Court in its recent decision.⁸⁸

The delay by MAF/Fish in granting special permits in 1990 and the exclusion from Areas 1 and 2 compounded Sealord's inability to acquire a vessel and this deprived it of an ability to establish catch history in the crucial years.

6.6.2 The Vessel Restriction

On 1 October 1990, the scampi fishery was placed under a moratorium imposed under s 65 of the Fisheries Act 1993.⁸⁹ The intention behind the imposition of the moratorium was:

“to prevent new entrants coming into the scampi fishery and to limit, by way of exemptions to the moratorium, the number of scampi fishers to those operating on 1 October 1990.”

At the time the scampi moratorium was imposed there was no restriction as to the use of vessels by the approved fishers. The decision by Mr Shallard on 22 April 1991, following discussions with the Minister of Fisheries, to restrict the fishery to only those vessels that were used by the fishers as at 30 September 1990, is described as the “Vessel Restriction”.

⁸⁸ Sealord Group Ltd v. CEO, MAF (CA 238/02) 1 April 2004

⁸⁹ The Fisheries (Species & Area Prohibition) Notice 1990, No. 2, Notice No. 5037, New Zealand Gazette September 1990 No. 169, P 3559 and see “The Scampi Fishery Moratorium” in the previous section

As described in the previous section, once the scampi moratorium was announced on 1 October, s 63 commercial scampi permits were issued to those that held scampi permits in the previous year, while criteria were being developed.

The non-QMS working group devised criteria, aimed at taking a consistent approach to those fishers that had been in the scampi fishery. Some fishers did not meet the criteria but had been approved, while others did meet the criteria and had not received authorisation to fish. The meeting of the non-QMS group to formulate policy and deal with the issue of permitting scampi fishers, has already been canvassed.⁹⁰

On 12 December Mr Penwarden rang from Cairns, concerned about a number of prawn vessels ready to leave Australia to fish scampi in New Zealand. He expressed his concern that wherever he goes he is hearing that Australian vessels can get permits to fish under New Zealand permits and *“that they believe it is an ‘El Dorado’ over here”*.

Correspondence from Simunovich on the same date, to the Minister of Fisheries and to the Regional Manager of the Northern Office, expressed dissatisfaction with the outcome and progress in resolving *“management concerns surrounding the scampi fishery”*.

On 12 December 1990, Simunovich told the Minister that it was led to believe by MAF/Fish that there were approximately 60 commercial fishing permits that were being held nationwide enabling permit holders to acquire a boat and go scampi fishing. Simunovich stressed that it had five dedicated vessels fishing the scampi fishery and *“has singlehandedly developed this fishery in New Zealand fisheries waters.”*

The letter stresses that all parties, including MAF/Fish officials understood the fishery and its history of development, namely by Simunovich, which was employing an additional 60 staff which was revenue and employment that was generated from its scampi fishing endeavour. It refers to an earlier letter on September 10, in which Simunovich requested the Minister to consider invoking appropriate emergency restrictions in the scampi fishery pursuant to s 12 of the Fisheries Act, namely to restrict the number of fishing vessels in the scampi fishery and to limit the amount of scampi that may be taken from each fishery. The letter urged that:

“To allow potentially up to 60 odd vessels the opportunity to enter the scampi fisheries is a classical fisheries management recipe for the demise of a fishery. It is an experience that we should have learned from by now and is totally avoidable”.

The letter alludes to five separate parties who were buying, or endeavouring to buy, scampi fishing vessels in Australia and three separate Australian concerns trying to sell up to 50 prawn vessels in New Zealand from their collapsed fishery. The letter urges that if five or ten more vessels were to be allowed to enter the established scampi fisheries, then Simunovich believed the fisheries would collapse and that \$6 million of annual export revenue would be lost, 70 staff would be out of work and a small company *“that fought hard and persevered to*

⁹⁰ Refer to Term of Reference 1 “Non-QMS Working Group Ongoing Regional Differences”

develop a new endeavour under difficult trading conditions would be put at risk of going out of business". The letter sought urgent redress for the issue.

This letter was followed by a meeting between Northern region personnel, Mr Walshe and Mr Hore, with Simunovich and a letter dated 18 December 1990, in which Simunovich's views were strongly put. The letter is phrased as follows:

"Our company wrote to you in February of this year expressing our alarm at the potential for there to be a rapid escalation of effort in the scampi fishery. We had met with you on repeated and numerous occasions for over a year prior to that expressing similar views. We have met with you on countless occasions since that date to discuss the same matter.

On the last occasion that we met recently I expressed to yourself and Mr Arthur Hore our extreme concern of the possibility that numerous commercial fishing permit holders had the latent potential to purchase scampi fishing vessels and go scampi fishing. At that meeting I reiterated again our firmly held view that the scampi fishery would collapse if that situation eventuated.

I am now even more concerned. We have since had confirmed from your own office that there are up to 60 odd commercial fishing permits on issue nationwide that authorise scampi fishing. We were first told this information by a manager of an Australian commercial prawn fishing company in Cairns who was trying to sell 12 vessels for scampi fishing in New Zealand".

The letter went on to express concerns that Mr Walshe, the Regional Manager, was not communicating the "*latent potential of these particular commercial fishing permits*" to appropriate individuals in Head Office, such as Mr Shallard, the Director of Operations. Because Mr Shallard was unaware of Mr Wilkinson's views in the previous week, Mr Wilkinson criticised Mr Walshe in the following way:

"The very least that we could expect from a regional manager is to ensure that our legitimate concerns surrounding the potential for an overfishing of the scampi resource to occur are conveyed to the proper parties that can give effective consideration to taking some action. Unless we are mistaken, not even this has occurred and, having been patient, we now have reasonable cause to be dissatisfied with that performance.

There is a potential emergency in quota management Area 1 and 2 that, in our opinion, may endanger the stock of scampi. That potential emergency is clear enough. If anything like 60 odd vessels were to fish scampi in the Bay of Plenty or on the Wairarapa coast, then that scampi resource would not only be endangered, it would cease to exist as a sustainably harvestable resource".

The reference to 60 commercial permit holders able to target the scampi fishery is perplexing. In November the evaluation of the scampi permits by Mr Arbuckle revealed 49 fishers, including those that were issued for permits for part or all of the 1989-90 fishing year, with three additional authorisations to be approved. Many of the 49 permits were either special permits or permits for potting only.

Mr Wilkinson advised Mr Walshe that Simunovich had taken the step of asking the Minister to act upon their range of concerns, particularly the issue relating to the latent commercial fishing permits that would enable the authorised parties to acquire additional vessels and go scampi fishing.

On 21 December 1990, the Minister wrote to Mr Wilkinson in response to his letter, stating that he understood the concerns Simunovich were raising about pressure on the scampi fishery and informed him that he had sought a report from MAF/Fish. He advised that until he was in a position to respond further, no decisions would be made about additional permits for the scampi fishery while the impact of such permits was assessed and the legal situation regarding their issue was clarified.

Simunovich also received a strong response from Mr Walshe, clearly annoyed at the anger expressed in Mr Wilkinson's letter. He wrote to the Managing Director of Simunovich explaining that he had made himself unpopular at times with his colleagues attempting to goad some action on the scampi issue and that he saw his job as assisting fishing interests to gain the benefits of a sustainable fishery. He had been supportive of Simunovich's concerns and asked that Mr Wilkinson was spoken to about his aggressive attitude which, in Mr Walshe's view, had at times hindered, not helped, the process of resolving the scampi issue.

The first mention in MFish's documents about restricting vessels in the scampi fishery is Mr Shallard's Briefing Paper to the Minister, recommending vessels to be restricted to those in the 1989-90 year. The Minister accepted MAF/Fish's recommendation and directed MAF/Fish to restrict vessels in the scampi fishery. The perseverance and communications from Simunovich appears to have been instrumental in MAF/Fish making the recommendation to the Minister and the Minister acting upon it.

Vessel restriction in the scampi fishery was raised at a meeting with the Minister by MAF/Fish officials on 1 April 1991. In a note of the meeting, Mr Burnard records the Minister's guidance in the following way:

Any permits issued will be restricted by way of condition to the vessel(s) held by that company as at 1 October 1990. New permits may be issued on a "one in one out" basis as long as no increase in effort will be placed on the fishery by the use of that new vessel."

Following the meeting with the Minister, Mr Shallard advised all senior monitoring officers and regional fisheries management officers of the criteria used to assess the commitment of current permit holders in the fishery and the permitting policy for scampi. He informed them that he had decided to condition any permit for scampi to the vessel(s) that were used by the permit holder as at 30 September 1990 and these vessels would be required to have an observer placed on them at any time scampi were targeted. The formal decision was signed and approved on 22 April 1991.

On the same day, 22 April 1991, Mr Shallard advised the successful fishers of the criteria and in relation to the vessels criterion said this:

“In addition any permit that is, or has been, issued will be conditioned to allow only those vessels that were used by the permit holder as at 30 September 1990 to fish for scampi. Different vessels may be added to this permit upon application to the undersigned and will only be approved if the permit holder can prove that there will be no increased effort in the fishery.”

The reason for the introduction of the retrospective vessel restriction is uncertain. Mr Shallard, in his decision paper alludes to recent experience (particularly in Australia) which has shown that similar fisheries can develop rapidly to levels where the resource is overfished and it is therefore appropriate to restrict access and/or total catches to control the development of the fishery and minimise the risk of over-fishing and stock collapse. He noted:

“This is particularly the case given the fishing capacity of new vessels in the fleet and potential new entrants to the fishery.”

In his evidence he described that:

“these criteria were finalised part way through the fishing year because considerable concern had been expressed to the Ministry about the future of the scampi fisheries, and it considered that tight criteria should be imposed to ensure there was no further uncontrolled expansion of operators.”

He noted that during the 1990-91 fishing year, there were approximately 49 new applicants for additional permits in the fishery, in addition to the approximately 14 existing fishers who at that stage held permits.

As a result of the moratorium on 1 October 1990, MAF/Fish documents reveal that there were 14 fishers granted exemptions to fish for scampi and of those, only eight met the criteria formulated between 1 October 1990 and 22 April 1991. Four of those were for bottom trawl and four for potting. MAF/Fish revoked seven of the 15 permitted fishers and approved three more.

If there were 49 new applicants for additional permits in the fishery, it appears from MAF/Fish’s own documents that they would have been excluded by the imposition of the s 65 Notice and moratorium on the scampi fishery.

6.6.3 The New Criteria

6.6.3.1 The Additional Vessels–Drysdale and Petersen

At the time Mr Shallard notified all existing permit holders of the new criteria, MAF/Fish recalled all permits that had been issued in October 1990 and re-issued them.

It appears that when the fishing permits were recalled for the 1990-91 year, they were reissued to the scampi fishers on or about May 1991. On a perusal of the permits issued to Simunovich in the 1990-91 year, Permit No. 005768/1 did not specify the vessels which were permitted to be used in the scampi fishery. When the permit was re-issued to Simunovich

under Permit No. 007337/3 on 22 May 1991, Simunovich were permitted to fish for scampi in all QMAs, with five named vessels but the permit did not include the *Drysdale*.

At the time the permits were re-issued in May 1991, Simunovich owned six vessels which it maintained were permitted and registered for scampi fishing. They were *Mutual Enterprise*, *Enemelay*, *Albatross II*, *Drysdale*, *Red Bluff*, and *Christmas Creek*.

6.6.3.2 The Drysdale

Simunovich purchased the *Drysdale* at auction in Darwin, Australia on 27 February 1991. The vessel's application for registration was made on 1 March 1991 and was issued on 6 March 1991. Simunovich used the *Drysdale* to fish for scampi under its fishing permit No. 005768. Simunovich maintained that the substitute permit No. 007210 was issued to it on 9 April 1990, which attached to conditions relating to the taking of ITQ species in the Auckland Fisheries Management Area. On this basis, it maintained that it was authorised to fish for scampi using the *Drysdale* under that permit.

The ultimate approval by MAF/Fish of the Simunovich vessels, the *Drysdale* and the *Petersen* to trawl for scampi after the imposition of the vessel restriction has been a contentious issue, both in litigation and before this Inquiry. The exemptions granted to Simunovich in respect of those vessels needs to be examined in relation to the other fishers and the chronology of events set out below.

Following a meeting on 29 April with Mr Shallard, Mr Wilkinson wrote to MAF/Fish on 16 May to confirm "*some aspects of our thinking on issues concerning development of the scampi fishery in New Zealand fishery waters.*" He asserted that Simunovich at that time owned six vessels which he said "*are permitted and registered for scampi fishing*". The list included the *Drysdale*. He referred to the acquisition of the *Drysdale* in February of that year and offered to operate all six scampi vessels that Simunovich owned to the same previous level of catch in Areas 1 and 2, thus "*voluntarily*" restraining their catch in those areas.

At the same time, he confirmed previous telephone advice that Simunovich wished to purchase a larger vessel, 43 metres long, and sought approval for the larger vessel to be exempted from the moratorium of Mr Shallard's of 22 April 1991. The basis for seeking approval of this larger vessel the *Petersen* was that Simunovich would not increase its scampi fishing activities in respect of its six permits with catches not increasing the current output in Areas 1 and 2 and secondly, that the permit that would be utilised by the larger vessel, the *Petersen*, could be conditioned so that it fished for scampi only in Areas 3 to 9 "*where the fishery is yet to be fully explored and developed.*"

Mr Wilkinson appealed to MAF/Fish by saying:

"We propose that this form of permit conditioning would satisfy the spirit of your intention that there would be no increase in effort in the developed fisheries. At the same time we would only have the capacity to operate up to five scampi vessels in Areas 1 and 2 as the larger vessel would be utilising the sixth permit to develop a fishery in the Southern Ocean's region."

MAF/Fish approved the *Petersen* on 6 June (described as “the larger vessel”) on 6 June 1991, subject to conditions, the most pertinent being:

- It must fish in Areas 3-9 only.
- Simunovich will advise the Ministry before registration and permitting of the *Petersen* which vessel it will replace in Areas 1 and 2.
- Simunovich will have no more than five vessels fishing for scampi at any one time.

In response, Mr Wilkinson accepted all of the conditions except the restriction to five scampi vessels. Simunovich asserted that there were six scampi vessels but the vessel to be substituted by the *Petersen* was not named. The only evidence that Simunovich reduced its effort appears in the affidavit of Mr Wilkinson that two of its vessels, the *Drysdale* between 15 to 29 September 1991 and the *Enemelay* between 1 July and 14 August and 18 September to 29 September were directed to fishing QMA 4 and not in QMAs 1 and 2.

On 8 October, Simunovich was notified by MAF/Fish that their scampi fishing for the ensuing 1991-92 year was restricted to five vessels only, which did not include either the *Drysdale* or the *Petersen*.

The response from Simunovich was immediate. Not only did it protest at the delays in receiving permits in time for the start of the fishing year on 1 October 1991, Simunovich also sought an immediate review of the decision not to allow the *Drysdale* to fish for scampi.

The argument advanced by Simunovich was that it had verbal assurances from Dr Allen and the *Drysdale* was bought on that basis. In the renewed permit issued on 22 May 1991, five Simunovich vessels (not including the *Drysdale*) were allowed to take scampi but the form on which this restriction was placed had conditions relating to the Auckland Fishing Management areas, when in fact it should have been a condition relating to Areas 1 to 9. Mr Wilkinson interpreted that to mean that the *Drysdale* could take scampi in Areas 3 to 9 and, as a result, it fished for scampi in those areas. Simunovich also argued that the fishing permits issued in October 1990 did not have a vessel restriction and that as required by s 63(6) MAF/Fish did not give written notice of new conditions relating to the vessel restriction and thus the re-issued permit of 22 May 1990 was invalid.

On 9 October, the Auckland Office (Northern region) mistakenly conceded that the restriction on the permit dated 22 May 1991 was placed on the wrong form and that the conditions should have related to Areas 1 to 9, not the Auckland Fisheries Management Areas 1 and 2. However, Simunovich had given a voluntary undertaking that it would not use the *Drysdale* in Areas 1 and 2. Only one of these were the Auckland Fishers Management Areas.

Strongly worded correspondence was sent to MAF/Fish on 11 October 1991 by Simunovich, taking issue with the exclusion of the *Drysdale* from the scampi fishery and referring to the conditions on the previous permit 007337 issued on 22 May 1991, which did not preclude the *Drysdale* from fishing for scampi outside QMAs 1 and 9 (the Auckland Fishing Management Areas). The letter also alluded to the *Petersen* being on its way to New Zealand and that Simunovich had proposed it would fish this vessel on one of the six available entitlements in

Areas 3 to 9, and another of the remaining six scampi vessels would be tied up. Again, there was no named or specific vessel which was going to be withdrawn.

Simunovich requested a s 63(11) review which, among other things, was a review of the exclusion of the *Drysdale* from the scampi fishery. On 24 October 1991, Mr Wilkinson, together with Messrs Peter and Ivan Simunovich met with the Minister of Fisheries and three MAF/Fish officials to express Simunovich's dissatisfaction with the process of issuing scampi trawl permits for the 1991-92 fishing year. Their complaint was that it was poorly handled, there had been inappropriate consultation with the industry and their legal entitlement had been prejudiced as their permit was not issued when requested.

Simunovich argued that the company had invested \$3 million in a new vessel, which clearly referred to the *Petersen* and they wished to fish Areas 3 to 9 in an "open fishery", which was not possible given the current restrictions on the scampi fishery. It pressed for a review of the tonnages available for QMAs 3 to 9 and stressed that their investment in a new vessel was based on the information they had gained in the previous year on a trial basis. The review of the permit conditions for the *Drysdale* was also raised, amid a complaint that there was no action and Simunovich were told that Mr Phil Major had been deputed to carry out the review and would be in contact with Simunovich before the end of the week.

Mr Burnard was asked to undertake an informal review. Meantime, Simunovich was threatening legal action on the basis that the *Drysdale* had been unable to fish since 1 October 1991. The Court action was threatened in relation to the catch limits proposed in QMAs 3 to 9 and urgency was requested in relation to the *Drysdale* review.

Mr Burnard did not accept the argument for Simunovich that the *Drysdale* was only prohibited from fishing in QMAs 1 and 2 but could fish in any other area. He referred to Permit No. 7337 issued on 22 May 1991 which had attached as Appendix C a list of 5 vessels that could fish for scampi under the permit and did not include the *Drysdale*. He noted that unfortunately, these conditions were placed on a form entitled "*Conditions Regulating the Taking of Non-ITQ Species in the Auckland Fishery Management Area*" and that Simunovich were taking advantage of an obvious error.

The report notes that despite Mr Wilkinson's claimed impression that the *Drysdale* could fish in QMAs 2 to 9 inclusive, the catch landing returns supplied by the company show that in both July and August of 1991 the *Drysdale* was targeting scampi in QMA 1. The report highlights that the fishing was totally in contravention of the permit then in force and was contrary to the protestations made by Mr Wilkinson in his letter that his company would give a voluntary undertaking they would not use the *Drysdale* to increase effort in QMAs 1 and 2.

Rejecting the request that the *Drysdale* be permitted, Mr Burnard recommended that the *Drysdale* not be approved as a scampi vessel, as Simunovich and Mr Wilkinson were fully aware of the intention of restriction access to new permit holders and vessels in the scampi fishery until a longer term management strategy was introduced. As Simunovich owned and was permitted for five vessels at the date of the imposition of the moratorium, and had not entered into any contractual arrangements to purchase the *Drysdale* or any other vessels, the *Drysdale* should not be approved.

Mr Major was appointed to undertake the s 63(11) review and he concluded that “*in fairness*” the *Drysdale* should be permitted to trawl for scampi. The decision was communicated to Simunovich on 12 December 1991 and the written decision was issued on 20 January 1992. From an examination of the correspondence and the interviews with Messrs Wilkinson, Ivory, Shallard and Burnard, together with the informal review by Mr Burnard and a summary of events by an SMO, Mr Major found that the vessel the *Drysdale* was authorised to fish for scampi shortly after its purchase in February 1991 and this occurred notwithstanding the intent of the moratorium imposed on 27 September 1990 by Gazette to restrict entry into the fishery.

As a result of the review decision, the *Drysdale*’s catches for Areas 1 and 2 were included in the ICE allocations.

6.6.3.3 The Petersen

In the meantime, Simunovich advised MAF/Fish that the *Petersen* was due to arrive in Auckland on 26 November and would be ready for scampi fishing the following week. The *Petersen* was duly permitted to fish for scampi in Areas 3 to 9 and commenced fishing in the week of 19 December 1991.

Despite the imposition of the vessel restriction on 22 April 1991, MAF/Fish permitted and approved in Simunovich’s favour, two additional vessels which were not fishing as at 30 September 1990. It also appears that the withdrawal of one of the Simunovich vessels from the scampi fishery was never required to be specified. It was not until 17 December 1991, when Mr Shallard responded to complaints from the Independent Scampi Group (ISG) that the *Petersen* was permitted to target scampi despite the vessel restriction, that Mr Shallard replied that the *Mutual Enterprise* had since been withdrawn from the scampi fishery in Areas 1 to 9 and replaced by the *Petersen*, which could fish in Areas 3 to 9. As Mr Shallard acknowledged in his evidence, MAF/Fish did not specify which vessel Simunovich should withdraw.

“I think the Mutual Enterprise was the vessel – we didn't specify which vessel Simunovich should withdraw. I think at some stage they said that would be the one that would be withdrawn but then another one broke down and they used the Mutual Enterprise instead ... So, there was still one vessel being taken out, I think is how it occurred, but we had not specified that it would be that particular vessel.”

The *Petersen* was approved for scampi fishing pursuant to a permit dated 9.12.91, which contained the following conditions:

- “1. Taking of scampi by the method of bottom trawl is restricted to FMAs 3-9
2. Fishing is restricted to the vessel *Petersen* registration no. 16030
3. The permit holder is authorised to use trawl net with minimum net size of 43 mm

4. *The permit holder shall take on board scientific observers*
5. *The permit holder shall ensure no more than “ five” (five vessels are targeting scampi concurrently)*
6. *The permit endorsement will be valid until 31 March 1992.”*

On 13 December 1991 the scampi permit for the *Petersen* was amended to allow “6” (six) vessels to target scampi concurrently. The amendment was authorised in faxes from the Registrar of Fisheries and the Director of Operations on 13 December 1991, as a result of the successful s 63(11) review of the *Drysdale* permit.

The next relevant event is a letter from Simunovich to Mr Shallard dated 17 February 1992 requesting approval for Simunovich to temporarily replace the *Drysdale* with the vessel *Mutual Enterprise*, as the *Drysdale* had suffered major engine damage and was unable to fish for scampi for a period of two months or more. Mr Burnard and Mr Shallard approved and recommended to Dr Allen that Simunovich should be given approval to “temporarily replace the vessel the *Drysdale* with the vessel *Mutual Enterprise*” and imposed a weekly reporting requirement on the fishing vessel *Mutual Enterprise*”. In an explanatory letter to Dr Allen, Mr Burnard said:

- “3. *Currently, Simunovich Fisheries Limited’s fishing permit is conditioned to allow the vessel “Drysdale” to fish for scampi in Areas 1 to 9. It is proposed that the vessel “Drysdale” be removed from the permit condition and the “Mutual Enterprise” be named as its replacement. This is to emphasise that the vessel “Mutual Enterprise” is only a replacement for the “Drysdale” and not an additional vessel. Although this is a temporary replacement, it is felt that by removing the vessel “Drysdale” from the permit condition it would also serve to avoid any confusion about which of the two vessels is permitted to fish for scampi.*
4. *It is envisaged that, at such time when the vessel “Drysdale” is repaired and is ready to fish for scampi, upon being notified by Simunovich Fisheries Limited, their scampi permit will subsequently be amended. The vessel “Mutual Enterprise” will then be removed from the permit endorsement and the vessel “Drysdale” replaced”.*

The recommendation that Simunovich be allowed to temporarily replace the vessel the *Drysdale* with the vessel *Mutual Enterprise* was approved by Dr Allen, including the requirement that when MAF/Fish was notified by Simunovich that the vessel *Drysdale* has been recommissioned, an instruction would be given that the vessel *Mutual Enterprise* be removed from the permit endorsement and be replaced by the vessel *Drysdale*.

Simunovich were notified of these amendments to the permit on 17 February 1992, including the requirement that when the vessel *Drysdale* has been recommissioned and was ready to commence fishing for scampi, Dr Allen would instruct the Registrar of Fisheries to amend Simunovich’s permit to allow the vessel *Drysdale* to be able to fish for scampi and the vessel *Mutual Enterprise* would be removed from the scampi permit.

It appears from documents recently made available to the Inquiry that on 23 March 1992, Simunovich notified MAF/Fish that the *Drysdale* had been repaired and was ready to fish for scampi again. However, instead of removing the *Mutual Enterprise*, Simunovich sought an “indulgence to now remove the “Red Bluff” ... in favour of allowing the “Drysdale” to recommence scampi fishing by way of the permit amendment.”

In the same letter seeking this further permit change, Simunovich referred to the *Mutual Enterprise* being “voluntarily removed” from the permit endorsement to enable the *Petersen* to begin fishing. It should be noted that the approval conditions of *Petersen* required Simunovich to name the vessel to be withdrawn in Areas 1 and 2. This condition was never transferred to the permit however.

Dr Allen acceded to Simunovich’s request noting that he was “happy to agree to this request”.

From the documentation available to this Inquiry, it appears that the *Drysdale* was recommissioned by Simunovich in the week of 7 May 1992 and fished for scampi until 15 July. At the same time, the *Mutual Enterprise* which had been commissioned in the week of 27 February, continued to fish throughout March and from mid-April through to 22 July. The *Petersen* was also fishing during that fishing year, from 19 December to 15 January and again in the first two weeks of July, at the same as the *Drysdale* and the *Mutual Enterprise*. The *Red Bluff* fished from 5 December 1991 to 1 January 1992 and for a month in February-March 1992. The table setting out the fishing patterns by boats in the scampi fishery Area 4 is set out in the accompanying table.

Scampi Fish Area 4 – 1991-92

Week	Red Bluff	Christmas Creek	Enemelay	Petersen	Alba II	Drysdale	Mutual Enterprise
27 Feb-4 Mar	0.061	0.101					0.442
5 Mar-11 Mar	0.980	0.538			1.288		0.505
12 Mar-18 Mar	0.371	0.463			0.685		0.407
19 Mar-25 Mar	0.248	0.096			0.685		0.103
26 Mar-1 Apr					2.823		
2 Apr-8 Apr							
9 Apr-15 Apr					2.435		2.390
16 Apr-22 Apr					2.224		1.301
23 Apr-29 Apr					1.851		1.735
30 Apr-6 May					2.575		1.783
7 May-13 May			0.923		1.178	1.260	0.860
14 May-20 May		0.387	3.237		1.520	2.785	2.510
21 May-27 May		0.077	2.641		2.300	2.830	2.215
28 May-3 Jun		2.103	3.503		1.513	2.554	2.637

4 June-10 Jun		1.262	0.503		1.533	1.318	0.548
11 Jun-17 Jun		0.684	1.673		1.700	1.790	1.295
18 Jun-24 Jun		2.643	3.353			3.238	2.515
25 June-1 Jul		1.762	2.395			0.970	1.270
2 Jul-8 Jul			2.658	1.433		2.925	0.575
9 Jul-15 Jul				3.796		3.854	2.240
Total	7.677	22.030	36.165	13.722	36.892	33.068	25.331

This data was compiled for Area 4 only.

It appears from the records compiled for all areas for the week ended 30 September 1992, 'Scampi Catch Report by Vessel' that there were for the 1991-92 year seven vessels owned by Simunovich fishing in areas SCI 1-6 in the scampi fishery.

We have tabulated the areas and period of time in which Simunovich were fishing vessels for the 1990-91 and 1991-92 years.

VESSEL	AREAS	PERIOD 1990-91 FISHING YEAR	AREA	PERIOD 1991-92 FISHING YEAR
1. Drysdale	1 4	6.7.91 – 9.8.91 15.9.91 – 29.9.91	2 4 6	19.12.91 – 15.01.92 07.04.92 – 15.07.92
2. Albatross II	1 2	12.12.90 – 22.12.90 25.01.91 – 03.10.91 03.10.90 – 09.12.90 12.12.90 – 22.12.90 06.09.99 – 03.10.91	1 2 4 6	05.12.91 – 14.01.92 05.03.92 – 01.04.92 09.04.92 – 17.06.92
3. Christmas Creek	1	01.10.90 – 30.09.91	1 2 4	05.12.91 – 15.01.92 27.02.92 – 25.03.92 14.05.92 – 01.07.92
4. Mutual Enterprise	2 1	03.10.90 – 07.05.91 29.05.91 – 21.07.91 29.05.91 – 22.07.91 31.07.91 – 22.08.91	1 2 4	27.02.92 – 25.03.92 09.04.92 – 15.07.92
5. Red Bluff	2 1	12.10.90 – 08.05.91 20.05.91 – 30.09.91	1 2 4	05.12.91 – 01.01.92 27.02.92 – 25.03.92
6. Enemelay	2 1 4 6	04.10.90 – 17.04.91 11.06.91 – 01.06.91 18.08.91 – 11.09.91 01.07.91 – 15.08.91 18.07.91 – 29.09.91 13.03.91 – 17.04.91	1 1 4 6	05.12.91 – 15.01.92 07.05.92 – 08.07.92
7. Petersen			4 6	19.12.91 – 15.1.92 2.7.92 – 8.7.92

For the year 1991-92, Simunovich had seven vessels fishing for scampi, with five vessels fishing Areas 1, and 2 and six vessels fishing concurrently.

6.6.4 Comparison with Other Fishers

6.6.4.1 Barine's Application to Bring in Additional Vessels

Unaware of the impending vessel restriction and any proposals to implement vessel restriction in the scampi fishery, Barine wrote to the Regional Manager of the Auckland office applying for approval to register and operate four or more vessels in the scampi fishery for the current fishing year. Barine also advised that it would be applying to renew its present permit and approvals for the fishing years to September 1992 and beyond on the basis of its commitment and history in the fishery. Barine explained that it had found new grounds in the areas worked to date, namely Areas 1 and 2 but exploratory trips to the more distant areas, Area 3 and 4, indicate that more research and exploration should be undertaken with larger vessels. Mr Penwarden on behalf of Barine, offered to meet with Mr Walshe for further discussion or the provision of additional supporting information if required. He informed Mr Walshe that various *"structures had been put in place to meet all requirements and can supplied on request"*.

Before receiving a reply to its letter, Barine received the notification from Mr Shallard of 22 April 1991 imposing the vessel moratoria and announcing the criteria for exemptions to the scampi fishing moratorium.

Almost one month later on 16 May 1991, Mr Shallard responded to Barine; whose letter had been forwarded to Head Office. Mr Shallard advised Barine that MAF/Fish was concerned at the rapid expansion of effort in the scampi fishery and referred to the recently approved criteria to control such expansion. He explained that MAF/Fish needed to evaluate a sustainable level of fishing but was not yet in a position to determine the sustainable yield for the fishery and advised Mr Penwarden that he was unable to give any approval in principle to the additional vessels as requested. Mr Shallard said further:

"If you are in a position to supply details of the individual vessels and fishing plans you propose to introduce I am happy to reconsider this decision. It is unlikely however, that I will approve any proposal that expands effort in the fishery."

Barine viewed the response from MAF/Fish as tantamount to a refusal to allow the extra vessels and believed it was prevented from pursuing the application. It is of note that MAF/Fish approved the *Petersen* in principle on 6 June, just over three weeks after Barine had made its application on 16 May to bring in additional vessels to the scampi fishery.

On 22 November 1991, Mr Shallard had occasion to explain his decision to the Group Director (Mr Craig) about the permitting of the *Petersen*. In a letter dated 22 November 1991, Mr Shallard expressed his view that it was now appropriate to allow additional vessels to fish in Areas 3 to 9.

“This raises the question however, of approval of additional vessels in the scampi fishery and it is my view that it is appropriate that we allow additional vessels for Simunovich and other companies that are permitted to fish in Areas 3 to 9 to be allowed to have vessels of the size and type so that scampi fishing in those areas may be able to take advantage of the 60 tonnes per area allocations that you have recently agreed to. I believe you should approve a general principle of allowing additional vessels to be permitted for current scampi permit holders in Areas 3 to 9 on application to allow additional fishing capacity in those areas in line with the intent to find what the resource is in a commercial sense in those areas.”

This shift in attitude was never communicated to Mr Penwarden of Barine or to any other fishers. Three days later, on 25 November, Mr Shallard corresponded with Mr Penwarden advising him of the allocation of individual catch limits in the scampi fishery but made no mention of his views about permitting additional vessels in areas 3 to 9, nor made any reference to Barine’s earlier application in May to bring in four or more additional vessels.

It was not until December, when the *Petersen* arrived in Auckland and commenced fishing, that other scampi fishers became aware that an additional and large Simunovich vessel had been permitted and approved by MAF/Fish.

This resulted in a letter being urgently faxed to Dr Allen dated 9 December 1991, seeking confirmation that Simunovich has now been permitted to add a 43 metre vessel to fish competitively, after the vessel restriction. It was understood at that time that Simunovich was to replace the 25 metre 40 tonne *Enemelay* with a 43 metre vessel, 400 tonnes (ten times the capacity of any other vessel), the *Petersen*:

“in complete contradiction of MAF’s stated purpose to restrict the catch effort in this interim period of consultation.”

The response came from Mr Shallard on 17 December 1991 advising that the *Petersen* was permitted to target scampi in Areas 3 to 9; that the *Petersen* had a registered length of 41.84 metres and a freezing capacity of 250 tonnes and that MAF/Fish were aware of the catching capacity of the *Petersen*. Mr Shallard advised that as part of the conditions of approval for the *Petersen* to be permitted to target scampi:

“it was agreed that this vessel would replace a vessel that is currently permitted to take scampi. The FV Mutual Enterprise has since been withdrawn from the scampi fishery in Areas 1 to 9 and has been replaced by the FV Petersen which can fish for scampi in Areas 3 to 9.”

Mr Shallard acknowledged the criticism of commercial prejudice to the ISG and other fishers but stated that MAF/Fish’s role was *“in the management and conservation of fisheries, not the commercial position of individuals or companies”*.

He said that if other fishers wished to transfer effort from QMAs 1 and 2 to QMAs 3 to 9 and they were permitted already for Areas 1 to 9 *“I am sure that the Ministry will look at this.”* He advised ISG that the *Petersen* was approved on 6 June, subject to a number of conditions which were agreed upon by Simunovich and subsequently the *Petersen* was purchased by Simunovich.

6.6.4.2 Mount Fish Markets

Mount Fish Markets also had applied to bring in another vessel the *N R Francis* to replace its vessel the *Kaiti*.

The initial request was declined because the *NR Francis* was a higher powered vessel with larger freezer capacity than the *Kaiti*, as it would signify an increase in catch effort. The company wished to improve the quality of the product by use of freezer capacity on board, which the permitted vessel the *Kaiti* did not have. On 21 May 1991, Mr Shallard met with Mount Fish Markets to discuss their proposal and revised his earlier decision not to allow the replacement vessel. Mount Fish Markets finally received approval to exchange its vessel.

In April 1992, Mount Fish Markets sought approval to replace the *N R Francis* with a larger vessel, the *James Cook* (formerly a MAF/Fish research vessel). This request arose from the 17 December 1991 letter of Mr Shallard to the Independent Scampi Group, responding to its criticism of the *Petersen* approval.

In the letter, Mr Shallard said:

“Should any fishers wish to transfer effort out of the stressed areas 1 and 2 to QMA 3-9, the Ministry will look at this”.

Mount Fish Markets acted upon that indication and sought to transfer its effort with a larger vessel to Areas 3-9.

Pertinently, Mount Fish Markets did not perceive this to be an indication it could have an additional vessel, but a replacement only.

6.6.4.3 Vautier and Petromont

For completeness, it should also be recorded that at the same time Simunovich purchased the *Drysdale*, Vautier purchased the *Venture K*. The two vessels appear to have been purchased at the same auction in Cairns in February 1991. This was before the announcement of the vessel restriction on 22 April 1991 and after the imposition of the moratorium on the scampi fishery.

Although Vautier had applied to the Central region for a permit, it had not been issued before October 1990 (the date of the moratorium), which handicapped its ability to acquire a vessel. Ellis J held this was unlawful in the ***Vautier Shelf*** decision and once a s 65 exemption was granted, Vautier was able to register the newly acquired vessel against its permit and this was the vessel *Venture K*. Although it was not fishing as at 30 September 1990, this was not an additional vessel added to the fishery, as Vautier had made its application prior to the moratorium in March 1990 and had corresponded with MAF/Fish and the Minister of Fisheries until it was finally granted on 30 May 1991, for Areas 2-9 only.

In the case of Petromont, it merged its fishing operations with Mr Montgomery, who had held a scampi permit since 1988, and they decided to purchase a vessel from Australia for scampi fishing. Before embarking on the purchase of a vessel, MAF/Fish had given assurances that it

would approve the introduction of a vessel, provided it was under 30 m. in length, and that Mr Montgomery's permit could be transferred to Petromont, provided Mr Montgomery was a shareholder. The reason for the vessel length restriction to 30 m. was MAF/Fish's wish that it did not want additional stress placed on the fishery by the introduction of vessels which were considerably larger and which would give rise to increased catching capacity.

Having obtained MAF/Fish's assurance, Mr Peterson and Mr Montgomery went to Darwin to purchase the *Raptis Pearl*, later named the *Langoustine Explorer*.

When Mr Montgomery made an application to register the *Langoustine Explorer* in May 1991, after its arrival and refit in New Zealand, MAF/Fish had not registered the vessel by the end of June. On making inquiry, Petromont were advised of the directive from Wellington that the vessel could not be registered for the scampi fishery. MAF/Fish however, had been aware of Petromont's wish to purchase a new vessel since January 1991. Following detailed submissions to MAF/Fish, Petromont received an undertaking and acceptance by MAF/Fish that Petromont was committed to the scampi fishery and that the purchase of the *Langoustine Explorer* was to fish against that permit.

The vessels acquired by both Petromont and Vautier were acquired to fish the approved scampi permits for each company.

These vessels were not **additional** vessels, as in the case of the *Drysdale* or the *Petersen* for Simunovich and in our view they should be viewed differently. Furthermore, Petromont was confined to a vessel less than 30 metres, compared to the approval for the Simunovich's vessel, the *Petersen* which was approved for 41 metres.

Although Simunovich did not know at the time of purchasing the *Drysdale* that vessel restrictions were to be imposed, the *Drysdale* did not meet the criteria of being a vessel that fished as at 30 September 1990 and when it commenced fishing in July 1991, was an additional vessel in the scampi fishery.

6.6.5 The Submissions

The issue of vessel permitting has been raised at this Inquiry as an illustration of MAF/Fish's inconsistent and incoherent decision-making. In the material presented to the Inquiry, issues and submissions that have been made in the context of previous Court decisions have been reiterated to this Inquiry.

6.6.5.1 Barine and Sealord Submissions

To summarise the criticism of MAF/Fish's decisions in relation to vessels, they are as follows:

- Having made the "no more vessels" rule, MAF/Fish made a deliberate decision to approve an additional, bigger, faster and greater capacity vessel into the scampi fishery, which would increase effort in the fishery.

- The *Petersen* was approved, on the basis that Simunovich would take one of its smaller vessels out of QMAs 1 and 2 whilst the *Petersen* was fishing in QMAs 3 to 9. Since the *Petersen* commenced fishing on 19 December 1991, the removal of a vessel from QMAs 1 and 2 after December 1991 did not counter the increased effort of the *Petersen* because catches were prescribed for each fisher in QMAs 1 and 2 from December 1991.
- MAF/Fish claimed that the *Petersen* would be able to fish in QMAs 3 to 9 instead of the *Mutual Enterprise* and QMAs 1 to 9, yet the *Mutual Enterprise* did fish for scampi in the 1990-91 year and the 1991-92 year.
- Despite Mr Shallard's letter assuring the ISG (as with the special permits) that any catch history developed in Areas 3 to 9 would not count in the allocation of any future fishing rights, ICE was allocated for QMAs 4 and 6A at the end of 1992, based on catches in the 1991-92 fishing year. Seven Simunovich vessels, including the *Drysdale*, the *Mutual Enterprise* and the *Petersen* contributed to catch history for QMAs 4 and 6 for the 1991-92 fishing year.
- The assurance from MAF/Fish that it would look at applications by other fishers to "transfer effort" in QMAs 1 and 2 and QMA 3 to 9 was meaningless, as the fishers were not in a position to transfer effort from Areas 1 and 2 because they only had one vessel each. Without approval for additional vessels, as requested by Barine, no other fisher other than Simunovich, could "transfer effort".

Barine and Sealord have submitted to the Inquiry that essentially the decisions by MAF/Fish concerning the *Drysdale* are evidence of incoherent decision-making whereas the decisions concerning the *Petersen* were considered decisions and as such are not an example of mismanagement but an illustration of unreasonable decision-making deliberately favouring a particular fisher. The comparison between Barine's application to bring in additional vessels and Simunovich's ability to obtain the entry of the *Petersen*, in Barine's submission demonstrates MAF/Fish were knowingly managing the fishery in a way that advantaged one particular fisher.

6.6.5.2 Ministry of Fisheries Submissions

There are two responses to these submissions. MFish has submitted that there can be no criticism of the approach MAF/Fish took in relation to the Barine and Simunovich applications. It contends that the approach taken by MAF/Fish was different because the application from Barine was non-specific as to vessel capacity and areas of fishing, whereas the Simunovich application was specific and offered to ensure no increased effort in areas where the fishery was stressed.

Secondly, after Mr Shallard had declined Barine's application but said:

"If you are in a position to supply details of the individual vessels and fishing plans you propose to introduce, I am happy to reconsider this decision. It is unlikely however, that I will approve any proposal that expands effort in the fishery".

Barine did not continue with its application or respond to this letter. MAF/Fish did not accept that Mr Shallard's letter simply declined the application and if Barine wished to pursue the application, it could have done so. This contrasted with the application by Simunovich to introduce the larger vessel, the *Petersen*.

In relation to the *Drysdale* MAF/Fish relies on the review undertaken by Mr Major who MFish submits, took into account all relevant factors, was procedurally fair and lawful and no criticism can be made that the decision was "*favourable*" to Simunovich in any way that implies bias towards the company. MFish also relies on MAF/Fish's decision to permit two other vessels purchased at the same time, namely the *Venture K* and the *Langoustine Explorer*, which was consistent with its decision to permit the *Drysdale*.

6.6.5.3 Simunovich Submissions

Simunovich submitted that MAF/Fish had to permit the *Drysdale* as well as the *Venture K* and the *Langoustine Explorer* as a substantial commitment had been made by the three fishers prior to the imposition of the vessel restriction, that natural justice required that the three cases justified an exception to the policy, because to do otherwise would have been unreasonable in that MAF/Fish would have closed its mind and applied policy rigidly, thus making it unreasonable in administrative law terms.

Simunovich complains that the failure to renew the permit with the *Drysdale* on 1 October 1991 meant that it was unable to fish from 1 October until 12 December 1991, when it was advised that MAF/Fish had approved the *Drysdale*. In relation to the *Petersen* Simunovich submits that its proposal was "*well crafted and designed to meet the concerns of the Ministry*" and Simunovich removed a vessel as agreed from Areas 1 and 2, notwithstanding that its new vessel had not arrived. The reduction of effort by one vessel was adhered to and in support of this submission, reference is made to an example in 1992, when the *Drysdale* suffered engine damage, a formal request was made to substitute the *Mutual Enterprise* whilst the *Drysdale* was repaired, which was approved by MAF/Fish.

Simunovich further submits that it offered to limit its effort in Areas 1 and 2 to that of the previous year, in return for approval of the entry of the *Petersen* and this disadvantaged Simunovich significantly. The change in the permitted vessel numbers from 5 to 6 was as a result of the successful 63(11) *Drysdale* review and that at all times, Simunovich complied with its "*voluntary arrangements*" to use only six vessels, except when authorised to make a substitution.

6.6.6 Analysis of the Vessel Policy

The application of the vessel restriction was honoured more in the breach than in the observance. Having imposed the restrictions on scampi permits to apply to named vessels that were fishing as at 30 September 1990, MAF/Fish proceeded to grant exemptions to permit holders who acquired vessels prior to the announcement of 22nd April 1990.

Not surprisingly, by announcing a vessel restriction with retrospective effect, MAF/Fish were immediately creating a problem that in the seven months between the imposition of the moratorium on new entrants to the scampi fishery and the vessel restriction, some of the fishers had already acquired an extra vessel (in the case of Simunovich) or a replacement vessel (in the cases of Mount Fish Markets) or a new vessel with which to fish their scampi permits (in the cases of Vautier and Petromont).

The vessel restriction was announced, seemingly, without checking the circumstances of the current scampi fishers, and discussing with fishers MAF/Fish's desire to reduce effort in QMAs 1 and 2 but encourage exploratory fishing in Areas 3 to 9.

As a result of the retrospective nature of the vessel restriction, MAF/Fish received the inevitable requests for exemption from scampi fishers to replace or add vessels to the fishery. Given that the announcement was made half way through the 1990-91 fishing year, the decision appears ill-timed and not properly thought through.

Once the vessel restriction was announced on 22 April 1991 and the permits were recalled, conditions attaching to each of the scampi permits named the vessel. Following Simunovich's purchase of the *Drysdale* at the February auction in 1991, there is a reference to the six scampi vessels, including the *Drysdale* newly acquired, but no request made of MAF/Fish or assurance received, that it could fish for scampi after the vessel restriction had been announced. Although registered, the *Drysdale* became part of the Simunovich fleet from 6 July 1991 to 29 September 1991, in Fishery Management Areas 1, 2 and 4. It is not surprising therefore that on 22 May 1991, in re-issuing the permit, the *Drysdale* is not included as one of the five vessels named for the taking of scampi in the conditions dated 22 May 1991.

The conditions in the permit dated 22 May 1991 state that MAF/Fish are regulating the taking of non-ITQ species in the Auckland Fishery management Area. This was a mistake, as identified in the review process conducted by MAF/Fish, but was relied on by Simunovich in that it assumed that the *Drysdale* could be used in areas other than the Auckland Fishery Management Area. The dates of the *Drysdale*'s fishing trips in the period May 1991 to September 1991 reveal that the *Drysdale* was fishing in FMA 1, being one of the Auckland fishing management areas. This does not appear to have been noticed by MAF/Fish. Contrary to the conditions in the permit, an unnamed vessel, the *Drysdale* was fishing in the Auckland Fishery Management Area.

Mr Wilkinson acknowledged that in respect of the *Drysdale*:

"we simply went and purchased the vessel. There wasn't anything to correspond about. Subsequently, April criteria came out, we corresponded and said to the Ministry: "We've got six vessels, not five ... we simply purchased the vessel because we believed there were no vessel constraints."

Having purchased the *Drysdale* at the February auction, and received the letter restricting vessels to those that were fishing on 30 September 1990, Simunovich did not seek approval for the *Drysdale*. In Mr Wilkinson's letter of 16 May 1990, in asking permission to bring in the *Petersen*, the letter simply stated that Simunovich Fisheries currently owned six vessels that were permitted and registered for scampi fishing and the list included the *Drysdale*. The

Drysdale is merely referred to as being acquired by auction in February, as it was a relatively new vessel. It has been submitted by Simunovich that it had no reason to believe vessel restrictions would be imposed when it bought the *Drysdale*. However, the *Drysdale* did not meet the criteria, as it was not fishing as at September 1990 and by July 1991, when it commenced fishing, was an additional vessel introduced into the scampi fishery, without specific approval at that time.

The matter came to a head when the permits were issued for the 1991-92 year and did not include the vessel the *Drysdale*. This prompted a request for a review under s 63(11) from Simunovich. It was only at this stage, MAF/Fish appear to have realised that the *Drysdale* was not only fishing in the scampi fishery, but was targeting scampi in SCI 1. It was in contravention of the permit then in force and contrary to the protestations made by Mr Wilkinson that his company would give a voluntary undertaking they would not use the *Drysdale* to increase effort in SCIs 1 and 2.

When Mr Shallard responded with the approval for the *Petersen*, the condition specified that Simunovich would not have more than five vessels fishing for scampi at any one time. Mr Wilkinson contacted Mr Burnard and Mr Shallard for a discussion including the fact that Simunovich now had six vessels, not five. Simunovich indicated that it would accept the conditions for the *Petersen*, on the proviso Simunovich would have six vessels. It appears MAF/Fish accepted this when asked, but the reasons for such acceptance are not noted. It was not until a review was conducted in November and December respectively of that year, that MAF/Fish were faced with the fact that Simunovich had considered it had advised MAF/Fish and MAF/Fish had given tacit approval.

Even when MAF/Fish issued the permit for the *Petersen*, the conditions contain the initial condition that Simunovich will not have more than five vessels targeting scampi. After the s 63 (11) review, the permit was amended to six vessels which gave Simunovich an entitlement to fish five vessels in all areas including Areas 1 and 2 and the *Petersen* to fish in Areas 3-9. As noted above and contrary to the initial condition of approval, MAF/Fish never required Simunovich to nominate a replacement vessel on the registration and permitting of the *Petersen* and nor was that condition transferred on to the permit. It was not until December 1991 when Mr Shallard received the complaint from the Independent Scampi Group that Simunovich had been allowed a large and new vessel in the scampi fishery, that Mr Shallard responded by stating that Simunovich had withdrawn the *Mutual Enterprise*.

Although the *Mutual Enterprise* was the vessel withdrawn as at December 1991, Simunovich sought and was granted two further replacements. The *Drysdale* had engine trouble so MAF/Fish allowed the *Mutual Enterprise* to return to fish on condition it was withdrawn when the *Drysdale* was repaired. Simunovich then applied to have the *Mutual Enterprise* and the *Drysdale* fishing and withdrew the *Red Bluff*. By March 1992, the *Red Bluff* had fished four months of that year from the beginning of December 1991 to the end of March 1992.

Thus, of Simunovich's fleet of seven scampi vessels, all seven were fishing during the 1991-92 year. It should be said that Simunovich complied with its permit conditions, of having six vessels operating concurrently. However, the loose wording of the permit condition and MAF/Fish's accommodation enabled Simunovich to interchange and use all seven vessels to maintain an ability to operate six vessels in the event of mechanical failure or preference.

Given that the purpose of the vessel policy was to restrict vessels and effort to the levels as at September 1990, the advent of the two additional vessels for Simunovich into the fishery, together with its ability to interchange vessels undermined the purpose of the vessel restriction imposed. These factors enhanced Simunovich's ability to acquire catch history during the 1990-91 and 1991-92 years.

Although Simunovich submits that it was disadvantaged by its offer to limit catch effort in Areas 1 and 2 in return for the approval of the *Petersen*, we note that the approval condition required Simunovich to advise which vessel was being withdrawn from Areas 1 and 2 before the *Petersen* was permitted.

6.6.6.1 Unevenhandedness

One example of inconsistent and different treatment between fishers is the way in which MAF/Fish dealt with the application by Barine to bring in four additional vessels and Simunovich's application to have the *Petersen* approved. Mr Penwarden made his request on 18 April 1991 before the vessel restriction was imposed. Mr Shallard declined to approve Barine's application on 16 May, the same day that Mr Wilkinson wrote to Mr Burnard in Wellington, seeking approval for Simunovich's seventh vessel, the *Petersen*.

Three weeks later Mr Shallard approved the *Petersen* on conditions, one of which required Simunovich to advise MAF/Fish which vessel the *Petersen* is replacing. This condition was never transferred on to Simunovich's permit for the *Petersen* and as has already been described, the vessel was never specified until December 1991 in Mr Shallard's letter to the ISG solicitor.

On the face of it, MAF/Fish acted inconsistently and unevenhandedly, with Simunovich receiving the advantage.

We have considered carefully the submissions of both MAF/Fish and Simunovich that Barine's letter was not detailed or specific as to which vessels he proposed to use and the plan that he was to follow. We have difficulty in accepting these submissions. If Barine was required to supply more detail, then that requirement should have been made clear. The suggestion by MAF/Fish that the paragraph:

“if you are in a position to supply details of the individual vessels and fishing plans you propose to introduce, I am happy to reconsider this decision. It is unlikely however, that I will approve any proposal that expands effort in the fishery”

was a bureaucratic double-speak for - we may say “yes” when we are saying “no” – then the communication is unacceptable to fishers who have not been former Ministry employees.

We accept Mr Penwarden's evidence that as he wished to bring in four vessels it would expand effort in the fishery and on that basis would meet with a further rejection from MAF/Fish.

On the basis of the submissions of MFish and Simunovich, that Barine's application was not properly tailored to MAF/Fish's requirements, the unhelpful inference to be drawn is that unless applicants wrote like a Ministry official, their applications would be unsuccessful. Whilst this was not the intention of the submission, it reinforces the perception that ex-employees such as Vaughan Wilkinson, a former senior fisheries officer, were always going to receive an advantage.

It has been submitted that because Mr Penwarden did not have a specific proposal for MAF/Fish to consider, MAF/Fish acted correctly in response to both applications. We do not accept this submission because the letter of refusal to Mr Penwarden is clearly stating that further effort in the fishery will not be approved.

It is inexcusable in our view that a Ministry which was intending to restrict vessel entry into the scampi fishery, could deal with the applications from Barine and Simunovich in entirely different ways.

Further, Barine had made reference to exploring Areas 3 to 9 in its application of 18 April. When Mr Shallard had a change of mind in November 1991, that it was then appropriate to allow exploration of QMA 3 to 9 for any fisher who wished to bring in additional vessels to explore the fishery, no-one from MAF/Fish, including Mr Shallard, contacted Barine. Given that there were only eight fishers in the scampi fishery and Barine was the only other fisher who made application for additional vessels, it would have been consistent, fair and reasonable for MAF/Fish to have at least notified Mr Penwarden of Barine and others:

- That he had had a change of mind in relation to additional vessels being brought in to QMA 3 to 9; and
- Advising the seven other fishers that an additional vessel, the *Petersen*, had been approved and the reasons why.

We agree with Mr Penwarden when he said

“what would have been good management would have been for Mr Shallard to write to us and say, “We have a new policy. We will now allow additional vessels in 3-9 and we will allow increased effort because clearly the fishery is growing”.

It has been submitted that the 17 December 1991 letter from Mr Shallard signalled that fishers could apply for approval for replacement vessels, and that Mount Fish Markets acted on this. As we have observed, the letter specifically advises that MAF/Fish would consider a “transfer” of effort from Areas 1 and 2 to 3-9 and Mount Fish Markets sought a replacement of its vessel to fish Areas 3-9, not an additional vessel as Simunovich did with the *Petersen* application.

However the scampi fishers were never given an indication that applications for additional vessels would be considered for Areas 3-9. They were told they could only transfer effort and this resulted in an application for a replacement vessel only, although Mr Shallard's letter of 22 November 1991 to Mr Craig expresses his view that it is appropriate to allow “*additional vessels for Simunovich and other companies that are permitted to fish in Areas 3-9*”.

As the example of Mount Fish Markets demonstrates, the possibility of having additional vessels was never signalled to the scampi fishers. No other application was forthcoming and we infer that fishers understood that they had to choose whether or not to transfer the effort from a known scampi fishery in Areas 1 and 2 to the rough southern seas which were comparatively unknown.

The lack of communication reinforces the ad hoc nature of dealing with the vessel policy and gives rise to the inevitable conclusion, that Simunovich was given preferential and favourable treatment by MAF/Fish, which has resulted in Simunovich gaining an advantage over other fishers, particularly Barine.

The second example arising in relation to vessel policy is the ease with which Simunovich could replace one vessel with another, seeking MAF/Fish's indulgence to change the *Mutual Enterprise* with the *Red Bluff*, compared to the difficulties experienced by the other fishers such as Mount Fish Markets to replace its only vessel or to fish the scampi permit at all in the case of Petromont. MAF/Fish was "*happy to oblige*" Simunovich's request to change for the third time a vessel, which was supposed to be nominated and withdrawn from the scampi fishery.

6.6.6.2 Persistent Contact

It appears that a fisher who persisted in contacting MAF/Fish or met with officials from MAF/Fish, secured greater advantage than those who dealt with MAF/Fish by correspondence. Simunovich did not hesitate to ring, meet, as well as communicate in writing, often recording telephone calls and meetings with Ministry officials to provide a record of verbal assurances or indications. This gave Simunovich a number of advantages, one example of which is Simunovich's reliance on verbal assurances and indications given by Dr Allen and Mr Burnard in relation to the *Drysdale*.

Similarly, the request by Mount Fish Markets to replace its vessel *Kaiti* with the *NR Francis* initially was declined. The request was in writing and it was not until Mr Shallard met with Mr Deadman, that the reasons for the replacement of the *Kaiti* were explained and approval was given to the *NR Francis*.

Petromont also had its application to register the *Langoustine Explorer* declined. Petromont had received an undertaking that Petromont could acquire a vessel. After a heated meeting, intervention by its solicitors and further representation, the vessel was registered in July 1991.

It appears that in a similar way, Vautier was able to acquire approval for *Venture K*. Having applied for a scampi permit in March 1990, Vautier was advised by MAF/Fish in May 1990 that its application "*was successful*" provided it obtained 25 tonnes of bycatch quota and a fine mesh permit.

On the strength of that advice, Vautier pursued the purchase of a vessel, culminating in the acquisition of the *Venture K*, in February 1991. Still MAF/Fish had not issued the permit and after further correspondence with MAF/Fish and the Minister of Fisheries describing the effect of the delay, Vautier received the permit, which was finally issued in May 1991,

approving the *Venture K*. This was 12 months after MAF/Fish had advised the permit was successful and was for Areas 2-9 only.

6.6.6.3 Failure of MAF/Fish to Verify Permit Conditions

The failure to require Simunovich to advise MAF/Fish of the replacement vessel for the *Petersen* pursuant to the conditions specified by Mr Shallard on 6 June 1991, is evident on a perusal of the permit which was ultimately issued on 9 December 1991. The permit, as has already been noted, is poorly drafted to reflect this condition, failing to require Simunovich to name the vessel being withdrawn. The result was that seven vessels were able to be used by Simunovich in the scampi fishery in the year 1991-92 almost interchangeably.

Simunovich had the ability to utilise seven vessels throughout the 1991-92 year, as long as not more than six vessels were being used concurrently. It was readily able to seek three changes to its replacement vessel. This gave Simunovich a substantial advantage. The ease with which Simunovich could seek changes to its replacement vessel contrasts markedly with the difficulties experienced by Mount Fish Markets, Vautier and Petromont.

6.6.7 Conclusion - Vessels

The policy on vessel restriction having been imposed retrospectively, developed in an ad hoc manner, was not soundly based on relevant information and was inappropriate.

The permitting and management of the scampi vessels was grossly inadequate, inappropriate and unreasonable, resulting in unevenhanded treatment among the scampi fishers.

MAF/Fish failed to implement vessel permit conditions in accordance with the conditions of approval to ensure adherence to the initial permitting approval decision, resulting in an advantage to Simunovich over other fishers.

6.7 PART VII: THE COURT DECISIONS IN THE SCAMPI FISHERY

6.7.1 A Review of the Significant Court Decisions in the Scampi Fishery

There has been considerable litigation since the QMS was introduced in 1986. In particular, the management and administration of the scampi fishery by MAF/Fish and by MFish since 1995, has been the subject of challenge in a number of decisions. The judgments in these cases have led to further changes in legislation, policies and management processes and even

during the course of this Inquiry, two decisions relating to the scampi fishery were under consideration and decided. A summary of the cases is contained in Appendix 9.

Many of the decisions make comment upon MAF/Fish's management of the scampi fishery. The following are selections from those decisions that comment on this issue.

McGechan J in ***Paris v. Director-General of Fisheries*** recorded his expectation that a Ministry of the scale and importance of the Ministry of Fisheries should be able to get its formal paperwork correct. This arose because a notice was issued contrary to the delegation authority. As His Honour pointed out, the failure to get the formal paperwork right will lead to further challenges.

The meaning of “commercial fisherman” was considered in ***Gunn v. Quota Appeal Authority***⁹¹. The High Court found that MAF/Fish had made a determination as to the meaning of commercial fisherman in a circular which was repugnant to the meaning in s 2 of the Fisheries Act 1983. The decision to refuse a fishing permit to the plaintiff based on the incorrect determination of commercial fisherman was unsound. The contention that s 64(2) of the Act gave a complete discretion to the Director-General was rejected. When dealing with the question of relief and delay, Williamson J said:

“I am satisfied that the findings of the first defendant in relation to the plaintiff’s suspension and the relevance of the Director-General’s circular are errors which were significant or material to the first defendant’s reasoning. I am also satisfied that the decision in these particular circumstances ... renders their decision both unfair and unreasonable.”

In 1993 ***Petromont Holdings*** challenged the revocation of its fishing permit under s 63(13) of the Fisheries Act 1983. In the decision Anderson J⁹² held that the revocation of the permit on the basis that Petromont had not taken scampi was unlawful, and that even if otherwise lawful, the decisions would have been reviewable because of the failure to accord as a matter of fairness the opportunity to be heard in connection with the fishery records or returns to be completed.

The existence of discretionary powers and the administrative inconvenience of fairness did not relieve the obligation to be fair in deciding to revoke.

As the decision to revoke depended upon information from records of returns furnished before October 1992, there was scope for error, omission, oversight or misinterpretation of the records. This required the Director-General to provide an opportunity to be heard as the Director-General was not infallible and the significance of an incorrect decision was shown by the case.

⁹¹ Gunn v. Quota Appeal Authority (1993) NZAR 102 -

⁹² Petromont Holdings Limited v. Chief Executive of Agriculture & Fisheries (unreported High Court Auckland Anderson J 7 September 1993, M986/93):

The ambit of s 64 that had arisen in *Gunn* arose again in *Vickerman Fisheries Limited v. The Attorney-General*⁹³. The Crown contended that s 64 gave the Director-General a discretion as to whether or not to issue a permit and not simply to impose conditions. In *Gunn* Williamson J had held that s 64(2) did not contain a complete discretion. It did contain a discretion as to the period for which a fishing permit may be issued and new conditions attach. Management of the fishery was covered by s 65. Neazor J did not go as far as Williamson J in *Gunn* and say that every applicant who is a commercial fisherman was entitled to a permit under s 64. After examining Part III and Part IV of the Act, Neazor J concluded that in construing s 64, Part III of the Act which allowed for express control of fisheries and s 65 had to be taken into account. Section 65 enabled the Minister to exclude all fishing vessels from a fishery. The Crown's interpretation of s 64 would allow exclusion under s 64 for reasons not associated with the operation of a vessel.

Although it may be in particular cases a permit could be refused having regard to the way or place in which an applicant wished to use a vessel, the implementation of a general policy of exclusion was beyond the legislative intention embodied in s 64. A decision to refuse a permit based on a desire to keep further vessels out of the industry not on conservation and management issues, was unlawful and based on an irrelevant consideration. The moratorium approach had no adequate legislative basis.

In *Jenssen v. Attorney-General*⁹⁴ the Jenssen family fished out of Napier. Mr Jenssen was so successful that by 1982 the family operated the largest business in Napier. When s 28E(2) of the Fisheries Act came into effect from 1986, allocation of rights that would mature into permanent quota could only be made to persons who were holders of fishing permits issued under the Act at the date of the declaration under s 28B and had held such permits within the previous 12 months. Mr Jenssen claimed to qualify for quota. However, because of a series of breaches on the part of MAF/Fish the Jenssens failed to secure prospective rights to permanent quota. The Jenssens appealed to the Quota Appeal Authority (QAA) who responded that they did not appear to hold a fishing permit as at 18 September 1986. These appeals to the Authority had never been determined.

The issues came before the Court of Appeal after Master Thomson had struck out the proceedings and Gendall J had declined to review the decision.

Jenssen maintained that they had made application in 1982 for four boat fishing permits, and had tendered the prescribed fees. In February 1983, MAF/Fish had tendered a refund of the fee cheque and Jenssen claimed that the applications were refused without reason and without justification. It was assumed in the case that the plaintiffs were entitled to a permit for each boat in 1983 and that the refusals were unlawful. The 1983 applications were returned because the vessels were not registered in the previous year. The 1984 applications were never dealt with or declined and MAF/Fish unlawfully purported to waive fees.

⁹³ *Vickerman Fisheries Limited v. The Attorney-General* (Unreported Neazor J High Court, CP1007/91; CP655/87 26 August 1994)

⁹⁴ *Jenssen v. Attorney-General* (Unreported: CA 273/98 25 May 1999)

The Crown originally contended that the plaintiffs had withdrawn their appeals under s 28HA of the 1983 Act; and the claim was barred by s 329 of the Fisheries Act. During argument a claim of no cause of action was added.

The Court of Appeal found there was no clear evidence as to what precisely had happened on the appeals and the Crown acknowledged that Jenssen had not conceded that there was any or any authorised withdrawal of the appeals to the QAA or any other claim. In the strike-out application the Crown had made inquiries as to the outstanding quota appeals and advised the Court that Jenssen had subsequently withdrawn the appeals. In the High Court Gendall J also stated that the appeal to the QAA did not proceed. However, as noted above, in the Court of Appeal the Crown had to concede that there had been no withdrawals of the appeals to the QAA.

Despite the change of position by the Crown, the Court of Appeal held that s 329 which validated decisions made before 1 October 1992, applied to decisions that had gone on appeal to the QAA. Jenssen's claim, based on the years 1983-84 could not succeed. Section 28ZGA barred the QAA from considering any decision of the Director-General proceedings filed after September 1992. The present proceedings were filed in 1998 and the claim was barred.

The other two cases where criticism has been made are **Vautier Shelf No. 14 Limited & ors v. Chief Executive of Ministry of Fisheries & ors**⁹⁵ and the subsequent Court of Appeal decision **Official Assignee v. Chief Executive of MAF**.⁹⁶ The plaintiffs in the consolidated proceedings claimed that they should have received more ICE and so the ICE allocation should have been increased.

After traversing the history to October 1992, and the imposition of the moratorium; the period from October 1992 to the **Petromont** in 1993; the history after **Petromont** and the Fisheries legislation in 1983 and 1996, Ellis J held that MAF/Fish must issue s 63 permits in an open fishery and considered that s 63(9) applied to the issuing of permits in this case. However in this respect it must be noted that the application of s 63(9) to a non-QMS fishery has been overturned by the Court of Appeal in **Westhaven Shellfish Ltd v. Chief Executive of the Ministry of Fisheries**.⁹⁷

Ellis J held that:

“... until October 1992 MAF was wrong to delay issuing permits to fishers who applied for the purposes of controlling fishing in an open fishery. The proper technique was to use regulations as was done in 1991, or a s 65 moratorium as was done in September 1990”.

MAF/Fish's failure to issue permits when requested prevented some fishers from fishing during periods when catch history was in fact being established. Further, the permit

⁹⁵ *Vautier Shelf No. 14 Limited & ors v. Chief Executive of Ministry of Fisheries & ors* (Unreported Ellis J, High Court, Wellington 20/97 24 July 2000)

⁹⁶ *Official Assignee v. Chief Executive of MAF* [2002] 2 NZLR 722

⁹⁷ *Westhaven Shellfish Ltd v. Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 158

conditions to the effect that fishing in 1989-90 and later would not go to quota were misleading and resulted in unfairness.

Ellis J also stated that it was plainly obvious that MAF/Fish policy makers were not in agreement and at the critical time in 1989-90-91 they failed to manage the developing fishery in a way that was fair to all fishers. MAF/Fish officers had made efforts to correct errors and introduce fairness after problems arose but it was too late. When allocating ICE each fisher had to be treated fairly and reasonably.

Ellis J noted that the decisions to settle ICE for 1992-93 were built on errors and injustices over the preceding fishing years and when the allocation for the next year came to be made, this again rolled over the earlier catch histories.

Ultimately, Ellis J found that the refusal to grant permits in an open fishery and the consequent delays were unlawful. This coupled with MAF/Fish's assertion that catch would not go to quota resulted in fishers being disadvantaged by not having fished in the years used to calculate ICE. This was unfair. It could have been rectified in the ICE decisions but was not. Ellis J's decision was appealed to the Court of Appeal who held that the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999⁹⁸ were invalid.⁹⁹

Because the regulations were invalid it followed that the allocations based on them were also invalid. The majority in the Court of Appeal considered that MAF/Fish's management of the fishery could not be usefully analysed or commented on, outside of the context of the invalidity of the regulations. Thomas J, on the other hand, made extensive critical comment on the management by MAF/Fish. These were that MAF/Fish had:

- Moved from one regime to another in a way that cause considerable confusion;
- Policies were announced but revoked or then changed without due consultation or notice;
- Other policies had been applied inconsistently as between competing fishers;
- Advice to fishers had not been given even-handedly and the treatment of fishers had been unequal;
- Assurances were given which were not kept and statements had been made which had been misleading;
- Different systems had operated in different regional offices;
- Needless mistakes had been in processing fishing permits;
- Delays at times inordinate and particular to a region or fisher had occurred.

⁹⁸ SR99/24

⁹⁹ *Official Assignee v. Chief Executive of MAF*: [2002] 2 NZLR 722

As Thomas J observed, MAF/Fish appeared to have been too ready to build on errors and injustices committed in preceding years and to rely on changing the legislation or adopting a new regime to overcome the problems caused by earlier mismanagement. Noted was MAF/Fish's response to the *Petromont* decision which was not to reconsider the legality or fairness of its prior decisions but to remake identical allocations of different quota. These decisions were justified on a different basis, namely management of the fishery.

Thomas J then considered the duty to act fairly in carrying out statutory duties and powers. Whilst acknowledging that the administrators had a wide margin within which the substantive decisions will not be questioned by the Court, this did not suggest that its officers were free to act other than even-handedly and fairly between fishers. The pressure brought by fishers individually and as a group and the nature of the commercial interests at stake, was acknowledged by His Honour to make the role of MAF/Fish a difficult one. The requirement to attain evenhanded treatment was not an expectation of infallibility.

Although it was unnecessary to examine the validity of the Chief Executive's exercise of discretion because the regulations were ultra vires, Thomas J did find that the CEO had failed to have regard to individual fishers circumstances. This has resulted from MAF/Fish's actions leading up to the determination of catch history which was then used to make allocations. The departure from the MAF/Fish policy that special permits would not establish catch history and the delays in processing applications had had serious impacts on some fishers.

The CEO was obliged to have regard to those facts when making the allocation. The catch histories had been generated at times when fishers had been treated unfairly. A key point was that MAF/Fish had by its earlier acts and omissions predetermined catch histories, which were then used to set future entitlements.

Another set of proceedings in which the Court's have commented on the alleged unfairness of MAF/Fish are those in respect of Trevor Goodship.¹⁰⁰ In the High Court Ellis J referred to his earlier assessment of MAF/Fish procedures in the history of fisheries that he recorded in the *Vautier Shelf* case. Mr Goodship was an experienced fisherman who in 1988 applied for and was granted a special permit to fish for scampi.

The history has been set out in the section on impact on fishers. Ellis J concluded that MAF/Fish's approach to the review in 1993, after Mr Goodship had complained to the Ombudsman, was narrow and unreasonable. This referred to MAF/Fish insisting that Mr Goodship's commitment be measured by the cash cost to him of his gear rather than a valuation of it. Further, His Honour considered that the three decisions rejecting Goodship's claims to commitment led him to the conclusion that the assessments were flawed by failing to take into account Goodship's financial commitment and secondly, the failure to assess the lease of the *Westerner* in the context of Mr Goodship's efforts to enter the fishery. There was no adequate evaluation of that point. His Honour concluded that the application was not

¹⁰⁰ *Trevor Goodship, Pranfield Holdings Ltd v. Ministry of Fisheries, Pranfield Holdings v. MAF* : (Unreported: High Court, Wellington CP 185/97, 9 May 2002, Ellis J)

properly assessed and the failure was part of the unsatisfactory situation analysed in the **Vautier Shelf** case.

If the issue of the permit had still been alive, Ellis J would have referred the matter back to MAF/Fish for reconsideration. In respect of the delay in dealing with the applications for permits and exemptions of eight months, His Honour characterised that as inexcusable and in the initial stages, possibly highly detrimental to Goodship. Ellis J refused to grant formal declaratory relief to Goodship and Pranfield.

On appeal, the Court determined that a proper reading of s 65 of the Fisheries Act meant that MAF/Fish could not lawfully impose a moratorium under s 65 affecting a person who held a permit prior to 1 October 1990. Because there was an unchallenged finding from Ellis J that the appellants should have been granted a permit, no question rose in the Court of Appeal about the need for an exemption or the likelihood that it might have been granted. Goodship could have simply gone fishing armed with a permit and with a vessel and equipment available. The question before the Court of Appeal was whether a declaration concerning the position at that time would now be of present value.

The Court of Appeal was aware of the difficulties that Goodship could still face, even if it obtained a formal declaration declaring their entitlement to a fishing permit for the 1990-91 year. Goodship may still fail in its objective because of the good faith exercise of a discretion by the Minister or Chief Executive. However, the Court of Appeal considered the making of the declaration would prove to be of some practical advantage to Goodship. It would assist Goodship in their ongoing efforts to obtain the right to fish. Further it would:

“At least emphasise to the Ministry that it has to acknowledge the factual findings made by the Judge, and its previous misinterpretation of s 65, and take these matters fully into account, if an application for a special permit is now made. For the Court, in these circumstances, to withhold a declaration might suggest that although the Ministry’s errors were serious they can now simply be put to one side. To withhold a declaration would ... only create unnecessary difficulties and potential uncertainties. We should add that it should not be counted against the appellants that since 1990 they have not had a fishing vessel available. The abandonment of the lease and purchasing arrangement at the time was the result of the unlawful failure of the Ministry to issue a permit.”

When confronted by an argument made by MAF/Fish and Simunovich that the issue of a declaration adversely affected other fishers, the Court said that it was not impressed by this argument. The Court characterised this argument as a contention that;

“any advantage other fishers may have gained from the injustice done to the appellants in 1990-91 should continue. We find that proposition unattractive.”

Finally, in response to an argument that delay mitigated against relief, the Court of Appeal noted there was a reasonable explanation for much of the delay, some of which was caused or contributed to by MAF/Fish.

The decisions are numerous and critical of the approach and management of the scampi fishery by MAF/Fish. Further detail in relation to these decisions is contained in Appendix 9.

6.8 CONCLUSIONS TO TERM OF REFERENCE 1

Given the legislation and Government policy framework within which the former Ministry of Agriculture and Fisheries was operating, did it act reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992?

In reaching our assessment on whether MAF/Fish acted reasonably, our findings in respect of the discrete questions under 1.1 and 1.2 assist us in reaching our final conclusion.

We have reached our conclusion in 1.1 that the administrative systems and processes for the granting of permits and licences at the relevant time were inadequate, inappropriate and inconsistent.

To reach that conclusion, we reviewed:

- the operation of the former Ministry of Agriculture & Fisheries,
- its administrative systems and processes,
- its organisational structures, its policies for permitting scampi as a non-ITQ species,
- the permits which were issued throughout New Zealand through the late 1980s to 1992,
- the treatment received by fishers at the hands of MAF/Fish, its office systems and processes,
- its policy and permitting practices in relation to vessels in the scampi fishery,
- widely divergent outcomes for the scampi fishers.

We conclude that the former MAF/Fish acted unreasonably in administering the grant of permits and other necessary licenses to fishers in relation to the scampi fishery from the late 1980s to 1992.

This conclusion is based on the totality of all of the evidence and the discrete conclusions which we have reached in relation to the Term of Reference 1.

We have assessed all of the factors which have formed the basis of our conclusions. The seven factors are:

- the inappropriate organisational structure,
- the regional inconsistency which occurred as a result,
- the inappropriate management responses,

- the inconsistent permit types and conditions,
- the inadequate office level administration,
- a review of the impact on fishers, the outcomes which occurred and the unevenhanded treatment which they received, and
- the grossly inadequate and unevenhanded vessel policy application,

all of which has driven us to the conclusion that MAF/Fish acted unreasonably in administering the grant of permits and other necessary licenses to fishers in the scampi fishery from the late 1980s to 1992.

In the *Vautier Shelf* decision, Ellis J observed:

“ ... there is an obvious current through the legislation and licensing provisions that fishers will receive evenhanded-treatment and that allocations of valuable rights will be transparent, fair and reasonable.”

We record that our conclusions are that MAF/Fish did not reach this requirement.

1.1 Did the former Ministry of Agriculture and Fisheries have adequate, appropriate and consistent administrative systems and processes for the granting of such permits and licences at the time?

We have reached the conclusion that the former Ministry of Agriculture and Fisheries did not have adequate, appropriate or consistent administrative systems and processes for the granting of such permits and licences in the late 1980s to 1992. The basis for our conclusions are as follows:

Inappropriate Organisational Structure

The regional organisational structure devolved the permitting and licensing powers to the regions with no effective system, structure, or accountability from Head Office to control or manage inappropriate, inconsistent or divergent permitting practices among the regions.

Policy direction to the regions from Head Office was ineffectual and inadequate as there were no systems to ensure implementation or compliance, leading to inconsistent permitting practices, which resulted in considerable benefit to some fishers to the detriment of others.

Regional Inconsistency

The regions had divergent permitting practices with no consistent approach to implementing Head Office policy or directives.

Contrary to the policy of regional control for each region's area and the statutory framework, one region cross-permitted for other regions' areas, without consultation or approval, resulting in inconsistency in permitting, exclusion of local fishers from a fishery in their area, and unfairness.

The two contrary views of s 63(1) and the regions' inconsistent practices, has led in the scampi fishery to fishers in one region receiving substantial advantages over fishers in other regions.

Delegations themselves were generally clear. However, widely delegated authority in combination with a regionally-based administrative system and complex directives and guidance, contributed to uncertainty, delays, and inconsistencies in the treatment of different fishers.¹⁰¹

Inappropriate Management Actions

In response to the refusal by Central to issue commercial permits and the complaint by Simunovich, MAF/Fish acted inappropriately by attending on Simunovich immediately, without undertaking a proper investigation of how the regional approaches had differed, taking advice from its officials and considering the impact on other scampi fishers.

The s 65 moratorium decision and permitting exemptions made by MAF/Fish in 1990-91 was implemented, without adequate preparation, relevant information or planning. MAF/Fish imposed a moratorium and subsequently developed criteria for entry to the fishery during the fishing year, revoking eight permits already issued.

The decision-making and allocation of ICE in SCIs 1, 2, 4 and 6A but not in SCIs 3 and 6B was inconsistent and reflected the wishes of the predominant fisher in the scampi industry.

Inconsistent Permit Types and Conditions

The differences in the types of permits issued and the contradictory conditions within them were a consequence of the regions exercising sole control over their permitting processes. The type of permit issued, namely whether it was a commercial or special permit, gave distinct advantages to those fishers that received commercial permits as opposed to those that received special permits.

Despite the wording on the special permits that no assurances were being given on future access and allocation levels, access to the scampi fishery was based in part on those permits, and later allocations were based on the catch history achieved following such access.

¹⁰¹ Refer Appendix 8: Delegations

To issue permits, stating that no future entitlements can be acquired by way of catch history and the contrary occurs, is misleading, inappropriate and administratively inconsistent for two reasons:

- The permits were never issued for investigative purposes.
- The permits contributed towards conferring valuable property rights and entitlements.

Office Processes

The office administrative procedures and systems within MAF/Fish were inadequate in that:

- there was no compliance with or monitoring of manual instructions on fees and timeliness of permit issue;
- there were inadequate information retrieval systems
- no adequate monitoring of compliance with national directives or guidelines within the scampi fishery; and
- haphazard office processes contributed to permit applications either being mislaid or lost, and led MAF/Fish and MFish to deny the existence of permit applications until discovered years later.

Treatment of Fishers

Fishers received disparate and unevenhanded treatment by MAF/Fish which either ignored or mislaid applications or failed to communicate in a timely and effective way.

Fishers were subject to delay in the granting of permits and did not receive information on changes in policy, resulting in some fishers being excluded entirely from the scampi fishery with others being unable to establish catch history in the relevant years, affecting the later allocations of ICE.

The record keeping of MAF/Fish was haphazard and in disarray, leading MAF/Fish to deny the existence of permit applications until discovered years later.

There appeared to be no consistent and transparent process applied by MAF/Fish in s63(11) and similar reviews.

Vessels

The policy on vessel restriction having been imposed retrospectively, developed in an ad hoc manner, was not soundly based on relevant information and was inappropriate.

The permitting and management of the scampi vessels was grossly inadequate, inappropriate and unreasonable, resulting in unevenhanded treatment among the scampi fishers.

MAF/Fish failed to implement vessel permit conditions in accordance with the conditions of approval to ensure adherence to the initial permitting approval decision, resulting in an advantage to Simunovich over other fishers.

1.2 If so, did the former Ministry of Agriculture and Fisheries comply with those systems?

In light of finding that the systems were inadequate, inappropriate and inconsistent this question needs no answer.

7.0 TERM OF REFERENCE 2: COMPLIANCE SYSTEMS

- 2 Did Fisheries Officers in the former Ministry of Agriculture and Fisheries in 1993, and in the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery?**
- 2.1 If so, did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries respectively carry out adequate investigations into the allegations? If not, why not?**
- 2.2 Did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences, and did the Ministries comply with those systems?**

Introduction

This Term of Reference requires the Inquiry to report on whether MAF/Fish, in 1993 and 1998, had a reasonable basis to suspect illegal fishing by any company involved in the scampi fishery and if so, did it carry out adequate investigations into the allegations.

In addition, the Inquiry is required to assess whether the former MAF/Fish and the present Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences and whether the respective Ministries complied with those systems.

The nominated years, namely 1993 and 1998 are years in which investigations and inquiries were undertaken in relation to alleged offending by Simunovich. As a result of those inquiries not being completed, allegations of impropriety have been made, which surround the unfinished investigations and the timing at which informant information was received by the Ministries. The main allegations are dealt with in Part III below, and others in Appendix 10. They are also dealt with in the context of these investigations where appropriate.

From 1991 to 2002, there were four instances of investigations, receipt of informant information and proposals for further investigations, which formed the basis of a suspicion of illegal fishing by Simunovich. They are named:

- Operation Export
- Operation Dog (which also covered other scampi fishers)
- Operation Forrest
- Operation Metro.

We propose to deal with this Term of Reference in the following way:

PART I

- A review of the compliance administrative structures systems and processes in the period up to and including 1993;
- An analysis of Operation Export, a preliminary investigation between 1991 to 1993;
- An analysis of the proposed Operation Dog 1993;
- An analysis of the investigation into Barine Developments Limited;

PART II

- The change from a district regional compliance management structure to a centralised management structure in 1995, and a review of the compliance administrative systems and processes in 1998 and currently;
- An analysis of Operation Forrest, an investigation by the Ministry in 1998;
- An analysis of Operation Metro which began in December 2001 and was suspended in August 2002;
- A review of the two year limitation on prosecutions under fisheries legislation;

PART III

- An analysis of the main allegations which were contained in the original affidavits or were otherwise placed before the Inquiry.

As outlined in the introductory section on the purpose and scope of the Inquiry, the Inquiry is examining the allegations to ascertain:

- If there is sufficient evidential foundation to support another agency investigating potential criminality, which would warrant this Inquiry recommending that the particular matter be investigated further by such agency; and
- If any of the allegations are relevant to any of the specific questions raised in our Terms of Reference.

The allegations are considered in this part of the Inquiry's report because they comprise or flow from the information which was at the heart of the "*Operations*" considered in addressing Term of Reference 2.

7.1 PART I: COMPLIANCE IN THE PERIOD TO 1993 - MFISH

- A review of the compliance administrative structures systems and processes in the period up to and including 1993;

In order to understand the compliance systems and processes in 1993, it is helpful to canvass the structures that were in place before 1993.

The Fisheries Act 1908 regulated the management of New Zealand fisheries, up until 1983. The management was by way of effort controls, such as area closures, restrictions on fishing gear and size limits. That approach to enforcement has been described as a “*game warden approach*,” which was aimed at catching people in the act of offending, usually through surveillance.

Although the Fisheries Act 1983 introduced changes to fisheries management with the introduction of Fisheries Management Plans, the approach to enforcement remained the same.

With the introduction of the Quota Management System in 1986¹⁰², a complex permitting regime was introduced by the allocation of individual transferable quotas, which restricted fishing to clearly allocated areas and quantity of catch in specific fisheries.

To complement the radical change, a new compliance or enforcement structure was needed, to change the former approach to enforcement. A restructure of MAF/Fish compliance took place in 1988.

7.1.1 The Regional Administrative Structure

7.1.1.1 Pre-1988

Enforcement or compliance activities were carried out by the regions. Unlike permitting, compliance was undertaken by six enforcement regions. The Chief Fishery Officer, who was based in Wellington, had management control and authority for all six regional fishery officers, who in turn had management responsibility for the fishery officers in their respective regions. For the period 1982 to 1988, there were approximately 100 fishery officers.

An independent compliance expert, Mr Spong, advised the Inquiry that in this regional structure, consistency among the districts seemed to be problematic. The underlying philosophy behind the regional management approach at the time, which was also applied to the MAF farming and horticultural activities, was “*regional solutions for regional issues but fisheries and fishers did not operate within the regional boundaries*”.

¹⁰² By an amendment to the Fisheries Act 1983

7.1.1.2 The 1988 Restructure – The Regional Model Revisited

The introduction of the QMS demanded a:

“national integrated capacity and capability involving surveillance, monitoring, investigation and audit to ensure effective enforcement”.

To this end, MAF/Fish enforcement function was “*completely reorganised*” in 1988 and Mr Crothers, as Chief Fishery Officer, was responsible for the design and implementation of the restructure, with the object of the restructure being “*to build a fisheries enforcement agency that could ensure the integrity of the QMS*”.

The restructure resulted in the formation of multi-disciplinary teams in the nine compliance districts, supported by technical specialists in a central National Compliance Unit known as the NCU.

Consistent with the regional structure in the policy and permitting area, the management structure of compliance was decentralised to the regions, where District Compliance Managers (DCMs) led both a compliance team and a monitoring team. The DCMs reported to a regional manager in relation to both functions of compliance and monitoring. As the Inquiry expert noted, “*there was no specific line reporting or control for enforcement*”. The relevant MAF/Fish organisation charts for 1990 and 1992, are shown in Appendices 6 and 7 respectively.

Because of the difference in focus in compliance up to the introduction of the QMS, MAF/Fish did not have the investigative or audit skills to enforce the QMS. As Mr Crothers described it, the previous fisheries management regimes were based on controlling effort in the fishery, and thus required an enforcement service structured around surveillance:

By contrast, the QMS compliance regime relied on a documentary trail, namely record-keeping and reporting by fishers of catch effort and landing, as well as fish purchases by fish receivers. In addition, “*traders in fish*” were required to keep records and Mr Crothers described this as a “*documentary product flow*” compliance regime. Those who made false declarations or kept false records could be caught after the event, but in order to do so a more complex enforcement capacity and capability involving not only surveillance, but monitoring, investigation and audit was required.

The change to a more complex enforcement regime necessitated by the introduction of the QMS, was analogous to a serious fraud system of inquiry, rather than the former: *poacher and game-warden*” approach. The reorganisation and restructure resulted in a turnover of more than 50% of existing enforcement staff, with new staff being recruited from the Police, Customs and Securities Commission, to bring new enforcement skills and experience to MAF/Fish compliance.

Under the restructure, the DCMs managed their respective compliance teams, which consisted of fisheries surveillance officers, investigators and monitoring officers. Subject to their regional manager’s approval, they were responsible for implementing national compliance policies and strategies at a district level. Importantly for this Inquiry, the DCMs were also

responsible for the allocation and direction of compliance resources within their district, subject to their regional manager's approval.

Mr Crothers held the position of Manager, Fisheries Compliance after the 1988 restructure and was responsible for the National Compliance Unit. He describes its role as:

- Establishing National fisheries compliance policy, plans, procedures and standards
- Chairing the National Compliance Technical Committee
- Providing technical compliance advice to the MAF/Fish Board
- Managing the National Compliance Unit (staff, finance, assets)
- Exercising delegated authority in relation to investigation, seizure and prosecutions relating to foreign licensed and foreign charter vessels
- Liaising with other national and international enforcement agencies.

The NCU consisted of three or four investigating accountants, two intelligence officers, 2-3 fisheries investigators, a national training officer and, from 1992, the investigating solicitor or Chief Fisheries Prosecutor. The NCU was responsible for undertaking foreign vessel investigation and substantive audits. Otherwise, its function was to support the districts by providing the additional expertise required for complex QMS investigations, training and intelligence analysis.

7.1.1.3 The Problem with the Regional Structure

Despite the restructure in 1988, the decentralisation of the management of compliance to the DCMs was unsuitable for an enforcement organisation. The author of the restructure, Mr Crothers, was himself critical of the effects of decentralisation, and he noted that he had been obliged to restructure within the regional structure for MAF/Fish imposed at the time. Having district compliance managers report to regional managers created *“a series of semi-autonomous enforcement teams without an effective mechanism for national coordination or management”*.

In Mr Crothers' view regional managers were responsible for the management of regional compliance activities and this was done on an *“ad hoc”* basis. Although national enforcement priorities were available for MAF/Fish and fisheries enforcement service delivery, there were no management systems in place to monitor and audit performance against the national priorities, processes, procedures and standards.

Mr Crothers also described the regional managers position, which in addition to being responsible for other MAF/Fish business groups, also required them to make compliance decisions:

“in circumstances where compliance activities conflict with other objectives. Further, the regional managers often lacked the specialist knowledge, skills, or experience to understand their responsibilities to manage the delivery of enforcement services.”

Mr Shallard shared Mr Crothers reservations, particularly as a number of DCMs lacked knowledge of fisheries management and issues. He told the Inquiry:

“... I had reservations ... as had Mr Crothers about the efficacy always of district compliance managers a number of whom were recent arrivals in the fisheries Ministry. They had excellent Police skills and background some of them. but they had no lengthy background in the fisheries side of things.

The regional managers, two out of three of them were farm advisory officers, they had no background in fisheries management either. So, I'm sure there was some scope there for lack of understanding and lack of background ... when things were less efficient than they could have been.”

The distinction between the two structures, pre- and post-1988, is that previously compliance was managed on a national basis and the Chief Fisheries Officer “*had full line control*”, meaning that he had authority over the regional fishery officers who managed the fishery offices in the region.

Post-1988, Mr Crothers, as Manager Fisheries Compliance recalled intervening on a number of occasions where a DCM wanted to investigate and/or prosecute a member of the fishing industry but received pressure from the regional manager not to proceed in the interests of maintaining a good relationship with that particular member of the fishing industry.

In those situations, the regional managers backed down from their positions, although Mr Crothers reported there were several instances where he had to threaten to lay a complaint with the Solicitor-General if they did not do so.

In a joint report of the Auditor-General and the Parliamentary Commissioner for the Environment, a number of conclusions were reached, affecting both the policy making decisions of MAF/Fish and its compliance activities. Noting that there were deficiencies in maximising the information obtained through the monitoring groups, the report found that:

- the role for monitoring officers needs to be clarified and implemented at regional level,
- the lack of investigating accountant staff has reduced MAF/Fish’s ability to detect illegal activity through auditing,
- the surveillance and investigation staff have concentrated their efforts on combating “*the well publicised poaching in the rock lobster and paua fisheries*” but such work takes resources away from fishing industry compliance activities,
- the compliance arm lacks the information it needs to evaluate how effectively its staff resources are being used to carry out investigations and that the number of prosecutions

taken does not provide sufficient information to make it a satisfactory performance indicator.

The report concluded by finding:

“a system struggling to provide the necessary information for management decisions which can control fishing at sustainable levels and ensure sustainability of the fishery resource”.

Among the reasons for the finding, the report highlights the problems in ensuring compliance.

In May 1991, an internal audit was undertaken on MAF/Fish enforcement, in light of the fishing industries perception that too much enforcement effort was directed to prosecutions for minor infringements. The report recorded that MAF/Fish at that time:

- Had not allocated resources to its monitoring and auditing areas to effectively detect major offences.
- Had only recently established national priority areas for its enforcement effort.
- Used discretion in dealing with offences.
- Exercised discretion in a similar manner to other law enforcement agencies when dealing with minor offences.

In particular, the report found that there were no written guidelines for fishery officers on how to exercise discretion in dealing with an offence and recommended that MAF/Fish draw up a comprehensive set of guidelines on the factors to be considered when deciding what action to take upon detecting an offence.

The report concluded that:

“Although MAF Fisheries does not deliberately focus on prosecuting for minor offences, the fishing industries claim may have some validity because of the resource allocation issue noted.”

A further specific recommendation of the report was that the monitoring and auditing groups be allocated sufficient resources to effectively carry out the roles for which they were created.

Dr Allen on behalf of MAF/Fish was severely critical of aspects of the report. However, he agreed with the findings and indicated that a set of guidelines would be prepared on the factors to be considered when deciding what action to take on detecting an offence, together with an approach for funding, to allocate resources to allow monitoring and audit groups to carry out their roles.

In November of the same year, Mr Crothers made submissions to the Fisheries Taskforce on fisheries enforcement. Mr Crothers reviewed the previous three years stating that MAF/Fish had significantly improved its enforcement productivity to improving enforcement staff skill levels, introducing new types of enforcement such as audit, investigation and intelligence

analysts and enhanced enforcement operational management. He noted that this had been accomplished *“despite resourcing and institutional structural management difficulties”*.

Dealing with the quality of activities in MAF/Fish, he submitted:

“MAF has many competing and conflicting fisheries conservation and management objectives. This along with the fact that enforcement is not managed as a nationally integrated business group creates operational management and resource inefficiencies.”

He also dealt with resources for enforcement:

“Lack of enforcement resources has limited investment in new technologies such as satellite surveillance and expert information systems that would significantly improve enforcement productivity in corresponding levels of compliance.

There are no business processes that manage enforcement activities to the best national fisheries management advantage. Resources are largely allocated on an historical input driven basis.

Optimal allocation in terms of achieving desired fisheries management outcomes are not considered.”

Dealing with the lack of a national basis for compliance management, he stated:

“No formal national operational command and control structures, proven essential in all successful enforcement agencies, have been established within MAF Fisheries. This has lead to serious operational and resource allocation inefficiencies”.

Following the submissions from Mr Crothers to the Fisheries Taskforce, it reported in April 1992.

The regional structure was a continued source of frustration for Mr Crothers. He described the difficulty of establishing and effectively implementing national fisheries compliance policy, plans, procedures and standards, without having direct management control and the authority over the district compliance managers. There were no national management reporting or management information systems to assist in coordinating enforcement activity and he had no control over DCM decisions as to which investigations to undertake, who would be prosecuted, or the allocation of regional district resources.

To help overcome the problems with the organisational arrangements, Mr Crothers chaired the Compliance Technical Committee (CTC), which was a forum to devise national policies, processes, procedures and standards in compliance, as well as to:

“reach consensus on national strategies and priorities. It was not a management committee”.

It was also a forum for DCMs to negotiate resource-sharing arrangements although the committee did not determine which investigation should be proceeded with or who should be prosecuted.

One of the problems facing MAF/Fish's enforcement functions was limited resources. The CTC formulated enforcement priorities to ensure limited resources were effectively used. Seven categories of enforcement activities were identified and listed in order of importance, although they were not to be rigidly applied. As the document notes:

“Budget allocation is an important component of the overall management planning process. Proposed operational plans are developed to justify budget requests and once funds are allocated to final operation and tactical/work plans are implemented to meet approved objectives within allocated budget limits”.

“Commercial Output (QMS)” was listed as priority 3, after organisational management and the exclusive economic zone. This category included the investigation and apprehension of those commercial fishers who exceed their quota, or fished without quota as well as monitoring foreign chartered fishing vessels. This category related to species within the QMS only.

Category 5 was listed as “commercial input” and included all those activities involved with enforcing commercial input/effort control such as commercial time/area closures and gear and fish restrictions. Given that scampi was not a QMS species, any enforcement issues would have fallen into the fifth category.

Mr Spong, in addressing the 1991-92 fishing enforcement operation priorities, observed that there was no monitoring process available to track whether national priorities were being implemented and referred to the joint report of the Auditor-General and the Parliamentary Commissioner for the Environment, who had arrived at similar conclusions in December 1990.

In describing the regional structure, most of the witnesses were in agreement with the frustrations expressed by Mr Crothers. Mr Walshe, the Regional Manager (Northern) saw Mr Crothers as being influential in advising the regional managers on enforcement decisions. In describing the organisation as a “matrix” one, he described the regional managers as “generalists” with “specialists such as Mr Crothers”, giving advice.

He confirmed that Mr Crothers and Mr Wood had no direct line of control and that was one of their frustrations. The line of control went from the District Compliance Managers to the Regional Manager and, ultimately, to Dr Allen, if there was any conflict between the regions and the National Compliance Unit as to why something was to be pursued. The procedure was as follows:

“Basically I, on behalf of the region, would put information to Robin [Allen] and Robin might also seek advice from people further down and, as I understand it, Stan [Crothers] would also put his advice to Robin and then Robin would resolve the issue that way.”

Mr Sullivan agreed that the regional managers had budget and day-to-day employee management control, including monitoring, science and compliance. His views diverged however, as to the way the regionalisation model worked. He believed:

“... although the regional managers had day-to-day administrative control, other people had day-to-day policy in line control on specific issues. For example, my experience within the Ministry was that on compliance matters Stan Crothers had the final say on matters relating to compliance policy, compliance initiatives and compliance based matters, even though Peter Brierley, the Regional Manager, was the nominal line authority for those people in the region.

We also took our instructions or our guidance from Stan Crothers on compliance matters and not Peter Brierley.”

Mr Sullivan described his contrary view to the MAF/Fish organisation chart. He drew a chart, which showed a line of control for operation compliance policy and standards from the regions through to Mr Crothers and then to senior MAF/Fish officials. He also showed a second line for budget and human resources management from the districts to regional managers such as Mr Walshe and then to senior MAF/Fish officials. This view was not shared by other witnesses. Mr Shallard, the Director of Operations, referred to his dissatisfaction along with Mr Crothers, with the regionalised management approach, which he expressed to Dr Allen and the Group Director, Mr Craig. He describes his dissatisfaction as follows:

“Mr Crothers and I certainly had those views, and I think probably most of our staff shares those views.

...

It doesn't mean to say that Robin Allen necessarily shared all our concerns. ... we discussed it with Robin and debated it with him at length, too.

He, I think, shared some of the concerns, but also the fact that he was managing actively the regional managers, thought that he should continue to do that and try and work that through to a good conclusion, rather than change the way we were doing things in such a fundamental manner.

The group director, Malcolm in particular, he liked the concept of the matrix. He thought it kept us all on our toes and was good for all of us to have to, in essence, fight for our position a little in terms of how things were done. That, in his view, led to a better management than if it was simply him and people under him directing things all the way down.

The fact that he didn't agree with us is probably the simple answer to why it didn't change, but certainly he didn't share our concerns ... I recall having significant discussions with him at various times about that and we agreed to disagree”.

It is important in the context of this Term of Reference, to record that Mr Chadwick, as the former DCM in Auckland, agreed that ultimately the decision to end an investigation would be the decision of a DCM, not Mr Crothers. He described it as follows:

“Q. So that if Mr Crothers was concerned to stop the investigation, would you not have expected him to say to you (a), "We don't have the resources,";(b), "We can't sustain another major investigation like Operation Roundup, we can only do one of these at a time,"; (c), "I want you to stop Mr Nalder."?”

A. Well, he has said that he didn't have that operational decision-making.

In any case, the decision was mine in the end as to whether we would launch it. I'd said in August of 1992 that it was warranted and in March of 1993 they said, "Yes, we'll go ahead," but I had discussed with Stan Crothers that one of our difficulties was the records that had gone missing and that's why our direction of the investigation was towards catching them out on this export situation to America which a number of the informants had talked about.”

Whilst Mr Crothers as Manager Fisheries Compliance was influential in providing advice on compliance matters, both to Dr Allen and the regional managers, the ultimate decision on the allocation of resources to an investigation or the undertaking or ending of an investigation was the decision of the DCM.⁵³

This view is reinforced by the final report of the Fisheries Taskforce in April 1992, which found that a number of organisational issues in the compliance area required change. The Taskforce concluded that there should be a national, not regional, review of significant and costly prosecutions.

“All significant enforcement decisions involving the undertaking of complex and costly prosecution above a reasonable threshold should be reviewed at central, not regional, level and all prosecutions should be reviewable at central level”.

This reinforces the evidence of Mr Crothers and others that the regional structure was not appropriate for an enforcement organisation and the lack of a national approach to implementation of priorities in enforcement undermined the ability of MAF/Fish Compliance to adequately prioritise and target serious offending.

The other areas of concern to the Taskforce were as follows:

- The enforcement functions of MAF/Fish were not separate from other administrative functions.
- There were indirect lines of accountability and mixed management.
- Enforcement, being such a key element in the maintenance of the integrity of the QMS and the extremely valuable property rights of any individuals, should have representation at Board level.

- The existing rights of search and entry held by enforcement officers were more extensive than those held by the Police and as a check on such wide powers, there is a need for independent review of enforcement activity through an agency such as the Police Complaints Authority.

The Taskforce view was firmly stated as at April 1992, namely, that enforcement should comprise an entirely separate unit within MAF/Fish, directly accountable to a very senior fulltime manager, then through the Director-General to the Board and the Minister. This is a direct criticism of the regional structure, which pertained through the period 1988 to 1995.

In commenting upon the regional structure, Mr Spong summarised it as follows:

“On balance I believe that in 1993 the regional structure had defects, did not provide an adequate national consistency to enforcement and did not respond sufficiently to national priorities such as the QMS. The 1993 fisheries enforcement structure was moving towards a system which would be adequate and appropriate for the identification and investigation of alleged offences but still had some distance to go.”

In reaching our conclusion, we adopt the reasoning of Mr Spong and the findings of the Fisheries Taskforce, about the adequacy or otherwise of the regional structure. For the period from 1988 to 1994 covering the first period in which complaints of illegal fishing took place in the scampi fishery, MAF/Fish did not have an adequate and appropriate administrative system in place for the identification and investigation of complex offending. Whilst the districts had systems in place for investigation of such offences, it was dependent on the allocation of limited resources and the prioritisation in the regions on offending.

7.1.1.4 Lack of Manuals or Guidance on Compliance

There is one further matter that requires addressing in the context of this Term of Reference. Prior to 1991, there was no guide or manual that established the procedures or standards for the day to day compliance activity, such as the search and seizure rules, the guidelines on how to conduct interviews and interrogation of suspects, the use of force, the authority to enter a building, arrest procedures and how to prepare a prosecution file.

Mr Henderson advised that in the early days senior Fishery Surveillance officers or Investigators were generally responsible for managing intelligence collection and that there were intelligence files but that there was not any particular administrative system to identify and investigate offences.

Mr Sullivan, the former Regional Solicitor for the Central region from 1989 to 1997, (and formerly a Crown Prosecutor) described the lack of guidance to compliance officers at the time when he arrived at MAF/Fish in 1988-89.

“What I found was that there were lots of these little bits of scraps of paper lying around and a lot of things in peoples’ memory and some monitoring staff had been there for a long time and some only 10 minutes, and some monitoring staff had a good appreciation of what had gone before. There was a lot of confusion

about the current standards and procedures and what had been repealed and what had been replaced.”

When questioned further, as to what manuals or guidelines were available to the compliance teams for the investigation of offending and bringing prosecutions, Mr Sullivan described it as follows:

“Scraps of paper. In essence, somebody might have issued a memo somewhere along the line when they had a rush of blood to the head about a particular issue and they would have dictated down a memo. ... I remember seeing and going through and sifting through screeds of memos. It was basically how the whole thing was managed. The whole thing was managed by memos and somebody would issue a memo because this happened, and somebody would issue a memo because this happened, and somebody would issue a memo because that happened, and if you were - and what would happen is that a Fishery Officer who had been there for a long, long time would collect these memos. They used to have these in their memo folders, collect them all.”

Mr Sullivan described it as being “pure luck” as to whether one person had all of the relevant memos or not and this situation ultimately led to the compilation of a fishery officers manual containing guidelines for the powers and procedures to be followed in the detection and prosecution of offending.

Using as a prototype the Police CIB manual, Mr Sullivan and Mr Nalder (an ex-policeman) wrote a manual in 1990-91 aided by a number of ex-policemen newly employed by MAF/Fish. Mr Nalder was deputed to undertake the responsibility for finalising the manual shortly after his arrival in MAF/Fish.

This manual was published in 1991 and as Mr Spong observed:

“With this aid, no fisheries officer could be in ignorance of his or her duties and responsibilities.”

However, even after the manual was published, there were gaps in systems and processes.

7.1.1.5 The Office Systems

At the micro level, there was no appropriate procedure for opening or closing files. Although there was an absence of formal processes about opening and closing files, Chapter 17 of the Fisheries Officer Manual specified the procedure for opening and preparing a prosecution file. However those procedures relate to offences which had been allocated a number and a decision has been made to prosecute, warn or discontinue the incident and is clearly related to information being retained in the fisheries offences system and associated computer system. There are no guidelines or suggested procedures for opening and closing investigation files.

The office systems or processes appear to have been ad hoc in nature in the period up to 1993, and were not adequate or appropriate for an effective enforcement structure within MAF/Fish.

Mr Younger confirmed there was no standard methodology for starting an investigation file and no system for closing a file or any process which kept such files under review.

The Operation Export file provides such an example. It was not formally opened but was a collation of information from various sources with a proposal recommending an investigation commence. The DCM approved the investigation and it commenced. On Mr Nalder's suspension, the file went into "*abeyance*" and was not reviewed, monitored, closed or otherwise actioned.

7.1.1.6 Illegal Fishing

Against this background, the suspicion of illegal fishing by Simunovich and Barine respectively needs to be examined.

During the years 1989 to 1994, MAF/Fish received information about suspected illegal fishing. Two operations, as they were called, were commenced by MAF/Fish in 1991 and 1993 respectively, into the information received. These operations were "Operation Export" and "Operation Dog". "Operation Dog" was not progressed to the stage of being a formal investigation or operation, and also covered other scampi fishers.

In addition, MAF/Fish received two principal complaints about Barine Developments. The first complaint, which was made by Simunovich in 1989 (which continued to 2000-01,) involved the registration of Barine's vessel as New Zealand owned. The second originated by an observer, related to the use of illegal fishing gear in June 1991. The complaints will also be examined against the regional structure during the same period.

7.1.2 Operation Export

Operation Export involved the Auckland office of MAF/Fish and in MAF/Fish's words was a preliminary investigation into potential offending by Simunovich during the early 1990s.

The main personnel involved were:

- Mr Chadwick, District Compliance Manager (DCM).
- Mr Younger, Senior Fisheries Surveillance Officer, who initiated Operation Export had some involvement after Mr Nalder was removed from the investigation.
- Mr Nalder, Acting Senior Fisheries Investigating Officer, who was allocated the file and held it for the period 1 March 1993 to 7 April 1993 and on a limited basis from 7 April 1993 to 23 September 1993.

In July 1991 Mr Younger commenced this investigation as a result of information received by MAF/Fish in Auckland from a number of individuals involved in the fishing industry.

The information supplied on a confidential basis, alleged that Simunovich was involved in fisheries related offending. The first three informants comprised former employees of Simunovich and a competitor.

The information obtained from those three informants comprised the following:

- Two named Simunovich skippers had been paid cash between October and January 1991 over and above their normal wages.
- The total amounts they were paid did not match the weights of fish they caught.
- Cash payments were made for undeclared fish, in excess of the Simunovich quota for 1989-90.
- The bank deposits and slips were at the Simunovich premises and the wage payments sheets if compared with the bank deposits should show up discrepancies in respect of payments to the captain and the crew.
- When questioned about the cash payments, Peter Simunovich told the informant not to say anything.
- Overtime in the Simunovich factory was paid in cash and some Simunovich staff were paid entirely in cash.
- The cash payments came from the Simunovich-owned shop and that it was understood the Simunovich factory did not invoice the shop for the stock it received from the factory.
- Some companies (but Simunovich being the principal company) were overstating their catch of scampi to establish a big catch history for quota allocation. This was done by filleting fish, namely hoki or ling at sea, packing it as scampi and when it was unloaded, it was placed in containers and consigned overseas where it is sold as fish. The returns however showed it all as scampi.
- The two big companies in the scampi fishery, namely Sanfords and Simunovich were “*cooking the books as much as they can*” in order to strengthen their position when it came to quota allocation.
- The vessel, the *Mutual Enterprise*, owned by Simunovich, was dumping bycatch.
- The scampi boats were involved in “*skimming*” namely trawling backwards and forwards over the same piece of seafloor a number of times, dumping the high proportion of bycatch obtained on the first trawls with the last few trawls providing higher levels of scampi. These latter ones were kept.
- The bycatch from early morning shots was nearly always dumped.

At this stage Mr Younger opened a file and named it “*Operation Export*”. In accordance with the practice in the Auckland Office, the file was not indexed or entered in any registry. Mr Younger explained that there was no standard methodology for starting an investigation file. The file started in loose form and became an aggregation of material into an Eastlight file.

During August 1991, a further five informants provided Mr Younger with further allegations in relation to illegal fishing by Simunovich. Those five informants together a further informant in October 1991 were former or current employees of Simunovich and alleged, among other things:

- Simunovich must have been over-fishing their quota.
- Simunovich carried out some fishing trips for which no log or record was ever kept.
- Simunovich always under weighed catches and that the crews did not complain because they needed their jobs. The amounts paid to crew were the same per trip and bore little relation to the weight of fish actually caught. Mr Ivan Simunovich would make up the weights as he went along.
- Under weighing of fish, including snapper for export and the alteration of weigh sheets.
- Two skippers in Napier receiving cash payments to make up for the under weighing.
- Containers of orange roughy sent to the USA were labelled as cardinal or hoki.
- Simunovich shipped containers to one of its own companies in Australia and the informant had a “hunch” that the product was repacked.
- Simunovich had someone in MAF/Fish on their payroll.

Mr Younger recorded the details and the information on file notes, job sheets and interview records and placed them in a file.

Mr Younger told the Inquiry that from late August 1991, the investigation “*basically got put on one side*” and that Mr Chadwick would have been aware of that, but did not express any concern at Operation Export not being progressed.

Mr Younger obtained from Customs various shipping and customs documents and conducted some research into properties in the name of Simunovich. He also looked at the assets and structures of the various companies in which Simunovich had an interest and the background to its quota allocations.

He told the Inquiry:

“It was potentially a huge enquiry and I never had enough resources available to me to do it justice”.

He confirmed that Operation Export had not occupied a large part of time and he could not remember whether he did any work on Operation Export from 1991 until the file went to Mr Nalder.

In December 1992, a Nelson based Senior Fisheries Investigator, Mr Bright, was in the USA making inquiries in connection with Operation Roundup.

While in America, Mr Bright received information about the alleged exporting by Simunovich of containers of orange roughy, described as the non-Quota species “*cardinal*”. There was also information held by MAF/Fish alleging that the United States importer of the orange roughy was being invoiced at cardinal (or hoki) prices which were approximately one-tenth of orange roughy prices and the balance of the price for orange roughy was paid into a Boston bank account in the name of Ivan Simunovich and laundered through a Westpac bank account in Australia.

In his evidence, Mr Bright believed that he passed the information to the Auckland office by phone but he had no record of this and believed that it was not provided to Mr Nalder or Mr Younger.

When Mr Nalder started work in Auckland, on Mr Chadwick’s direction, Mr Younger gave the file to Mr Nalder which comprised the documents prepared by Mr Younger, some further lists, two videos and the company searches with a trail of shareholdings of Simunovich.

As the DCM in the Auckland Office, Mr Chadwick confirmed that when Mr Nalder started in the Auckland Office in March 1993:

“Mr Younger handed him the Simunovich file and Barry began considering the best course of action”.

Mr Nalder reviewed the file and obtained copies of specific fishing returns/certified by Simunovich to MAF/Fish since October 1992.

On 10 March 1993, Mr Nalder completed a report to Mr Chadwick. The report summarised the intelligence to date, commented that the preliminary examination of the returns for the period October 1992 to January 1993 showed no discrepancies, and noted “*the records were excellent and balanced in almost every respect*”. Mr Nalder specifically noted that most of the information received to date was historical, which created problems due to the two year time limit for bringing prosecutions under the Fisheries Act 1983. He noted it was only of value to establish the fact there is a problem and the methodology to be used.

Mr Nalder concluded by recommending investigation because of the volume and content of some of the allegations, but warned his DCM, that if sound evidence of illegal activity is obtained, “*this will become a major investigation requiring special funding*” noting that MAF/Fish have two years from October 1992 to lay any information, he recommends that “*due to the size of the problem*” the focus should be on snapper and orange roughy exports. If the focus was widened beyond that “*our resources would have difficulty coping*”.

He set out a suggested investigative plan and concluded there was sufficient information at that stage to warrant commencing an investigation.

Mr Chadwick agreed and it proceeded in accordance with the investigative plan, with the emphasis on alleged offending by Simunovich in respect of orange roughy and snapper.

After inquiries had been made of the DCM in Nelson and information obtained on shipping documents, Mr Nalder reported to his DCM, on 24 March 1993, on the areas then being investigated. This included the export by Simunovich of containers of scampi labelled as non-ITQ finfish species. Mr Nalder described the investigation as being at the stage of gathering intelligence and evidence of illegal activity. As Simunovich suffered a major fire which destroyed records, the investigation was concentrating on activities since 1 October 1992, because of the difficulties the destruction of records presented. Stressing the need for containers to be examined overseas, Mr Nalder sought authority for himself and one other investigator to travel overseas to examine the containers.

Following his report, Mr Nalder prepared a draft appreciation, namely an overview or summary of the actions to date. It was entitled “*Situation Analysis*” and is undated but was completed between 24 March and 30 March 1993.

By the time Mr Nalder wrote his draft appreciation, he was highlighting scampi as well as orange roughy as the species which were alleged to be misreported or not reported at all by Simunovich. He records that most of the product involved was being exported to the United States in refrigerated containers and whilst the boxes in the containers are correctly labelled, the accompanying documentation states the contents to be species other than the species actually in the container. He assessed the quality of this information “*to be extremely reliable*” and the stated aim within the appreciation was:

“to examine the contents of refrigerated shipping containers leaving the premises of Simunovich Fisheries Limited, Auckland, bound for the United States of America, without the knowledge of Simunovich Fisheries Limited, in order to gain evidence of the illegal taking of scampi and other quota species fish.”

Mr Nalder believed he had prepared a further report based upon the appreciation. His further report however, was not amongst the documents available to the Inquiry and in light of the evidence the Inquiry received about the method of filing and record keeping in the Auckland District Office, it is possible that his further report has been lost.

On 30 March 1993 Mr Nalder pursued his inquiries and interviewed an informant in Napier. He was on his way to Gisborne to interview another informant, when he received a call from Mr Paul Williams, Director of Management Support, who required Mr Nalder to meet with him in Auckland. Mr Nalder proceeded to Auckland where he was interviewed by Mr Williams in respect of an incident, in relation to a different operation and prosecution in Tauranga.¹⁰³

On 7 April 1993, Mr Walshe met with Mr Nalder and delivered a letter which:

- suspended all financial delegations held by Mr Nalder as an employee of MAF/Fish (in fact, Mr Nalder, as acting SFI, had no or minimal financial delegations);

¹⁰³ This is the KPMG Peat Marwick incident discussed and analysed in Term of Reference 3.

- stated that the Deputy Group Director had asked that Mr Nalder cease all work on his current investigations until the report of Mr Williams was completed;
- stated that Deputy Group Director (Dr Allen) had asked that Mr Nalder undertake a new assignment investigating allegations that fishers were deliberately over fishing snapper as “bycatch” when they had no snapper quota.

The letter informed him that the two decisions would be reviewed when Mr Williams submitted his report. Mr Chadwick was advised by Mr Walshe that *“Barry was confined to the office by our own Head Office”*.

Mr Chadwick informed the Inquiry that Mr Nalder could not work at full capacity on Operation Export and that, although he continued to work on it, he was confined to the office. This contrasts with the instructions in the letter that Mr Nalder cease all work on his current investigations.

On 18 May 1993 Dr Allen advised Mr Nalder and Mr Walshe that the restrictions on Mr Nalder’s duties no longer applied subject to his being trained in financial management and team building. Although Mr Walshe could return Mr Nalder to normal duties, no action was taken to do so and Mr Nalder continued to work on Operation Export on the restricted basis that he was confined to the office.

He communicated with the United States authorities and did some other minor work in relation to Operation Export.

Mr Nalder and Mr Chadwick together attended at Customs in order to arrange for the supply of shipping documents. They each acknowledged that this was in disregard of the instruction that Mr Nalder should not work outside the office and was in defiance of the Head Office directive. As noted above, this instruction remained in force subsequent to it being lifted by Dr Allen.

As a result of another incident surrounding the Tauranga Operation,¹⁰⁴ Dr Allen, wrote to Mr Nalder on 23 September 1993:

“This is formal advice to you of suspension forthwith on ordinary pay from MAF Fisheries pending an investigation into allegations made that you have fraudulently misrepresented MAF Fisheries information.

MAF Fisheries is formally initiating an investigation into these allegations. You will be given the opportunity to respond to the allegations made during this investigation and it is expected that this will be completed within 10 working days from the date of this letter.

¹⁰⁴ QMR Incident: Operation Buster: See Term of Reference 3 for discussion and analysis of this incident

In terms of the “MAF Way” and MAF Fisheries Discipline and Dismissal Procedure, if these allegations are proven, they will constitute serious misconduct and may lead to dismissal.

Your employment contract and MAF Fisheries procedures entitle you to seek independent representation on your behalf.”

On the same day, Mr Walshe visited Mr Nalder at his home about 7.00 pm. He gave Mr Nalder the letter from Dr Allen and explained that he was suspended because of a QMR alteration Mr Nalder had authorised in February 1992 in respect of the Tauranga prosecution of Papakura Trawling and Fishing Company Limited.

Following his suspension Mr Nalder took no further part in Operation Export.

After Mr Nalder left, Mr Younger asked the Compliance Manager and staff in the office whether they had seen the Operation Export file. He looked in the filing cupboard, but could not find the file.

Mr Younger gave evidence that he had asked Mr Nalder about the file during his suspension. His evidence was:

“Q. I asked him what he’d done with all of the scampi work. He said, “It’s in my desk,” or on his desk, or I forget which, and I went looking for it and was never able to find it.

Q Did he have drawers on his desk that could be locked?

A I think so. We all had a lockable file drawer. I believe his was functioning. I’m not really sure.

Q Did you have access to that drawer?

A No.

Q So, could have the missing file been in the locked drawer?

A It’s possible, but I’m sure I would have at the time asked for the key from either the manager or from the office administrator to get in to look for a file. It’s not something I would have just left on the assumption that it could have been in a locked drawer. I would have gone looking for it.

Q Well, in fact, you say at paragraph 22 you “remember Barry telling me that the files had been locked in his desk before he left”.

A Yep.

Q So, who had the keys to his desk, can you remember?

A No, I’d be guessing. It would either have been the district compliance manager or the office manager.

Q Do you recall opening the drawer?

A No, I'm sorry, I don't. It's highly probable that I would have done, but I can't particularly remember looking – whether it was locked or unlocked”.

The inquiry explored the reasons that Operation Export was not pursued. Mr Younger did not raise the issue with the Auckland DCM once Mr Nalder left and agreed that there were a whole combination of factors, including his own disinclination to take the inquiry further. His evidence before the Inquiry was that when Mr Nalder left MAF/Fish at the end of February 1994, the Simunovich investigation stopped. He told the Inquiry:

“The allegations against Simunovich Fisheries were in my view the strongest leads of the Ministry that were not fully investigated and brought to a conclusion. I am still surprised that with what I believe was apparently serious, deliberate and repeat offending over a number of years, that the Ministry has never seen fit to allocate resources to fully investigate the conduct of Simunovich.”

Despite his views to the Inquiry, neither Mr Younger nor Mr Chadwick did anything to continue the investigation. Mr Younger attributed his lack of motivation for resurrecting the Operation Export investigation to the fact that it would double his workload.

Mr Chadwick told the Inquiry that after the suspension of Mr Nalder, Operation Export was just left in “*abeyance*”. The reason Operation Export did not proceed after Mr Nalder was suspended, was that Mr Walshe, Mr Chadwick and the staff were “*demoralised by what had occurred in relation to how they had treated an employee*”. In his view, the impetus was lost and no further steps were taken after Mr Nalder’s departure because he perceived Auckland Office was not getting support from Head Office because “*they had persecuted Barry Nalder without proper foundation.*”

Mr Chadwick also told the Inquiry that in his view, the investigation did not finish because of lack of resources and the right person to run the file as he had asked “*again and again*” for the right person to take over at some later stage after Mr Nalder had left. He did not ask for a replacement for Mr Nalder.

In Mr Chadwick’s view, there was a need to investigate Operation Export thoroughly although as DCM, he did not direct an investigator to pursue it and did not allocate resources to it for the reasons already described.

7.1.3 Operation Dog

Following Mr Nalder’s suspension in September 1993, there was a National Fisheries Investigators Conference in December 1993.

Operation Dog was initiated by a Fisheries intelligence officer named Mr Bedford, whose manager was Mr Wood (Assistant Manager, Fisheries Compliance, Wellington).

Before dealing with the detail of this Operation, it is important to understand the definition of “an appreciation”. The Inquiry was informed that an appreciation means a formal documented process, whereby all available information is gathered, offences and offenders are identified and options for compliance action are recommended.

The information and analysis that led to Mr Bedford’s appreciation were as follows:

- informant information on scampi offending by a number of companies was received and entered into a Ministry intelligence data base
- information from Ministry observers on board scampi vessels was received
- RNZAF patrol flights directed to specific positions and activities by the National Compliance Unit
- a preliminary analysis of scampi fishing returns was made (and compared to other records)

On an analysis of the information by Mr Bedford, he believed there were enforcement issues relating to the scampi fishery and that a full appreciation of the situation was needed. Those issues included:

- area misreporting
- discrepancies in fishing returns
- bycatch dumping and misreporting.

Mr Bedford started to draft an appreciation before deciding that it was not his role as a Fisheries Intelligence Officer in the National Compliance Unit. He was also committed to other investigations which in his opinion, were of a higher priority than the scampi appreciation. He was also of the opinion that the impending satellite vessel monitoring system (“VMS”) would be a significant deterrent to area type offending.

On 8 December 1993, Mr Bedford made a presentation at the National Fishery Investigators' conference and put forward his suggestion that a national scampi appreciation be undertaken.

Mr Reid (Fisheries Investigator, Nelson) volunteered to act as officer in charge of the appreciation.

Following the conference, Mr Bedford sent the appreciation proposal to his manager, Mr Wood. The proposal included the name of the Fisheries Officer Mr Reid, who had volunteered at the conference to conduct the appreciation. Mr Bedford realised that approval from both Mr Reid’s manager, Mr Bishop and Mr Wood was required before Mr Reid could take up this role.

Mr Wood faxed Mr Bishop about the proposed appreciation and suggested that he consider Mr Reid's involvement as officer in charge of the appreciation.

On 20 December 1993, Mr Bishop decided that Mr Reid would not be available to conduct the appreciation and the reasons for this were noted on the letter from Mr Wood. A copy of the letter was given to Mr Reid.

In Mr Bishop's view, Fisheries Investigator John Reid had existing commitments which needed to be completed. For that reason, Mr Bishop, did not permit Mr Reid to conduct the proposed appreciation. No further action was taken in respect of Mr Bedford's proposal and nor was the proposal forwarded to other regions or circulated nationally.

7.1.4 The Complaints about Barine

Vessel Registration

During the same period, between 1990 to 1992, MAF/Fish received information about Barine Developments Limited. On 6 January 1990, when the *Bilyara* arrived at the Auckland fishing wharf, Mr Chadwick, in his role as DCM for the Auckland region, and two other officials arrived at the vessel and removed the fishing permit. Mr Penwarden gave evidence that this followed a visit from Ivan Simunovich and then Peter Simunovich, who asked what he was doing. Mr Penwarden's evidence is "*when I answered that we were going scampi fishing, he replied 'no you're not', that's our fishery*".

When Mr Penwarden sought an explanation from Mr Chadwick regarding the withdrawal of the permit, "*he said it had been brought to his notice that the named person on the permit did not meet residency criteria to hold a permit*".

Barine alleged that Simunovich had complained to MAF/Fish and sought action.

Simunovich denied the sequence of events as presented by Barine. Mr Peter Simunovich denies that he and his father went to the wharf on 6 January and denies making the statements alleged by Mr Penwarden.

Barine sought help from Mr Chadwick who suggested that Barine would require a new entity, namely a company that met the residency requirements and Mr Penwarden acquired Barine Developments Limited. According to Mr Penwarden:

"This delayed the start of our fishing a couple of weeks".

The issue in relation to the vessel arose because Mr Penwarden, although a New Zealand citizen, had not been resident in New Zealand for 2 ½ years as required.¹⁰⁵

¹⁰⁵ Section 57 (9)(a)(i) Fisheries Act 1983

The *Bilyara* was and, it is alleged by Simunovich, still is, owned by an Australian company P & R Trawling Pty Limited, a company owned by Mr Penwarden and his wife. In its submissions to this Inquiry, Simunovich still argue that this was an Australian company which was not entitled to register a vessel as a New Zealand fishing vessel, being a requirement under the Fisheries legislation, before any vessel can fish in New Zealand waters. Simunovich maintain that Barine Developments Limited has never owned the *Bilyara*.

Although Simunovich deny that anyone from their company objected to the arrival or registration of the *Bilyara* the Inquiry has received submissions on this issue from Simunovich which state:

“So far as anyone at Simunovich can recall, no-one at Simunovich was involved in that revocation, although if it had been aware at the time, it would have objected to its registration. Simunovich was determined to keep foreigners out of the scampi fishery as New Zealanders could easily catch all the scampi sustainably harvestable”.

Once the *Bilyara* was registered as a New Zealand fishing vessel, the issue did not stop there. Simunovich still protest that the re-registration of the vessel as a New Zealand fishing vessel did not comply with s 57 of the Fisheries Act 1983.

In 1992, the issue was raised again by Mr Wilkinson who made a further complaint.

The complaint again related to the *Bilyara* being foreign owned and a concern that the vessel was not subject to the requirement to have deep-water surveys and crewing. This issue arose because the Ministry of Transport had decided that the Auckland Islands were no longer to be treated as off-shore islands. All New Zealand vessels were required to have deep-water surveys and crewing and the fishing industry Guild and Simunovich believed the *Bilyara* would be exempt from these.

As a result of the complaint, the *Bilyara*’s registration was reviewed by Mr Younger. He concluded that the vessel may technically have been wrongly registered but in his view the registration should be allowed to remain. In his view, Mr Penwarden had done his best to comply, made no secret of the ownership arrangements, and had structured his fishing operations in a way which endeavoured to satisfy all. He recommended that MAF/Fish should not pursue the matter further.

Mr Chadwick, the DCM from Auckland, wrote to Simunovich with the outcome of the review. He told Simunovich that he had exercised his discretion under s 57(8) Fisheries Act 1983 to register the vessel.

Simunovich still complains that this advice by Mr Chadwick was a “cover up” not revealing Mr Younger’s conclusions in his report that:

“The law in these matters is quite clear in respect of foreign ownership of businesses and the relation to carrying on business in New Zealand, however I consider that within the bounds of practicality, and having regard to Penwarden’s tax benefits and in respect of his family and businesses (which MAF Fisheries

cannot have interest in) he has structured his fishing operation in a way which endeavors to satisfy all.

I do not think MAF Fisheries should pursue this matter any further”.

Simunovich has submitted to this Inquiry that the vessel was unlawfully registered and Barine were not entitled to enter the New Zealand scampi fishery, and it was only assisted in doing so by the decision-making of Mr Chadwick, supported by the report of Mr Younger “*to fudge the issue as one of practicality and not the law*”.

Simunovich further submits that MAF/Fish never did seem to comprehend the exercise of its discretion under s 57(8) of the Fisheries Act 1983 and whether not it was then required to exercise its discretion under s 28Z regarding the holding of quota.

MFish submits that the registration of the *Bilyara* as a New Zealand owned vessel was processed on the basis that Barine declared that the *Bilyara* was New Zealand owned, instead of declaring it was foreign owned and on charter to Barine.

The legality or otherwise of the registration of the *Bilyara* is outside the jurisdiction of this Inquiry. Barine complied with the directions of MAF/Fish at the relevant times and as a result of the initial complaint, lost some fishing time in the 1989-90 year.

For the purposes of this Term of Reference, MAF/Fish had a reasonable basis to suspect illegal fishing by Barine and actioned it immediately. It should be noted, that Mr Penwarden claims that at the time Simunovich was attempting to exclude Barine’s vessel from the scampi fishery on the basis of overseas ownership, Simunovich had three foreign owned scampi vessels fishing in New Zealand, being the *Enemelay*, not registered until 29 February 1996, the *Drysdale* not registered until 27 March 1992 and the *Petersen* not registered until 30 September 1992. No complaint was made however, in respect of these vessels and as far as the Inquiry is aware, no action was required of MAF/Fish.

Illegal Fishing Gear

In June 1991, when the *Bilyara* docked in Napier, the vessel was seized by MAF/Fish, following allegations that Barine had used undersized cod-end mesh, a double cod-end and had discarded juvenile bycatch.

MAF/Fish undertook an immediate investigation into the allegations. This involved interviews of the *Bilyara* skipper, two observers, two other crew members, the net importer and Mr Penwarden. Mr Younger was the investigator and he completed a report to Mr Chadwick dated 5 July 1991, concluding that MAF/Fish should take no further action. In his report, Mr Younger concluded:

- the problem with undersized mesh was industry wide and attributable to “*very marginal sized nets being distributed*” by importers.

- in relation to the allegation of dumping, the amount was insignificant. One observer noted an average of 14 kg per tow while a second observer spoke of “*insignificant amounts*”. It was also recognised that “*Penwarden has constantly maintained that his instructions to his crews have always been to retain fin fish for processing*”.
- in relation to the net construction, Barine’s gear had been inspected and not commented on by MAF/Fish or its various observers on many previous occasions.

During the investigation, the *Bilyara* was seized and under bond for a period of three days.

During the same period, it is alleged by Mr Penwarden that Simunovich also had an undersized net on the vessel *Mutual Enterprise* and that on the comparison of invoices annexed to an affidavit sworn by Mr Milligan, a net maker, the evidence suggests that the nets came from the same source.

Although no further action was to be taken against Barine, Mr Penwarden has deposed that Barine paid a very heavy price for the incident, as he decided to return to Australia because of the fear of forfeiture. He put it this way:

“The seizure of our only boat and the threat of it being permanently forfeited to the Crown for what seemed like arbitrary decisions, played a significant part in our decision to take the boat back to Australia for several months where we felt much less vulnerable so [we] could regroup. The result was that we lost considerable scampi catch history during this time.”

Following Mr Younger’s inquiry and his report of 5 July 1991, letters of warning were sent to Mr Penwarden advising him that breaches of the Fisheries Act had occurred in that the nets were illegal and that they had undersized mesh, there was use of liners in the cod-ends and there was some dumping of ITQ fin fish. As Mr Younger records in a file note to Mr Chadwick “*the illegal nets taken from the Bilyara and Mutual Enterprise are still held in Napier and will remain so until we are advised in writing, as to their disposal, by Penwarden and Simunovich*”.

Mr Younger records that shortly after the news of the seizure of the *Bilyara*, Simunovich and Sanfords approached MAF/Fish with a similar problem. On 7 August, warning letters were sent to Simunovich, Sanfords and Mr Milligan, the net maker. Those letters warn that mesh size for the taking of scampi is to be no smaller than 43 mm, as the permits require, in accordance with 47(1)(d) of the Fisheries (Commercial Fishing) Regulations 1986. The nets imported by Milligan Trawl and supplied to Sanfords and Simunovich and used by their respective vessels were not of a legal size. It appears that nets were taken by MAF/Fish from Simunovich and Sanfords, although there is no evidence to suggest that either of the Simunovich or Sanfords vessels were arrested and their crews subjected to interviews or investigation.

7.1.5 The Simunovich Allegations

The Inquiry has received many views about whether there was a reasonable basis to suspect illegal fishing in respect of Operations Dog and Export. On the one hand, ex-Ministry staff, such as Mr Chadwick, Mr Younger, Mr Sullivan and Mr Bishop, together with Barine, believed there was more than a reasonable basis to suspect illegal fishing by Simunovich. Simunovich on the other hand, point to statements being historic and coming from competitors and disaffected employees; the examination of catch returns did not support the allegations and the summaries of company records and assets were worthless, in that they did not contain any liabilities. The video referred to by Mr Nalder as showing offending, either did not exist or did not show what he claimed it to show.

In relation to Operation Dog, the information collected by Mr Bedford as the subject of his proposal for an appreciation, did not include the Operation Export allegations or materials but a range of matters from different sources about the scampi fishery in general, obtained from sources such as the Orion aircraft observations and complaints received.

Mr Bedford told the Inquiry:

“...I mean, it wasn’t an Operation file per se ... It’s unfortunate that I gave the appreciation an Operation name because it wasn’t. It wasn’t an Operation per se. So, in a sense, the file was a topic and that topic was just added to.”

As with Operation Export, the file was not closed but left “*in abeyance*” in case it could be taken up later.

This Term of Reference requires the Reviewers to be satisfied that there was a reasonable basis to suspect illegal fishing. On any view of the information collected, under Operation Export and Operation Dog, there was a sufficient and reasonable basis to suspect that illegal fishing may have occurred.

We are mindful that a suspicion of offending does not equate to the “*belief on reasonable grounds*” that offending has occurred, being the threshold requirements for the exercise of a fishery officer’s powers to search, interview and seize documents or evidence.

It is clear that Mr Nalder and Mr Chadwick were both of the view that the information collected under Operation Export justified further investigation, with Mr Chadwick approving as DCM, the investigation into the information.

MFish has submitted that at best, Mr Nalder and Mr Younger were suspicious that Simunovich was offending, but they lacked the evidence to substantiate reasonable grounds to believe specific offending was occurring.

This submission is difficult to accept. On any view of the material, there was information which gave rise to a reasonable basis to suspect that Simunovich was offending, but before

reaching the threshold of having reasonable grounds to believe specific offending was occurring, the matters required further investigation.¹⁰⁶

The fact that an investigation was proceeding, when Mr Nalder was undertaking his interviews in Napier and potentially in Gisborne, indicates that the MAF/Fish view at that time, was that the matters should continue to be investigated at least. The person who had the authority to decide that the investigation take place was Mr Chadwick.

The circumstances in which the investigation was stopped, relating to Mr Nalder's actions on another investigation, do not detract from the fact that an investigation was underway and in the normal course, should have progressed to the point where a proper decision could be made as to the continuation or otherwise of the investigation. Only after an investigation was properly conducted and finished, could there be any further decision made as to whether there was a reasonable ground for believing offending had occurred and initiating prosecution. This stage had not been reached.

We agree with Mr Sullivan's views about the consequences of failing to conduct investigations properly:

"... when I was in the Ministry, and I'd be surprised if it is not the case now, when you got allegations of such serious offending you investigated them to the fullest extent possible.

Now, it's quite possible in an investigation that you get frustrated, you just can't get the evidence. Well, that's life. It's quite possible that if the investigations had been done to the level of adequacy that I would have expected, that Mr Wilkinson and Simunovich Fisheries would have been vindicated. It's quite possible that all the allegations are wrong, that this is all rumour, speculation and other things, and we wouldn't be sitting here today dragging Simunovich's name through this process if proper investigations had been done. And in some way I feel some sympathy for Simunovich Fisheries in the position they're in on this matter because they're in here as a consequence, not of their own actions, if they're innocent, but because of a failure to conduct proper investigations by the Ministry.

If they are guilty, and I don't know whether they are or they aren't, and it's not my job to say whether they are or they aren't, then it should have been properly investigated. It may be that the outcome would have been a prosecution. It may be that they couldn't have got enough evidence.

But on what I've seen on these papers, I wouldn't rank a single one of these investigations as having been carried out to a proper professional standard."

¹⁰⁶ It should be noted that the threshold for a prosecution is "just cause to suspect and do suspect". Section 13 Summary Proceedings Act, s 104 Fisheries Act 1983 and s 236 Fisheries Act 1996.

It is unsatisfactory that the allegations were not further investigated, regardless of the outcome as to whether or not it resulted in a prosecution of Simunovich. When information is received on a scale such as Operation Export, it is in everyone's interests that investigations once commenced, be completed and a decision made as to whether there is sufficient evidence to believe that offending has actually occurred.

The removal of Mr Nalder from the Operation Export investigation was specifically directed by Dr Allen, as recorded in the letter dated 7 April 1993 from the Regional Manager, Mr Walsh. The interference by Head Office in relation to regional compliance matters was unusual and for reasons explored in Term of Reference 3, were prompted by incidents involving Mr Nalder and an investigation into another fisher.

On the evidence before the Inquiry, the decision as to whether an investigation should continue was that of the DCM, Mr Chadwick. While Mr Chadwick indicated he had sought the resources, this was not effective. It was open to Mr Chadwick to allocate or to seek resources or personnel to continue the Operation Export investigation. Although he had the power to continue the investigation, because of his dissatisfaction with Head Office and his mistrust the actions of Head Office had created, he chose not to.

It is clear that Operation Dog was not a formal investigation and nor did it concern only Simunovich. MAF/Fish was receiving various information about area misreporting, discrepancies in fishing returns and bycatch dumping and misreporting from a number of sources about a number of fishers within the scampi fishery.

An investigator (Mr Reid) did volunteer to develop an appreciation, but his DCM, Mr Bishop, has accepted that he was not prepared to release Mr Reid to undertake the investigation because there were other priorities and there was an investigation to which he was already fully committed.

The message sent by Mr Wood to Mr Bishop contained the comment

“You will see that John Reid has “volunteered” to act as OC. I am not sure what the “contractual” arrangements are with John’s employment in Nelson, so you will need to consider his possible involvement in this sort of exercise”.

The Inquiry notes that Mr Wood did not intend this as an instruction that Mr Reid should not undertake an investigation; nor did Mr Bishop take it that way. Nevertheless in Mr Reid's mind he did have some time available to work on an investigation. The Inquiry considers that the comment is indicative of some ability on the part of Head Office to influence compliance matters and in this case the allocation of resources to investigations. As noted earlier, however, the ultimate decision on resource allocation rested with the DCM, Mr Bishop, who was not prepared to release Mr Reid for another investigation.

7.1.6 The Barine Complaints

The complaint in January 1990 in relation to the registration of the *Bilyara* and the event in June 1991 involving the arrest of the *Bilyara* in Napier, were actioned promptly.

In each case there was a reasonable basis to suspect aspects of illegal fishing.

The alacrity and impact of the responses by MAF/Fish to the complaints and information relating to Barine contrasts starkly with the two operations “Export”, which related to Simunovich, and Dog, which related to the fishery generally. In the view of the Inquiry, this reflects a focus on enforcement “*gamekeeping*” rather than a willingness to concentrate on and sustain the more complex document-based investigations which the information collected in Export and Dog would have required.

7.1.7 Conclusion – Compliance in the Period to 1993 – MAF/Fish

Structures, Systems and Processes

The regional compliance structure was inappropriate and inadequate to provide consistent support for the investigation of major offending. The regional structure gave authority to the District Compliance Managers to undertake and allocate resources to investigations. There was no effective mechanism to enforce national priorities.

The enforcement of complex fraud based offending was not pursued adequately or in a consistent way. The regionalised approach still favoured the gamekeeper approach which emphasised minor regulatory breaches as the target of investigations.

Although priorities were constrained and not all offending could be pursued, the disaggregated approach to resource allocation meant that there was inevitably a tendency for major investigations to be adversely affected because of the impact such investigations had on limited local resources. The devolved structure also meant that if a potentially significant investigation went into abeyance there was no system for national oversight to ensure that it was reinstated and progressed effectively.

In 1993, while there was a Fisheries Officer Manual which gave guidance on investigations, there were no prescribed procedures for opening and closing investigation files. No formal decision-making processes governed the conclusion of investigations and these factors contributed to the way in which Operation Export went into “abeyance”.

Operations Export and Dog

There was a reasonable basis to suspect illegal fishing in 1993 on the basis of the information held in Operations Export and Dog at the time they stopped. Although there was insufficient evidence to initiate prosecution, further investigation was warranted. However priorities and the lack of resources, together with motivation, in the case of Operation Export, were the reasons for the operations ceasing.

There was no evidence that any actions by either Mr Crothers or Mr Wood in relation to these two operations caused the operations to go into abeyance. The reasons for discontinuing them were not sinister and they were not stopped because of any inappropriate action taken by either of these officials. Operation Export ceased following intervention by Dr Allen in relation to the disciplinary action taken against Mr Nalder, and while the cessation of the proposed Operation Dog was stopped by Mr Bishop following communication with Mr Wood, there is nothing to suggest that their intentions were in any way inappropriate given the emphasis being given to other investigations in the Central region.

Barine

The outcome in relation to Operations Export and Dog can be contrasted with the way that complaints about Barine's vessels registration and use of undersized net were pursued.

7.2 PART II: COMPLIANCE IN 1998, AND OPERATION METRO - MFISH

7.2.1 The Centralised Management Structure from 1995

With the formation of the Ministry of Fisheries in 1995, the compliance structure changed significantly. Previously, the nine autonomous compliance teams reported to regional managers who had responsibility for the full range of MAF/Fish operations. As we have already noted, there was no national control for compliance activities or line accountability.

From 1 July 1995, all compliance functions and the fisheries observer programme were combined into one nationally coordinated and directed business unit. This is shown on the organisation chart 2003, annexed in Appendix 7.

All compliance services and activities are now managed much more centrally within a compliance strategy and an annual compliance group operational plan, which comprises a plan of enforcement, prosecution and observer activities annually.

As Mr Spong observed, the year 1998, in terms of the Inquiry's Term of Reference, offers a completely new face to fisheries enforcement. The combination by that date of all compliance functions and the fisheries observer programme into one nationally coordinated and directed business unit from 1 July 1995, contributed to a significant improvement of the structure for enforcement. Also by 1998, the Serious Offences Unit (SOU) established in 1997, had as its function the investigation of serious and complex QMS fraud offending on a national level.

In November 1996, MFish formulated a compliance policy statement on prosecution and appeal standards and procedures which gave direction on decisions to prosecute under the relevant legislation, including the delegation of authority to approve prosecution. The decision to prosecute is formulated on two decisions, namely (a) whether it is appropriate to prosecute in the circumstance of the case, and (b) is there sufficient evidence to succeed with a prosecution?

The decision ultimately as to whether there is sufficient evidence to support a prosecution must be made by a Senior Fisheries Prosecutor (SFP). In the event that there is an inability to agree among the National Compliance Manager, (who must make the decision in relation to offences against the Fisheries Act 1983 and 1996, the Marine Farming 1973 and related regulations, and other fisheries legislation) the Manager of Compliance Operation (MCO) or the SFP as to whether a specific prosecution should occur, the file is to be referred to a nominated decision maker. Once the decision to prosecute is finalised, the accountability for legal issues in relation to the prosecution file passes to the SFP who is responsible for the wording of the information or instructing a non-Ministry prosecutor if necessary, and ensuring the prosecution file is prepared to an appropriate standard. Mr Spong was of the opinion that this policy was and still is appropriate for an enforcement agency.

There were two other changes. The first was the development of specialist information management systems, including satellite vessel monitoring and intelligence management. The second was the establishment of staff training development programmes to improve investigative ability, with individual performance being regularly assessed and recognised within the context of a detailed appraisal system.

The evidence from Mr Spong concluded by his stating that the documentary evidence points to MFish having achieved by 1998 significant structural and management change with administrative systems which, in his opinion, were adequate to identify and investigate alleged offences.

Mr Thurston, DCM, advised the Inquiry that when he joined MFish in 2000 there was a poor tracking filing system but that had been replaced with the offences system. He outlined in respect of the offences and intelligence system:

- Notebooks in which all matters should be noted. About one third of the entries would go no further.
- Job sheets which should be prepared promptly if an entry in a notebook is to go further – certainly if a prosecution or arrest could be made.
- Every contact with an informant should be recorded on a job sheet.

- A job sheet should always be entered into FIN.
- It is the individual choice of the investigator as to what file the job sheet is placed on or whether they are just left on the computer.
- The job sheet could be printed out and placed on an investigations file, or a prosecution file which are normally hard files with an index showing job sheets, statements, exhibits, documentary evidence, research, analysis etc.
- The investigations file remains with the investigator until closure, prosecution or passing to another officer.
- If a file is to be stopped the decision is made between Mr Thurston and the investigator.
- On the stopping of a file Mr Thurston ensures that relevant material goes into FIN and is referenced so that if someone interrogates FIN there is a cross reference to the hard copy investigation file.
- The job sheet may go onto a prosecutions file. After the completion of the prosecution information goes over to FIN. Court issues are flagged.

Although the Fisheries Officers Manual documented the procedures for opening and closing prosecution files¹⁰⁷, the procedures suggested had not adequately covered investigation files in 1991-93. If they did, then the procedures were not followed, certainly in the Auckland office.

By 1998, the “*Casefile Manual*” provided updated instructions for casefile management processes which includes the closure of files.

A number of witnesses have confirmed in their evidence that files should be properly closed with a record of reasons for closure clearly marked on the file and the offences system updated accordingly.

Mr Stuart, Manager National Operations for Compliance, told the Inquiry that since 1995, compliance managers have emphasised the importance of ensuring files were opened and closed appropriately. Referring to Operation Forrest, he made a decision to close the file but kept a watching brief on it. The purpose of a watching brief, in his view was to:

“Lets keep an eye on this company and if other information comes, then lets re-evaluate what we’ve got.”

The watching brief was not uncommon, where people have embarked on an investigation and cannot go much further, but the information can be supplemented when further material comes to hand, which enables the investigation to continue. He believed in some cases it may

¹⁰⁷ Chapter 17: Fishery Officers Manual: Doc. 259.1

well be appropriate to leave the file open, pending further information being received but *“obviously at some point you would need to consider closing it off”*.

Fishery officers are now able to access relevant compliance procedures is done in a number of ways. These include the Fisheries Officers Manual, which although first published in 1991, was amended eight times in 1993 and has been superseded by MFish’s intranet which is an internal computer system containing compliance policy statements, the 1999 Fishery Officers Manual, Lesson Notes from the Fisheries Officers induction courses and *“Fishnet”* the newsletter providing Fisheries officers with legal information.

With the restructuring of compliance administrative and management systems and processes, the investigations into illegal fishing under Operation Forrest and Operation Metro are now considered.

7.2.2 Operation Forrest

Operation Forrest concerned the information from informants during 1998, particularly from Mr Penwarden of Barine, alleging that Simunovich had been involved in historical fisheries related offending. Operation Forrest formally commenced on 11 August 1998 when specific terms of reference were prepared.

The main Terms of Reference were:

- to test the validity of informant information
- to determine if the alleged offending by Simunovich Fisheries Limited was currently occurring.

An investigation report with recommendations was to be prepared by 30 November 1998. Ongoing compliance activity was to be carried out as agreed by the Manager of the Serious Offences Unit.

The operation concluded mid-June 1999.

The Manager with ultimate responsibility was Mr Stuart, Manager of the Serious Offences Unit, who appointed Trevor Prescott (Fisheries Investigator for the Wellington District) the officer in charge of the Operation.

The information received by MFish alleged that before 1993, Simunovich were offending by misreporting in the following ways:

- initially over-reporting scampi to inflate catch history
- under-declaring quota species and scampi caught
- exporting one quota species and mis-declaring it as another quota species

- area misreporting by taking fish from one quota management area and declaring it as being caught in another.

MAF/Fish received information from informants, various skippers, their crew and ex-employees of Simunovich. One of the problems facing the compliance staff, was the fact that much of the information being received related to the allegations made against Simunovich between 1991 and 1993.

It appears that MFish was concerned however, that the company had grown significantly since the receipt of the original information, as had its vessel fleet and business structure.

MFish understood this Operation was always going to be difficult. Ascertaining if there was evidence of current offending required a covert surveillance to be undertaken in Napier. Contact needed to be made with Simunovich personnel from time to time to obtain information about the bin weights.

Because of the security concerns, only some Napier staff were directed to take part in the Operation. The staff not involved in the Operation were advised of its general nature but were not given any detail.

Before the surveillance activity was undertaken, all staff were instructed by the investigator heading the Napier surveillance activity that they were not to board any vessels which they normally did not visit or to undertake any unusual activity which may arouse suspicion at the wharf.

Both the Serious Offences Unit and the Napier investigator were concerned that some of the Napier staff had close personal relationships with ex-Ministry staff who were working for the fishing industry.

The surveillance work that was undertaken by MFish, covered not only the Napier port but Auckland as well as:

- covert surveillance of discharges from two Simunovich vessels (*Ocean Fresh* - a fresher (non-refrigerated) fishing vessel, and *Albatross II*- a scampi vessel) at Napier Port
- covert surveillance of activity at Auckland wharf
- weighbridge inspections of trucks transporting fish product away from Napier port to the Simunovich factory in Auckland
- Inspection and analysis of product exported by Simunovich at the destination port in United States of America

Because of the allegations relating to the misreporting of fish by Simunovich, the Serious Offences Unit requested MFish's national audit team in November 1998 to undertake an audit of Ministry held returns to determine whether or not there was any validity to the allegation of misreporting.

In particular, the audit team was requested to determine if quantities of orange roughy, scampi, ling and cardinal which were exported, equated to reported landings.

The request for the 1997-98 fishing year was to concentrate on hoki, scampi, orange roughy, stargazer, ling and cardinal. The vessels concerned were the Simunovich vessels, which at that stage were *Ocean Fresh*, *Ocean Dawn*, *Christmas Creek*, *Petersen*, *Drysdale*, *Enemelay*, *Albatross*, *Mutual Enterprise*, and *Kermadec*.

Surveillance Results

Covert surveillance of discharges at Napier Port, and subsequent weigh station checks, indicated some weight discrepancies. Further work was needed to determine if this discrepancy amounted to misreporting.

The covert surveillance at Auckland wharf provided no evidence of offending.

In April 1999 United States National Marine Fisheries Service and United States Customs Service personnel inspected two Simunovich containers on arrival in the Long Beach / Los Angeles seaport. The preliminary view of the National Marine Fisheries Service was that fish labeled as hoki was actually orange roughy. Samples of the fish were taken for laboratory analysis. In July 1999 that analysis confirmed that the fish labeled as hoki, was hoki.

The National Audit Team's inspection of the licensed fish receiver forms, found Simunovich had good internal controls and a very good awareness of record-keeping regulations.

Their analysis of harvest, catch and landing data showed that the company's returns predominantly balanced. Some vessels, however, in particular *Ocean Fresh* a non-scampi vessel, showed that estimates of orange roughy were consistently overstated and estimates of cardinal were consistently understated.

The opinion of a forensic accountant who undertook a product flow analysis for orange roughy, concluded that sales and purchases of orange roughy balanced to within 142 kg. Her view was based on the most probable recovery rate. The review also suggested a number of avenues MFish could follow up to confirm if this was correct.

Unauthorised Boarding of Target Vessel

Despite the warning to Napier staff not to board any vessels or do anything unusual that may arose suspicion, on 30 March 1999, two fishery officers boarded and inspected the Simunovich vessel, the *Albatross*. These fishery officers were not part of Operation Forrest and the *Albatross* was being monitored by covert Ministry surveillance at that time.

According to information received by MFish, Simunovich vessel operators were becoming suspicious of increasing Ministry interest. The boarding of the *Albatross* which was monitored by covert surveillance, destroyed an opportunity for MFish to follow through on weight discrepancy checks.

MFish acted swiftly in respect of the two fishery officers who had boarded the *Albatross*. They were suspended from duty. The monitoring of the discharge of fish from the *Albatross* was to be the final covert activity planned for this operation. The Manager of the Serious Offences Unit had already determined that unless admissible evidence of offending was found, he was intending to reallocate resources to other priority areas, involving area misreporting and large scale dumping of quota species.

The unauthorised boarding the *Albatross* prompted a review of Operation Forrest. Mr Prescott prepared a summary of Operation Forrest in June 1999 and reported to his manager Mr Stuart.

Mr Stuart “*made a conscious and deliberate decision to discontinue Operation Forrest*”. His reasons for terminating Operation Forrest were:

- there was insufficient evidence to form a reasonable belief, on reasonable grounds, that Simunovich was currently engaged in serious QMS fraud offending.
- given the actions of the two fisheries officers who boarded the Simunovich vessel, reliable evidence of current serious QMS fraud was unlikely to be obtained in the immediate future. The threshold to continue on to the planning and investigation stage had not been satisfied.
- The Serious Offences Unit’s resources were stretched and were required to be redeployed to other priorities and on to more productive investigative and prosecution work.

He told the Inquiry that arriving at his decision, he balanced a number of factors. They were:

- The only potential admissible evidence of current offending came from the truck weighing exercise which had to be balanced by the crude nature of the exercise and the variables that had yet to be explored.
- Evidence of current offending was not supported by subsequent product checks in the USA.
- The product flow analysis did not support misreporting.
- Informant information was mainly hearsay, untested, historic and inadmissible.
- Information about the covert operation was most probably circulating around the industry.

He also told the Inquiry that he has reflected on his decision to terminate Operation Forrest many times since the Inquiry was announced. In his words:

“I remain confident that it was the correct decision, given the circumstances and the quality of information and evidence available at that time. I stand by that decision today.”

This decision has been the subject of criticism. Barine considered that MFish's interpretation of its inability to pursue historic allegations unduly restricted MFish so that it had no will to prosecute Simunovich. Mr Sullivan did not believe that Operation Forest was stopped for reasons of resourcing. He considered that no impediment to a prosecution had been reached.

"Q. In your experience in the Ministry and the former MAF office as it was, were there investigations stopped for reasons of resourcing or for individual regional [decision] maker reasons?"

A Absolutely. One of the things that is an exception to things I'm talking about is resources. You can't chase everybody, and I agree with that and accept it as a fundamental principle. You only have so many men and so much money and you can only achieve so much. If that was a legitimate basis for not pursuing Operation Forrest then I would accept it, but I don't believe it is.

This is where I can't understand the Ministry prosecution list and prosecution examples because if it comes down to a question of priorities, the kind of allegations and the kind - if you took the allegations at face value about the scale of the offending that is imputed to Simunovich Fisheries in these investigations, they fall into the most serious category, and yet we've got the list which they presented which is only a small portion, in my view, of the cases that we've done over those years, and even today, there are - I would say a good 80% of them fall into a far lesser seriousness category than what's in this investigation.

If it came to an issue of prioritizing resources I would have thought the decision would be made to drop some of those minor cases compared to this kind of investigation."

Simunovich submitted to the Inquiry that Mr Stuart made the right decision on information obtained over 3000 hours of investigation.

7.2.3 Operation Metro

In November 2001, after Mr Prescott became aware of the Court of Appeal decision in *Vautier*, he made contact with Mr Penwarden and queried whether the allegations of potential offending by Simunovich in 1998 was continuing. Mr Prescott met with Mr Penwarden and received further allegations, which were based on *"hearsay information that either indicated or alleged offending"*.

Following these discussions, Mr Prescott sought the approval to recommence his inquiry from the Regional Manager, Compliance, Mr Driscoll as Mr Prescott was the Wellington Regional Fisheries Investigator, and this matter was out of his regional jurisdiction.

Mr Driscoll gave approval to Mr Prescott to commence this inquiry on the basis that it was to investigate *"current offending in both the scampi or wet fish area"*.

Mr Prescott collected documents and following his meetings with Mr Penwarden, approached the Regional Intelligence Analyst to analyse Simunovich's scampi catch records for the 2000-01 period and to compare the findings with the catch of other scampi vessels.

The analyst, Mr Gleeson, prepared an interim report dated 21 December 2001 but was unable at the time to complete any analysis on the fishing returns.

In January 2002, Mr Prescott prepared terms of reference for his manager, Mr Thurston with the stated purpose of the investigation being a follow up and a test of the information alleging current scampi offending by Simunovich.

During the course of Operation Metro, Mr Prescott met with Mr Penwarden on approximately five occasions and had telephone contact with Mr Penwarden or his solicitor on a number of occasions.

Mr Prescott was aware that he was directed to look at current offending, not historic offending, and he advised Mr Penwarden that historical offending was outside the limitation period for Fisheries Act charges.

In May 2002 Mr Penwarden provided Mr Prescott with two folders containing the affidavits and documents which we have named the "*Original affidavit*" consisting of the allegations of illegality and corruption within MAF/Fish.

Mr Thurston became aware that Mr Penwarden had recorded conversations with Ministry staff without their knowledge. Mr Thurston and MFish became concerned that Mr Prescott was being manipulated by Penwarden and on 25 June 2002, Mr Thurston advised MFish staff member, Mr Bright, that he had been recorded in April 2002.

Having raised his concerns about Mr Penwarden with his manager, Mr McKay, Mr Thurston then advised Mr Prescott to immediately cease all contact with Mr Penwarden and to submit the Operation Metro file with a covering report on the background of the Operation and enquiries made to date.

Mr Prescott, in his report of 16 July 2002, summarised the historical information and current information that he had received from Mr Penwarden.

He reached the view that there were reasonable grounds to believe that offending had occurred historically and, based on allegations by Mr Penwarden, offending may have occurred currently.

His view of historical offending differed from his manager and MFish.

"I was of the view that the historical offending was relevant in that the overstating of scampi could amount to conspiracy to defraud the public of New Zealand of the scampi resource. I was also of the view that the alleged historical offending had been raised a number of times and had never satisfactorily been finalised and thought that a thorough investigation into both current and historical offending should be done".

When asked whether he had contemplated a charge under the Crimes Act, he told the Inquiry:

“I can’t say I turned my mind to a Crimes Act offence but probably at that point in time I would have thought that a Crimes Act offence may have been relevant to cover offending outside the Fisheries Act”.

On receipt of Prescott’s report in July 2002, Mr Thurston discussed the findings with his manager, Mr McKay (Acting Manager Compliance Operations (North)).

There is nothing on the file recording a decision or the reasons for not progressing the operation. In effect in June 2002 Mr Thurston decided to suspend Metro unless further evidence of current offending was received because:

- the investigation to date had not disclosed significant reliable evidence of recent fisheries offending by Simunovich Fisheries Limited
- there was insufficient evidence to substantiate allegations of fraudulent manipulation of scampi catch history by Simunovich Fisheries Limited
- Penwarden's actions in relation to political and publicity manoeuvring brought the reliability of his information into question
- MFish was at risk of being used for political gain by individual players in the scampi fishery.

Operation Metro ceased to exist as a separate operation and merged into the Serious Fraud Office review and other investigations which preceded this inquiry.

7.2.4 Conclusion – Compliance in 1998 and Operation Metro – MFish

Structures, Systems and Processes

From 1995 compliance systems had been centralised and systems and processes were being steadily upgraded. By 1998 the restructured systems and processes in place at MFish were appropriate and adequate for robust compliance activity.

Operation Forrest

There was a basis to suspect illegal fishing in 1998 from the information gathered in Operation Forrest. MFish did action the information received and was progressing an investigation into suspected current (i.e. within two years) illegal activity. Operation Forrest was concluded properly when it was assessed that the information gathered did not support the probability of current offending by Simunovich, and the prospects of further effective information gathering had been compromised by interference in the covert operation.

Operation Metro

Operation Metro was in effect the re-opening of Operation Forrest. It ceased as a separate operation and merged into the Serious Fraud Office review and other investigations which preceded this Inquiry.

The decision to stop Operation Metro was not sinister.

7.2.5 The Legal Issue Concerning Historical Allegations

Although MFish has collected together the information about possible offending by Simunovich from the early 1990s, Mr Stuart in Operation Forrest decided MFish would not investigate the allegations of earlier offending, but would focus on more recent offending. The reason for not pursuing the early 1990s information was the belief on behalf of MFish that they could not exercise their Fisheries Act powers to investigate matters, dating back more than two years. The Fisheries Act has a limitation on the laying of charges for offending which occurred more than two years previously.¹⁰⁸

Mr Prescott in his task sheet report to Mr Stuart of 11 November 1998, was considering the possibility of bringing a prosecution under the Crimes Act and the need to contact the Police. He specifically requested contact with the Special Audit Unit of Inland Revenue Department to bring to their attention the allegation of potential revenue offending and the Police Proceeds of Crimes Unit to alert them to a possibility of charges under the Crimes Act.

Mr Stuart, together with Mr Prescott, went to discuss the matter with the Police in late November or early December 1998 at Police National Headquarters, to make contact and bring them up to date as to where the Operation might go and the assistance they might be seeking with their investigation at some stage.

Mr Stuart was of the view, shared by MFish and its legal advisers, that MFish's ability to proceed under the Crimes Act for historical offending was extremely limited. As he puts it:

“given the two year time limit on offences under the Fisheries Act, the question that I wanted Fisheries investigator Prescott to answer was – ‘is Simunovich Fisheries currently committing offences against the Fisheries Act?’”

For that reason, the SOU in his view was unable to pursue historic offending because it was outside the two year time limit, but information about historic offending might be a useful guide to any potential current offending.

¹⁰⁸

S.104 Fisheries Act 1983: S. 236 Fisheries Act 1996

The issue as to whether MFish turned its mind properly to consider the Crimes Act charges for historical offending is important in the context of this Term of Reference as it contributed several times to decisions not to continue to investigate.

The Inquiry was familiar with cases where the Courts have held that Crimes Act charges can be used in fisheries related matters. Drawing on the Court of Appeal decision in **R. v Sew Hoy** (1991) 1 HRNZ 424, which determined that evidence lawfully obtained by Customs officers, investigating Customs Act offences, was admissible in Crimes Act prosecutions, the High Court in **R v Walters** [1993] 1 NZLR 533 held that evidence obtained lawfully during an investigation into Fisheries Act offending was admissible in a Crimes Act prosecution for fisheries related offending.

The Inquiry also had an example before it of Operation Buster in which Mr Nalder was the investigating officer, culminating in a successful prosecution under the Crimes Act for fisheries related offending.¹⁰⁹

It appears from documents recently discovered by MFish¹¹⁰ that the in-house legal advice confirmed that no case had tested whether knowledge by a Fishery officer that Fishery Act charges are statute barred at the time of exercising their powers would make the exercise of those powers unlawful. The advice was that as long as the fishery officer exercises his or her powers for the purpose of enforcing fishery law there should be no reason why a Court would find there had been an unlawful execution of those powers. However, items should only be seized under s 80 Fisheries Act 1996 where there is a likelihood that Fisheries Act charges will be laid. If the fishery officer knew Fisheries Act charges would be statute barred, they should not seize items, but could remove documentation under s 79(4). The advice specifically notes that there is nothing in s 79 of the Fisheries Act which prohibits a fishery officer exercising their powers outside the two year time period.

The Inquiry was advised that the draft opinion was circulated to regional fishery prosecutors on 9 November 1998 and there was a significant divergence of views. The concern was that while Crimes Act charges could be used for Fisheries Act offences, coercive powers may be problematic for investigating statute barred Fisheries Act offending.

MFish sought a Crown Law opinion on 16 November 2002 and was advised that fishery officer powers which could be used for the enforcement of the Act (including ss 119(2), 201 and 207) were not available to obtain historic information, as there is no possibility of a prosecution under the Fisheries Act from the reporting catch 10 or 12 years previously. Similarly, the power of entry into premises and examination of records under s 119(1) was available for random checks and audits, rather than a more intensive focused investigation into the affairs of a particular fisher.

MFish has submitted that it acted appropriately in exercising caution in the use of its powers to investigate offences that could never be charged under the Fisheries Act. If MFish had used fishery officers powers knowing of the potential limitation on the lawful exercise of

¹⁰⁹ See Term of Reference 3 – Operation Buster

¹¹⁰ This is a Memorandum from Steve Stuart MFish Council copied to T Prescott dated 9 November 1998

those powers, it has submitted that it would be likely that one or more prosecutions would have been compromised on this basis. Because successful prosecutions “*are the most effective deterrent to offending*” MFish was of the view that such risks cannot and should not be taken.

We have given consideration to the submissions that have been made to the Inquiry. Barine have submitted that no thought was given by MFish to the possibility that much of the necessary investigation into the suspected offending in the early 1990s could have been carried out without the exercise of any fishery officer powers and cite as an example detailed expert audits of Simunovich’s fishing returns, records and other information already held by MFish, together with interviews with other witnesses on a voluntary basis, a number of whom appeared before the Inquiry. They submit that MFish had no will to prosecute Simunovich in 1998, either for recent offending or for the offending that was suspected to have taken place in the earlier years.

7.2.5.1 Conclusion – The Two Year Limitation

The investigations were carried out, but MFish believed it could not investigate historic offending. MFish acted on advice at the relevant time and made its decision accordingly. This led however, to an inadequate investigation of serious allegations of illegal fishing which should have been investigated and concluded. This was unfortunate, as the lack of investigation has fuelled suspicion that something more sinister had occurred.

Although the administrative systems and processes in place were appropriate, the principal problem dogging both Operations Forrest and Metro was the perception that offending outside the two year limitation period could not be pursued.

This limitation was not appropriate or adequate, given the nature of the serious allegations. In order for MFish to exercise its powers lawfully and appropriately, under the Quota Management System, the time limitation for the bringing of Fisheries Act offences should be greater than two years.

7.3 PART III - ALLEGATIONS

As noted in the introduction to this report dealing with Term of Reference 2, the Inquiry is considering the allegations in order to ascertain if there is sufficient evidential foundation to support the Inquiry recommending that another agency investigate potential criminality.

The allegations contained in the scampi briefing note and the “*original affidavits*”, which were provided to The Right Hon. Winston Peters, Serious Fraud Office and the Crown Law Office and which formed the background to this Inquiry, being documents also used by the *Assignment* programme on Television New Zealand, should be viewed in the context of what has been known as “*the historical allegations of offending*” by Simunovich.

The main allegations contained in the documents include:

- Two senior fisheries officials, Mr Crothers and Mr Wood, have had an ongoing, improper and very close working relationship with their friend and former Ministry colleague, Mr Vaughan Wilkinson, and that these officials thwarted the various investigations and thus ensured that no charges were ever laid against Simunovich/Wilkinson.
- Simunovich/Wilkinson misreported other fish species as scampi in order to inflate artificially its catch history, e.g. the recording of hoki, gemfish and ling as scampi (i.e. fraudulent over-reporting).
- Following the introduction of individual catch allocations Simunovich/ Wilkinson fraudulently under-reported scampi catch by, for example, packaging scampi in excess of 5 kg in cartons recorded to be weighing only 5 kg. Those cartons were later repacked in Simunovich's Auckland factory and then exported.
- Simunovich/Wilkinson fraudulently misreported various species of fish in order to avoid the problem of a lack of quota for bycatch, e.g. recording of catch as spotted stargazer (for which quota required) when in fact it was giant stargazer which is a quota species.
- Wilkinson instructed the skippers to destroy all written records so that there was no documentary evidence of fraudulent activities (i.e. obstructing justice).
- Wilkinson instructed skippers fraudulently to misreport the location of catch taken, e.g. recording that ling caught in SCI 6A when in fact it was caught on the Chatham Rise, namely area SCI 4.
- The fraudulent misreporting by Simunovich/Wilkinson occurred during the critical qualifying years for scampi catch history (1990-92). Simunovich has thus received catch rights for scampi based on a fraudulent catch history.
- Simunovich caught scampi in 1997-98 in excess of its catch entitlement.
- Simunovich deliberately had its records destroyed by fire immediately after the qualifying period in 1992 in order to destroy potentially incriminating evidence.
- Fishing companies in which Vaughan Wilkinson had an interest, were allocated quota that was not based on actual catch history but '*history*' that existed on the record only.

The Inquiry has canvassed many of these allegations in the Report and in Appendix 10. The Inquiry's main conclusion is that the evidence heard and the information available to it do not substantiate any foundation on which to recommend to another agency that any of the allegations be further investigated for potential criminality on the part of either officials or fishers. In particular there is nothing to substantiate any corruption or improper practice on the part of Mr Crothers or Mr Wood.

7.3.1.1 Allegations Against Crothers and Wood

The “*original affidavits*” include both express and implicit allegations. They do not always distinguish between the role of Mr Crothers and that of Mr Wood, and often refer to them collectively as “*Head Office*”. Viewed overall, the following allegations emerge:

- Fishery Investigators in the Auckland Office in 1993 had a reasonable basis for suspecting substantial, illegal fishing by Simunovich and that, had investigations been followed through adequately, criminal charges could and should properly have been brought at the time against Simunovich/Wilkinson.
- Again in 1998 Fishery Officers in the Auckland Office had a reasonable basis for suspecting further illegal fishing by Simunovich/Wilkinson in 1997-98. However, this investigation was also discontinued.
- Messrs Wood and Crothers have had an ongoing, improper and very close working relationship with their friend and former Ministry colleague, Mr Wilkinson. Mr Wilkinson had access to Ministry information about scampi, to which he was not entitled and/or a disproportionately unfair level of access to that information.
- Officials in the Head Office, namely Messrs Crothers and Wood, thwarted the various investigations and thus ensured that no charges were ever laid against Simunovich/Wilkinson. The particular actions taken to prevent any ongoing investigation are said to be:
 - Mr Crothers improperly and unfairly instigated disciplinary action against Mr Nalder, one of the investigators, in 1993, on the basis that Crothers believed that Nalder was being too effective with his investigation.
 - That arrangements were made to have Mr Nalder’s investigative file destroyed or removed from the Auckland Office following his dismissal. Thus, the information on the file was not available for the officer who picked up the investigation.
 - Mr Wood instructed Nelson-based Mr Reid not to become involved in the scampi investigation at a time when the inquiry should have been a priority deserving of the allocation of extra resources.
 - Ensuring that adequate resources essential to an ongoing inquiry were not made available to the Auckland Office at a time when it was known that there was a real problem of inaccurate reporting within the scampi fishery.
 - That arrangements were made to have destroyed or removed from the Auckland Office the Operation Export file or part of it.
- Messrs Wood and Crothers have either known or had good reason to suspect that Simunovich has enjoyed ongoing, improper and unfair advantage in its allocation of catch entitlement in the scampi fishery, i.e. allocation on the basis of a false catch history.

- Messrs Crothers and Wood were motivated by a desire to protect their friend and former colleague, Mr Wilkinson. It is further expressly alleged that they had a desire to ensure that the Crown's position in defending the judicial review proceedings and seeking to uphold allocations in favour of Simunovich were not compromised or prejudiced by any Ministry investigation into the fishing activities of Simunovich.

There is no evidence provided which supports these allegations and certainly, no basis upon which this matter can be taken any further. This was also the view reached by the Serious Fraud Office.

There is, for example, no direct evidence that Messrs Crothers and Wood had anything to do with the temporary loss of the Operation Export file or any documents missing from it.

Similarly, the critical evidence of Messrs Chadwick, a former DCM in Auckland, and Younger, a former investigation officer, contain no details of how and in what way Messrs Crothers and Wood thwarted any ongoing investigation into Simunovich's fishing activity. Those two witnesses could be seen as best placed to provide direct evidence of actual wrongdoing by Messrs Crothers and Wood if that actually were the case. Chadwick, in particular, who held a senior position in the Auckland Office, simply makes a bald allegation of Head Office "*ensuring that a major investigation of Simunovich did not take place*". However, the evidence establishes that Mr Chadwick as DCM in Auckland had the power to order the continuation of Operation Export and ask for more resources if required. The operation however, was left "*in abeyance*".

The other investigations were stopped by officers other than Crothers and Wood, as follows:

- Operation Export – DCM Chadwick
- Operation Dog – DCM Bishop
- Operation Forrest – Mr Stuart, Manager SOU
- Operation Metro – DCM Thurston.

7.3.1.2 The Patterson Allegations

Mr Patterson was a skipper who had wide experience in fishing New Zealand waters and overseas. He was employed by Simunovich Fisheries Limited from 1989 until March 1995 as skipper of the *Red Bluff*, the *Enemelay* and the *Petersen*. He was the first skipper employed by Simunovich for scampi. Mr Patterson located the *Petersen* in Greenland and it was purchased by Simunovich.

Mr Patterson says he met with Mr Younger in 1997. There were communications between Mr Patterson and Mr Penwarden. Mr Penwarden then spoke with personnel from MFish. As a result Mr Patterson was interviewed by Mr Prescott, Fisheries Investigation Officer, at Paihia on 12 September 1998 and a transcript was taken. On 3 November 1998 Mr Patterson was interviewed at Waitangi Wharf, Bay of Islands, by Mr Prescott and Mr Backhouse, Fisheries Investigation Officers, and a transcript was taken.

Mr Patterson was approached by Mr Penwarden and his advisers and, at their request, swore an affidavit dated 22 February 2002. The affidavit was the basis of or contributed to a number of allegations made in the Scampi Briefing Notes, the Briefing Notes re Scampi and the Assignment Programme. Mr Patterson stated in the affidavit that he was making it because he was concerned about the conduct of Simunovich.

Mr Patterson said that he was still at a loss to understand how the material he asked to be deleted, came into the affidavit. Mr Patterson acknowledged that when reading the affidavit the day before he gave evidence to the Inquiry he knew it was wrong in quite important respects.

Mr Patterson deposed in his affidavit that 10kg boxes were supplied for scampi tails and that, on instructions from Mr Wilkinson, the 10kg boxes were reported as 5kg boxes. At the beginning of his evidence Mr Patterson said that the paragraph containing the allegation should be deleted.

In his affidavit Mr Patterson said:

“In hindsight, I recognise that the result was that we were seriously underreporting how much scampi we had caught. The effect was even more serious when the conversion factors are taken into account.”

Following questioning at the Inquiry, Mr Patterson said he would like to strike the passage and that he wanted it deleted.

Mr Patterson exhibited to his affidavit what he said was his diary when in fact, the diary was not his diary and he had no idea whose diary it was.

Mr Patterson said in his affidavit that he was confident that all of the records in the diaries were accurate *“as we knew that this was the only basis on which we could be sure that we were being accurately paid.”* The clear inference from that and other evidence of Mr Patterson was that the diaries contained an accurate record of the catch whereas the Catch Landing Returns¹¹¹ (or other records used by the Simunovich) were inaccurate.

Mr Patterson gave evidence that he completed the Trawl Catch Effort and Processing Returns¹¹² correctly (except in relation to the reporting of giant stargazer as spotted stargazer). Ms Lang was the former mate on the *Enemelay* and was part of the crew, whom Mr Patterson skippered. Ms Lang gave evidence and told the Inquiry the diaries were in fact hers, not Mr Patterson's, and that the relevant entries in the diaries were copied from the TCEPRs. The entries in the CLRs were also taken by Simunovich from the information contained in the TCEPRs.

If the entries in the Lang diaries and the CLRs were taken from the same TCEPRs, the diaries and the CLRs should be consistent. Such an analysis was undertaken by Mr Hide, a Fisheries

¹¹¹ Catch Landing Returns

¹¹² Trawl Catch Effort and Processing Returns

Investigation Officer, who established that any difference between the diaries and the CLRs was minimal and was, in his opinion, in the range of human error. Mr Patterson's evidence that there would be a difference between the diaries and the CLRs had no proper foundation.

Mr Patterson said that he did not accept the contents of Mr Marinovic's affidavit and that if Mr Marinovic were present, he would revoke his affidavit. In fact Mr Marinovic confirmed his affidavit.

Some of the matters in respect of which Mr Patterson makes allegations arose a number of years before he was interviewed by fisheries officers and before he was asked to swear an affidavit. The lapse of time may account to some degree for differences between the evidence given by Mr Patterson and the evidence given by other witnesses.

Whilst the Inquiry accepts that Mr Patterson was giving evidence to the best of his recollection, there were factors which indicated that it would be unsafe to rely on Mr Patterson's evidence on material matters where his evidence was in conflict with other evidence.

After Mr Patterson was heard by the Inquiry, a number of matters were raised before the Inquiry that directly or indirectly impacted on the evidence that he had given. The Inquiry obtained the relevant fishing returns by seeking orders from the High Court under s 66 Fisheries Act. These fishing returns were put to Mr Patterson after the Inquiry, together with a series of questions by Counsel Assisting. This did not elucidate any further basis upon which an investigation should be undertaken.

The allegations made by Mr Patterson which are not addressed elsewhere in this Report are analysed in full detail of Appendix 10.

7.3.1.3 Mr Hunt

Mr Hunt was employed by Simunovich from 1989 to 1995 initially as a mate and, from late 1990, as a skipper. For some years he has had no further involvement in the fishing industry, and at the time he appeared before the Inquiry, he was employed as a quality control officer in a cement plant.

Mr Hunt told the Inquiry that at the time he was the skipper on the *Enemelay*, on his way back from a trip to the Chatham Rise, he was telephoned by Mr Wilkinson and directed to change his catch effort returns (TCEPRs) to show scampi caught in area 3 to scampi caught in area 4.

Mr Hunt said that he made a change which meant "*filling in another set of records basically*" and "*I believe I rewrote the catch effort for the amount that was required.*". He also said that he "*reconstructed the tail end of the trip*" and "*rewrote those daily sheets*". He maintained that as a skipper he was meticulous with the paperwork he was required to complete.

Mr Wilkinson for Simunovich denied that he made any call or gave any instructions to Mr Hunt to change the area as alleged.

At the time Mr Hunt gave evidence, the Inquiry did not have any returns or documents completed by Simunovich or their skippers. During the Inquiry, the High Court authorised¹¹³ the release of the returns, including those relevant to Mr Hunt.

Following the completion of the hearings, the Inquiry directed that the relevant returns completed by Mr Hunt for the *Enemelay* in 1991-92 and 1992-93 should be shown to Mr Hunt, to verify the oral evidence he had given at the Inquiry.

Counsel Assisting attended on Mr Hunt in Whangarei and as a result of having been shown the returns, Mr Hunt was unable to identify any return where he had made the alterations as he had alleged. As the report from Counsel Assisting shows, Mr Hunt was unable to identify any of the TCEPRs shown to him at that time as a TCEPR rewritten by him to show catch from Area 3 as being caught in Area 4.

Mr Hunt also at that stage summarised the detail of what he did. It included:

- On the voyage on which the rewriting occurred the *Enemelay* fished in both areas 3 and 4.
- He wrote up the initial TCEPRs showing catches of scampi and bi-catch in each of areas 3 and 4. These entries reflected the true or actual catches in each of areas 3 and 4.
- The true entries would have been in one or two TCEPR books.
- He received telephone instructions to show some scampi caught in area 3 as caught in area 4.
- He copied from the initial TCEPR book(s) into a replacement TCEPR book(s) the latitude, longitude and other information. The true or actual figures for the scampi catch were not carried forward.
- Mr Hunt then inserted in the new book figures which moved the required amount of scampi caught in area 3 to caught in area 4 so as to comply with the telephone instructions. This was done by taking some catch from area 3 and showing it as catch in area 4.
- The total scampi catch remained the same.
- The original TCEPRs were then destroyed by him.

Of the catch records (TCEPRs) which were shown to Mr Hunt, some were the original returns completed in Mr Hunt's handwriting and others were computer-generated and retained in the Ministry's records. Of the latter category, the original TCEPRs were no longer in existence.

¹¹³ Judgment of France J refer Appendix 4.

The Inquiry reported to the parties the results of the meeting of Counsel Assisting and Mr Hunt.

The Inquiry received further submissions from Barine, suggesting that returns from later years, namely 1983-94 and 1994 to 1995, could be relevant. With the assistance of the Inquiry's expert, Mr Jones, Counsel Assisting identified further returns for the relevant period specified by Barine and in which Mr Hunt was the skipper of the *Enemelay* and these returns were also shown to Mr Hunt for his comment. After a perusal of the returns, Mr Hunt confirmed on 23 February 2004 that none of them were consistent with being rewritten by him in the manner that he had described

Counsel Assisting reported to the Inquiry and his report was circulated to the parties.

In the absence of the identification of a rewritten catch return (TCEPR) by Mr Hunt, there is an insufficient evidential basis or record which would warrant this allegation being investigated further.

7.3.1.4 Napier Wharf Incident

Mr Penwarden gave evidence of statements said to be made by Mr Crapper on the wharf at Napier on a warm afternoon in 1998. He deposed:

"I clearly recall a confession by one of Simunovich's senior scampi skippers, Wayne Crapper that I heard on Napier Wharf one warm afternoon in 1998. He was and still is the skipper of the vessel Mutual Enterprise. I cannot recall the exact date of the confession but do recall that our skipper Noel Parker, Mike Claudatos who manages a local Napier fishing company and Richard Cade were present at the time. I can remember what Wayne said very clearly as it astonished me.

Wayne Crapper told us that his boat, the Mutual Enterprise and two others, which I think were the Enemelay and the Albatross had been recalled to Area 2 by Vaughan Wilkinson because Simunovich had "found" another 70 tonnes of scampi catching rights in that area. He told us that his boat had caught 52 tonnes and he did not believe that the other two boats, which had been there at the same time, had caught only 18 tonnes between them. By this I assumed that he was suggesting that in all approximately 150 extra tonnes of Scampi had been taken by Simunovich vessels from Area 2 during the 1997-98 fishing season. Wayne said that he was telling us because his job depended on maintaining the scampi resource and he was worried that Simunovich vessels were overfishing and depleting the resource".

Mr Penwarden advised that Mr Crapper asked him to pass the information on to MFish.

Mr Claudatos, the managing director of Starfish Supplies Limited and a holder of a number of positions in the fishing industry, gave evidence which was similar to that of Mr Penwarden. In response to the Inquiry Mr Claudatos acknowledged that he could not remember the precise tonnages but he recollected that the tonnages were stated by Mr Crapper.

Mr Claudatos said “*I believe that Mr Crappers tongue was loosened by the beer*”. A little later he said it was “*Wharf talk. But it came straight from the horses mouth*”.

Mr Parker was a skipper of scampi vessels including the *Bilyara* and had been at the Napier Wharf when Mr Crapper told them about Area 2. Mr Parker was a personal friend of Mr Crapper, whom he described as being “*pretty jovial*”, and that at the Napier Wharf he was “*merrier or happier*”. There was discussion about destruction of the fishery and after “*many beers or a few beers*” Mr Crapper made statements about tonnages. Mr Parker says he got a bit of a shock at what he heard and he was quite clear that the conversation took place. Initially, Mr Parker did not think the reference to the tonnages was to illegal fishing, until he stopped and thought about it that night or the next day.

Mr Cade, who is the CEO of the Hoki Management Company and the Squid Fishery Management Company, was on the wharf at Napier and his recollection is that there was general talk about fishing and the scampi fishery. He recollects Mr Crapper talking about prawn killers and there was also discussion about Spanish lobsters. He has no recollection of any discussion about 70 tonnes of scampi.

Mr Crapper does not accept the affidavits or evidence of Mr Penwarden, Mr Claudatos or Mr Parker in relation to the 70 tonnes.

It seems that the first time MFish received information relating to the 70 tonnes was following Mr Prescott reading the *Original Affidavits* after receiving copies in May 2002.

The Inquiry finds that it is likely that the conversation took place in which Mr Crapper made statements as alleged but that there is no documentary evidence before the Inquiry to substantiate or support the allegations that overfishing took place, such that the matter can be investigated further.

7.3.1.5 Stargazer

It was alleged that Simunovich misreported giant stargazer (SPA), which was a quota species, as spotted stargazer (SPZ), which was not a quota species, and that this was done to avoid the need for quota¹¹⁴. Stargazer are caught as bycatch when trawling for scampi.

The issue of misreporting of stargazer appears to have been discussed between MAF/Fish and Simunovich, prior to the end of March 1990. Mr Wilkinson said that he first raised the issue with MAF/Fish in late 1989-90 and that he then instructed that all stargazer should be reported as giant stargazer. A report of May 1990 shows that MAF/Fish knew that there was apparent misreporting with respect to particular stargazer species caught while fishing for scampi.

The issue was discussed at a meeting on 4 September 1990 with Dr Allen, Mr Arbuckle and Mr Bishop and was further identified in a report on the Development and Management of

¹¹⁴ Briefing Notes re Scampi para 7

New Zealand Scampi and Prawn Fisheries. Mr Hide, Fisheries Investigator, told the Inquiry that he investigated 22 trips and in March 1990 there was a sudden change from reporting spotted stargazer to reporting giant stargazer and that “*It was unlikely that giant stargazer was not taken*” prior to March 1990.

Mr Wilkinson maintained that there were difficulties and confusion in identifying species of stargazer and in the coding for them. The Inquiry was shown photographs which Simunovich claimed showed the difficulty of identifying the different species of stargazer. Mr Wilkinson told the Inquiry that he had never said it was acceptable to mis-report and that he “*never instructed any fisher to misreport*” He submitted that Simunovich had “*never deliberately misreported bycatch*”.

On the evidence and the returns before the Inquiry, there appears to be no doubt that prior to the end of March 1990, the returns showed misreporting of giant stargazer. When the issues was raised, changes were made to the reporting of stargazer.

Whilst the returns show misreporting of stargazer, the practice ceased in March 1990. MAF/Fish dealt with the matter by discussion and no enforcement action was taken.

The two year period for prosecution under the Fisheries Act has long past and the evidence before the Inquiry is insufficient to warrant the Inquiry making any recommendation that the misreporting issue be referred to any enforcement authority.

7.3.1.6 Returns by Simunovich

The Inquiry heard allegations that the returns by Simunovich were false, constituted misreporting, had significant discrepancies and were improperly altered by Mr Wilkinson.

Section 66 Fisheries Act 1983 section 66 required specified classes of persons, which included Simunovich, to keep accounts and records and to “*furnish to the Ministry such returns and information as may be required by or under regulations made under the Act to assist the management and conservation of any fishery resource.*” Except where a Court so directs, no return or information furnished pursuant to this Act shall be disclosed or used in any proceedings whatsoever.

As a result of proceedings issued by Simunovich about the production of returns, the Inquiry was joined as a party as returns or information furnished to MAF/Fish could assist the Inquiry. An application was made by the Inquiry for an order that the Chief Executive and MFish be authorised to disclose to the Inquiry relevant returns and other information furnished. The application was heard by Justice France who delivered a judgment on 11 June 2003¹¹⁵ authorising disclosure of returns.

Mr Jones was retained by the Inquiry as an expert, to examine the returns in light of the allegations made. The Inquiry also received evidence from Mr Hide, Fisheries Investigator.

¹¹⁵ *Simunovich v. Chief Office & MFish* (CP36/03 Wellington Registry) 7 March 2003: Appendix 15

The records of Simunovich appear to have been first investigated by Mr Nalder as part of Operation Export. Mr Nalder reported to Mr Chadwick on 10 March 1993 that the records he had examined all for the period October 1992 to January 1993 “*showed no discrepancies*” and that “*the records were excellent and balanced in almost every respect*”.

On 3 November 1998, as part of Operation Forrest, Mr Prescott asked for an “*analysis of Simunovich’s fishing returns*”. Mr Prescott gave evidence that:

“The purpose of the audit was to ascertain whether Simunovich were misreporting catch by under-declaring the landed weight of product. Specifically we were investigating the possibility that Simunovich were:

Under declaring orange roughy and over-declaring hoki to facilitate an export scam; and

Under-declaring the bin numbers processed units and weight of each bin or processed unit.

The audit was to compare trawl catch effort processing returns and catch landing returns for the 1997-98 fishing year and was to concentrate on hoki, scampi, orange roughy, stargazer, ling and cardinal.

Around early February 1999 the National Audit team provided a report of its audit. The report states that Simunovich’s returns for the majority of vessels appeared to have very few inconsistencies”.

“On 15 February 1999 a forensic accountant, Jacqui Hall was asked to review the audit of Simunovich’s fishing returns that had been done by the National Audit team. She was asked to determine whether there was an excess of purchases over exports, and to advise how excess product could best be located within the system.”

Ms Hall provided an interim report dated 23 February 1999. She stated in her opinion that the figures indicated a very small excess of sales over purchases (142kg) on the information reviewed to date and

“In November 1999 the National Audit team also conducted a quality assurance inspection of the audit undertaken by Deloitte Touche Tohmatsu of Simunovich’s licensed Fisher receiver’s record keeping documentation. The National Audit team found that the auditor had done a competent job of the audit and that his assessment was justified, as Simunovich had numerous internal controls and also produced documents that were not prescribed that are used as additional controls to ensure the integrity of the information within their systems.”

Mr Hide, Fisheries investigator, was briefed by MFish on 22 October 2002. He was supplied with relevant returns and was given the initial investigation work by Mr Prescott. He enquired into allegations that Simunovich Fisheries had misreported scampi catches during the 1990-91 and 1991-92 fishing years. As part of the inquiry a comparison was made with the scampi recorded in three CLRs and one of the “*Patterson*” diaries. The variation was

found to be small. Mr Hide says he was surprised as he had expected to see significant variations.

On 15 November 2002 Mr Hide, after receiving a report from Mr Gleeson, concluded that there was only a very small variation between the 1990-92 diaries and the fishing records.

Mr Gleeson was instructed to compare all diary entries against fishing returns. Mr Gleeson reported on 7 March 2003. Mr Hide cross-checked the report and adopted it. The report analysed 22 scampi trips recorded in the diaries as against the fishing returns. The overall difference between scampi recorded in the diaries and the CLRs was one percent which Mr Hide said was “*in the range of human error.*” However it transpired at the Inquiry hearings that the diaries, which were involved in the comparison, were copied by Ms Lang from the information in the TCEPRs and the information in the CLRs was also taken from the TCEPRs. Thus, the Lang diaries and the CLRs had little difference or variation between them.

Mr Hide examined returns that had been altered and initialled by Mr Wilkinson. Mr Hide was of the view that the returns did require alteration and alterations were common in the fishing industry.

The Inquiry’s expert, Mr Jones, had had practical experience in filling in fishing returns and as an owner he taught skippers employed by him. He was elected to the New Zealand Federation of Commercial Fisheries Executive and in that capacity was involved with the Ministry on issues relating to the collection and use of data. He had input into the development of reporting forms and was managing director of New Zealand Quota Management Services Limited.

Mr Jones analysed the returns for scampi filed by Simunovich for the years 1988-89, 1989-90, 1990-91, and 1991-92. Mr Jones gave evidence that:

“The documents that I inspected were the TCEPRs and CLRs furnished by Simunovich to the Ministry. My general impression is that the quality and accuracy of the returns appears on the face of them to be of a reasonably high standard. As indicated in the Appendix, I carried out a number of checks and I was unable to find any material discrepancies. Generally speaking, there was a close relationship between the estimated scampi and bycatch shown in the TCEPRs and the scampi and bycatch shown in the CLRs.

In a general sense it was noticeable that the standard of the completion of the TCEPRs and CLRs improved over time as skippers and others became more conversant with the requirements.”

“I was looking for any errors that may be apparent. The returns, as originally written by the skipper or other persons, contained a number of errors and omissions such as wrong coding, wrong conversion factors, omission of longitude being east or west, and other mistakes. Virtually all of these appeared to have been picked up and amendments made.

The amendments were generally initialled by VW (whom I believed to be Vaughan Wilkinson) and on some occasions by “DB”.

Where there was a significant amendment (eg major weight change), I checked that the amendment appeared to be proper and valid.

In respect of the errors and alterations, I was watching throughout my inspection of any discernible trait and, in particular, for any increase, decrease, or any particular policy influence over the whole period or from time to time. My impression is that the errors and alterations were both up and down and were of the nature that is almost inherent with the system. One should remember that filling in fishing returns while at sea is a secondary consideration, as safety of the ship must come first.”

On the evidence before the Inquiry, the returns and information furnished do not disclose misreporting by Simunovich, such that over-reporting or under-reporting of scampi occurred.

7.4 CONCLUSIONS TO TERM OF REFERENCE 2

7.4.1.1 Compliance in the Period to 1993 - MAF/Fish

Structures, Systems and Processes

The regional compliance structure was inappropriate and inadequate to provide consistent support for the investigation of major offending. The regional structure gave authority to the District Compliance Managers to undertake and allocate resources to investigations. There was no effective mechanism to enforce national priorities.

The enforcement of complex fraud based offending was not pursued adequately or in a consistent way. The regionalised approach still favoured the gamekeeper approach which emphasised minor regulatory breaches as the target of investigations.

Although priorities were constrained and not all offending could be pursued, the disaggregated approach to resource allocation meant that there was inevitably a tendency for major investigations to be adversely affected because of the impact such investigations had on limited local resources. The devolved structure also meant that if a potentially significant investigation went into abeyance there was no system for national oversight to ensure that it was reinstated and progressed effectively.

In 1993, while there was a Fisheries Officer Manual which gave guidance on investigations, there were no prescribed procedures for opening and closing investigation files. No formal decision-making processes governed the conclusion of investigations and these factors contributed to the way in which Operation Export went into “abeyance”.

Operations Export and Dog

There was a reasonable basis to suspect illegal fishing in 1993 on the basis of the information held in Operations Export and Dog at the time they stopped. Although there was insufficient evidence to initiate prosecution, further investigation was warranted. However priorities and the lack of resources, together with motivation, in the case of Operation Export, were the reasons for the operations ceasing.

There was no evidence that any actions by either Mr Crothers or Mr Wood in relation to these two operations caused the operations to go into abeyance. The reasons for discontinuing them were not sinister and they were not stopped because of any inappropriate action taken by either of these officials. Operation Export ceased following intervention by Dr Allen in relation to the disciplinary action taken against Mr Nalder, and while the cessation of the proposed Operation Dog was stopped by Mr Bishop following communication with Mr Wood, there is nothing to suggest that their intentions were in any way inappropriate given the emphasis being given to other investigations in the Central region.

Barine

The outcome in relation to Operations Export and Dog can be contrasted with the way that complaints about Barine's vessels registration and use of undersized net were pursued.

7.4.1.2 Compliance in 1998 and Operation Metro - MFish

Structures, Systems and Processes

From 1995 compliance systems had been centralised and systems and processes were being steadily upgraded. By 1998 the restructured systems and processes in place at MFish were appropriate and adequate for robust compliance activity.

Operation Forrest

There was a basis to suspect illegal fishing in 1998 from the information gathered in Operation Forrest. MFish did action the information received and was progressing an investigation into suspected current (i.e. within two years) illegal activity. Operation Forrest was concluded properly when it was assessed that the information gathered did not support the probability of current offending by Simunovich, and the prospects of further effective information gathering had been compromised by interference in the covert operation.

Operation Metro

Operation Metro was in effect the re-opening of Operation Forrest. It ceased as a separate operation and merged into the Serious Fraud Office review and other investigations which preceded this Inquiry.

The decision to stop Operation Metro was not sinister.

7.4.1.3 The Two Year Limitation Period

The investigations were carried out, but MFish believed it could not investigate historic offending. MFish acted on advice at the relevant time and made its decision accordingly. This led however, to an inadequate investigation of serious allegations of illegal fishing which should have been investigated and concluded. This was unfortunate, as the lack of investigation has fuelled suspicion that something more sinister had occurred.

Although the administrative systems and processes in place were appropriate, the principal problem dogging both Operations Forrest and Metro was the perception that offending outside the two year limitation period could not be pursued.

This limitation was not appropriate or adequate, given the nature of the serious allegations. In order for MFish to exercise its powers lawfully and appropriately, under the Quota Management System, the time limitation for the bringing of Fisheries Act offences should be greater than two years.
Did Fisheries Officers in the former Ministry of Agriculture and Fisheries in 1993, and in the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery?
Fisheries officers in MAF/Fish in 1993 and in MFish in 1998 did have a reasonable basis to suspect illegal fishing by one or more fishing companies involved in the scampi fishery.
If so, did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries respectively carry out adequate investigations into the allegations? If not, why not?
In 1993 MAF/Fish did not carry out adequate investigations into those allegations. The reasons which contributed to that include the inappropriate regional structure for compliance activities, the lack of adequate national oversight and prioritisation, the fragmented nature of resource allocation decisions in respect of compliance activities, and in respect of Operation Export a failure to ensure that an apparent lack of motivation to continue the investigation was reversed and activity renewed. In 1998 MFish did carry out adequate investigations into allegations of current illegal activity, but was constrained by the two year limitation on prosecutions and the exercise of fishery officers' powers, so that allegations of historical offending were not adequately pursued.
Did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences, and did the Ministries comply with those systems?
In 1993 MAF/Fish did not have adequate and appropriate administrative systems and processes in place for the identification and investigation of alleged offences. In 1998 MFish did have adequate and appropriate systems and processes in place and did comply with those systems.

8.0 TERM OF REFERENCE 3: THE NALDER COMPLAINT

- 3 Did the former Ministry of Agriculture and Fisheries have adequate grounds for taking disciplinary action against Mr Nalder on each occasion? What were the circumstances surrounding the termination of his employment? Did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery?**

Introduction

This Term of reference requires the Inquiry to report on the termination of Mr Nalder's employment with MAF/Fish and the circumstances surrounding the termination of his employment.

In particular, we are asked whether Mr Nalder's cessation of employment had any connection with his investigation of alleged offending in the scampi fishery.

We propose to deal with this Term of Reference in the following way:

- Who is Mr Nalder?
- Operation Buster
- The KPMG incident
- The QMR incident
- The circumstances surrounding the ending of his employment
- Whether the ending of his employment had any connection with his investigation of alleged offences relating to the scampi fishery
- Allegations made by Mr Nalder.

8.1.1 Who Is Mr Nalder?

Mr Nalder was employed with the New Zealand Police from 1962 to 1985. He served most of his service in the Criminal Investigation Branch and believed he was an experienced and trained fraud investigator. At the time of leaving the Police, he was in charge of the Christchurch Police Prosecution Section. He received the Police Commissioner's Award for Excellence in Criminal Investigation and a Long Service and Good Conduct Medal with a Bar. Mr Nalder was one of the team who compiled the Fisheries Officers' Manual, which was published in 1991.

On 4 September 1989 Mr Nalder commenced employment as the DCM at Tauranga. The employment of Mr Nalder was consistent with a policy of MAF/Fish of enhancing compliance capabilities, in particular in relation to QMS matters, by employing persons who had police experience.

Mr Nalder's employment contract comprised provisions from the MAF/Fish Fish Way including provisions relating to misconduct and the MAF/Fish Collective Employment Contract, which contained discipline and dismissal provisions.

As a result of tension in the Tauranga office and the work pressures arising from Operation Buster, Mr Nalder went on sick leave on 22 October 1992. Later in the year he was diagnosed as having burn-out syndrome and by then he wished to leave the position as DCM Tauranga.

By 1 March 1993, Mr Nalder was fit to resume work and was seconded to Auckland as an Acting Senior Fisheries Investigator. His immediate supervisor was Mr Chadwick, DCM.

On 7 April 1993, pending completion of the investigation into the KPMG incident, his financial delegations were suspended and he was directed to cease work on current investigations, which included Operation Export. He was assigned to a snapper quota investigation.

On 19 May 1993, following a decision on the KPMG incident, Mr Nalder was cleared, subject to some training, to resume normal duties. On 13 September 1993, pending completion of an investigation into an incident which we have called "*the QMR incident*", Mr Nalder's employment was suspended. A settlement, which included the ending of Mr Nalder's employment by agreement, was signed on 26 April 1994.

8.1.2 Operation Buster

Mr Nalder, in his capacity as DCM Tauranga was the officer in charge of Operation Buster until he took sick leave on 22 October 1992. Operation Buster forms the background to the two incidents, namely "*the KPMG incident*" and "*the QMR incident*", both of which were the precursors to the ending of Mr Nalder's employment with MAF/Fish and which go to the heart of the issues in this Term of Reference.

Operation Buster was the investigation into large quantities of quota species that had been illegally landed by Papakura Trawling and Fishing Company Limited (Papakura Trawling). The illegal product had either not been reported under the provisions of the QMS, or had been misreported as species other than quota species. The operation led to criminal prosecutions which resulted in the conviction of a number of defendants on charges under the Crimes Act of criminal conspiracy. Following an application by the defendants pursuant to the New Zealand Bill of Rights Act 1990 at a later stage, charges under the Fisheries Act 1983 were withdrawn.

8.2 KPMG INCIDENT

As part of Operation Buster there were discussions between Mr Nalder and Ms Hall, chief accountant NCU Group, as to the compilation and presentation of forensic accounting material to support the charges of conspiracy under the Crimes Act.

On 22 July 1992 there was a meeting of Mr Nalder, Ms Hall and Mr Fiskin (of the NCU Group) and later Mr Cathcart, the Crown Solicitor. Mr Cathcart explained to the Inquiry that, following the decision to bring indictable charges under the Crimes Act for conspiracy, the prosecution became a Crown matter. Mr Cathcart indicated his wish for the evidence to be presented by a single witness and not by a team, and that the fraud needed to be explained and presented in a simple way to the jury. Mr Cathcart told the Inquiry that at that time, he had formed the opinion that Ms Hall did not understand his requirements or the demands of a jury trial.

Mr Nalder however, attempted to resolve the issue in correspondence and communication with the NCU and Ms Hall. Taking an opportunity at a Compliance Technical Committee (CTC) meeting at which he was in attendance, Mr Nalder attempted to discuss the forensic accounting requirements with Ms Hall, but they were unable to agree. He also took the opportunity to raise with Mr Crothers, the Manager, Fisheries Compliance, the problems he was encountering in having Ms Hall provide the forensic accounting evidence as required. There is a conflict of evidence on what next occurred. Mr Nalder believed Mr Crothers told him *“Do whatever you have to do”*. Mr Crothers, however, denies giving Mr Nalder such authorisation.

After the CTC meeting, Mr Nalder returned to Tauranga and spoke to Mr Cathcart about the impasse which had been reached between himself and Ms Hall. As a result Mr Cathcart, as Crown solicitor, gave Mr Nalder a direction that the prosecution needed independent accountancy advice from a chartered accountant, who could be called as a witness to present to the jury, complex accountancy evidence in a simple way.

On 7 August 1992 Mr Nalder wrote to Ms Hall that he had discussed the position with Mr Chadwick, DCM, Mr Lyndstrom, DCM, and the Crown Prosecutor, and:

“As a result no further assistance was required from your team in respect of Operation Buster.”

Mr Nalder concluded:

“Thank you for the assistance you have given”.

As a result of Mr Cathcart’s direction, Mr Nalder instructed KPMG Peat Marwick (KPMG) to prepare the forensic accounting material.

Because of the publicity that Operation Buster was generating and the complexity of the investigation, which was one of the first major prosecutions under the QMS, Head Office decided to establish an Operation Buster Overview Committee. Such a Committee was unique to Operation Buster and the members of the Overview Committee comprised Dr Allen, Mr Shallard, Mr Crothers and Mr Walshe.

Dr Allen received information on aspects of the engagement of KPMG and directed that he wanted those matters discussed at the Overview Committee meeting scheduled for 28 September 1992. At that meeting, Mr Nalder reported on Operation Buster and the use of KPMG's involvement. The Minutes record that Mr Nalder stated that:

“Cathcart wanted the accountants to complete this task as they would be the accepted experts in the Court on the matter of business systems and records”.

Mr Cathcart joined the meeting, part way through, and the Minutes record that:

“Cathcart stated that his sole concern was to ensure that people who provided documentary evidence only did that. Mr Cathcart wanted a global document analysis, that is a summary position of the fish disclosed to MAF, then a statement of the undisclosed information”.

Mr Cathcart also took the opportunity to detail the difficulties he had with the presentation proposed by Ms Hall.

The Minutes record that the KPMG accounting analysis was due to be completed that week at a cost of “around \$15,000”.

Both Dr Allen and Mr Walshe inferred from this that \$15,000 would comprise the total cost of the work done or to be done by KPMG. Mr Nalder acknowledged to the Inquiry that he had informed the meeting that the KPMG accounting analysis was likely to be completed at a cost of \$15,000. He also acknowledged that if there was a significant increase in price, he had the responsibility to inform his manager at least, of the increase.

Mr Nalder had advised Mr Walshe it was likely there would be additional costs but he understood those to be small in value. Mr Walshe directed Mr Nalder to keep him informed and that if there was an increase above \$15,000, he would expect Mr Nalder to advise the Overview Committee before the costs were incurred.

The next development in the KPMG incident was towards the end of March 1993. The NCU accountants informed Mr Crothers they had been told, that the cost of the KPMG work to that date had been \$70,000. On the 26th March 1993 Mr Crothers formally advised Dr Allen that the cost of the KPMG work was \$70,000. Dr Allen considered the matter warranted investigation and on 30 March 1993 established the “Terms of Reference for the KPMG Tauranga Contract Inquiry”. He appointed Mr Paul Williams, Director of Management Support, to carry out the inquiry.

Mr Paul Williams phoned Mr Nalder on 30 March 1993 and required Mr Nalder to meet with him. At the time Mr Nalder received the communication from Mr Williams, he was in transit between Napier, where he had interviewed an informant in relation to Operation Export, and Gisborne, where he intended to interview another informant in relation to Operation Export.

On 31 March, in Auckland Mr Nalder met with Mr Williams who handed him a letter from Dr Allen. This letter advised Mr Nalder that an investigation had been instigated by MAF/Fish in relation to the KPMG expenditure.

As a result of the investigation, on 7 April 1993, Mr Walshe delivered Mr Nalder a letter, which informed him that his financial delegations had been suspended, his current investigations were to cease and that he was to undertake work on a fresh investigation.

“Until this investigation is completed, it is in both our interests to suspend all financial delegations held by you as an employee of MAF Fisheries.

The Deputy Group Director has asked that you cease work on your current investigations until the Director Management Support’s report is completed and undertake a new assignment investigating allegations that fishers are deliberately over fishing their snapper quota or claiming snapper as a “bycatch” when they have no snapper quota.

These two decisions will be reviewed once the Director Management Support submits the report requested from him.”

It was perplexing that Mr Nalder was removed from the investigations he was conducting at the time, including Operation Export, to be placed on a fresh investigation. Mr Walshe, when asked why such an instruction had been given, said that he could not speak for Dr Allen, who clearly made the decision. In turn, Dr Allen was asked the same question. He acknowledged meeting with Mr Walshe over this issue, but said that the instructions sounded *“most unlike anything that I would have said”*. There was no satisfactory explanation for the instructions that Mr Nalder cease work on his current investigations but was placed on another.

Mr Chadwick confirmed that *“Barry was confined to the office by our own Head Office”* and Mr Walshe also gave an instruction, based on his understanding of what Dr Allen had said, that Mr Nalder was confined to the office.

Following the disciplinary investigation, Mr Williams reported to Dr Allen on 27 April 1993 that at the date of the Overview Committee meeting Mr Nalder knew of the over-expenditure. The report noted:

“At the meeting of the Oversight Committee on 28 September Barry Nalder knew the work agreed to on 10 August had been completed by Peat Marwick. He also knew one invoice for \$5,175 had already been approved by him and it is highly likely he knew of the existence of the second invoice dated 25 September for \$10,933 as he approved it for payment the day following the meeting.

It is clear, however, no mention was made at the meeting that because additional work had been requested by Barry Nalder the job was going to take longer than the originally expected two weeks and cost significantly more. Given the committee discussed the use of Peat Marwick and were advised the expected total cost was (only) to be approximately \$15,000 it must be assumed the committee’s approval to the expenditure of the expected total cost of \$15,000 was (tacitly) given on 28 September.

Barry Nalder approved further invoices on 2 October for \$6158.25 and 16 October for \$8030.03 and \$4911.13 but did not advise any of the Oversight Committee members of his actions.

“When I asked Barry Nalder why he had not advised anybody of the cost and time overruns he said he didn’t think it was necessary as Peat Marwick were seen as part of the “Buster team” collecting evidence and were going to be called as witnesses in Court. He further said Peat Marwick were no different in his eyes to the handwriting expert who had also been called in so why was it necessary to advise anybody of their continued use, especially as money was also not a problem because he thought he had an unlimited budget within the \$2 million allocated to the Prosecutions Output.”

....

“The information above clearly shows the Oversight Committee were not properly advised in respect of the cost of KPMG (and it was not until 26 March 1993 that the Deputy Group Director became aware of the extra costs of using KPMG PM following a discussion he had with Stan Crothers). They were not advised by Barry Nalder nor by those who had subsequently acted in the position of O/C “Buster”, or DCM Tauranga”.

The conclusions reached by Mr Williams were:

- Finding 1: *“I do not believe the Oversight Committee was properly advised in respect of the contracting and cost of KPMG.”*
- Finding 2: *“I do not believe the decision to contract [KPMG] was necessary or proper.”*
- Finding 3: *“I do not believe there were adequate specifications for the [KPMG] work.”*

On 6 May 1993 Mr Nalder wrote to Mr Walshe:

“I was very conscious of cost and I should have been more precise with the Oversight Committee on this issue. I did discuss the issue with you [Mr Walshe] but that being as it may, I accept I did not fully brief the Oversight Committee in this area because the work was ongoing and I assumed it went without saying that there would be additional costs”.

On 18 May 1993, Dr Allen met with Mr Nalder to give him an opportunity to comment on Dr Allen’s view of the findings of the investigation and a draft email to Mr Walshe. Dr Allen reported the findings of the investigation in his letter, and specifically attributed blame to Mr Nalder for findings 1 and 2.

The email to Mr Walshe is set out below but essentially Dr Allen was directing that Mr Nalder could go back to his normal duties but requested that he be given close supervision and training.

Dr Allen recorded that Mr Nalder had no comment on either of those items and that subject to minor alteration, Dr Allen signed them both.

We set out Dr Allen's letter to Mr Nalder below:

"The findings of this investigation were that:

- 1. You did not properly advise the MAF Fisheries Operation "Buster" Oversight Committee in respect of the contracting and costs of Peat Marwick;*
- 2. Your decision to contract Peat Marwick was not necessary and/or proper; and*
- 3. The specifications for the Peat Marwick work were not adequate."*

"From the above findings I have decided this is a serious incident. I have concluded that you did not exercise proper judgment and that your unacceptable management of the situation amounts to misconduct. There is a certain level of management, judgment and integrity expected of senior managers and in this instance your performance fell below those expectations.

You are therefore to regard the contents of this letter as a formal reprimand for unacceptable management practices. No formal disciplinary action will be taken in this instance, however you are warned that any similar incident in the future is likely to led to formal disciplinary action.

In order to avert a similar incident in the future, you will be required to undertake training in financial management and in teambuilding skills. Kim Walshe will be discussing these matters with you in the near future. A copy of this letter will be placed on your personal file."

The email to Mr Walshe, which was shown to Mr Nalder recorded:

"Finally he (Mr Nalder) asked about resumption of normal duties. From my point of view the matter is closed (subject to Mr Walshe ensuring that the training is carried out), and my request that Barry be given restricted duties until the matter is resolved is now completed.

Nevertheless I think you should, given the circumstances, ensure he is given close supervision and see that he does not get involved in areas or issues that might be controversial."

Following the decision of Dr Allen, Mr Nalder was not required by Mr Walshe or Mr Chadwick to undertake training in financial management or team building skills and did not resume normal duties.

MFish in its final submissions said (para 66):

“The grounds for commencing the inquiry into the KPMG contract were strong and an internal inquiry was commenced, aimed at a quick and fair resolution of the issues. The findings presented to Dr Allen were balanced and acknowledged potential systems problems (relating to the delegations) and acknowledged that Mr Nalder was not solely responsible. Dr Allen’s approach was to conclude the matter not by taking formal disciplinary action but by taking constructive approach to the total issue to ensure that in future such issues did not arise again”.

The evidence establishes that the decision or direction to employ KPMG was to a large extent made or given by Mr Cathcart, Crown Solicitor, who was at that stage seized of the prosecution as if an indictment had in fact been laid. Mr Cathcart made it clear how he wanted the evidence presented for the jury and by whom. The conclusion of Mr Williams in relation to the decision to contract KPMG did not name Mr Nalder and is as follows:

“I do not believe the decision to contract PM (KPMG) was necessary and/or proper”

Finding 3 relates to giving specifications for KPMG to undertake the accounting work. Mr Williams concluded that they were inadequate and said:

“I do not believe there were adequate specifications... for the (KPMG) work”.

Dr Allen’s letter records that he decided the three findings constituted a serious incident, that the situation amounted to misconduct and that Mr Nalder should be formally reprimanded for unacceptable management practices.

It should not be overlooked, that the work was performed to the satisfaction of the Crown Solicitor and the prosecution was successful.

There was a failure on the part of Mr Nalder to properly advise the Overview Committee of significant expenditure in excess of \$15,000 and this was an adequate ground for taking disciplinary action by MAF/Fish against Mr Nalder.

The decision by Dr Allen to commence a disciplinary investigation and appoint an investigator was appropriate.

Dr Allen over-reacted to the situation however, by suspending Mr Nalder from his current investigations, although the withdrawal of his financial delegations was appropriate, subject to the outcome of the investigation.

There were adequate grounds for the investigator to reach Finding 1 of his investigation, namely that the MAF/Fish Operation Buster Overview Committee was not properly advised in respect of the contracting and costs of KPMG.

There were inadequate grounds for the investigator’s finding that the decision to contract KPMG was not necessary and/or proper, as it overlooked the exigencies of the complex prosecution process which was underway at the relevant time and the wishes and directions of the Crown Solicitor, whose responsibility was to conduct the prosecution and the jury trial adequately.

The investigator's finding that the "*specifications for the Peat Marwick work were not adequate*" does not attribute blame to Mr Nalder and that is an appropriate finding, given that Mr Nalder followed the instruction of the Crown Solicitor and commissioned the work on his direction.

Dr Allen as the decision-maker, construed the first two findings of the investigator as being the fault of Mr Nalder and included all three in his finding of a "*serious incident*". He did not have adequate grounds to call this a "*serious incident*" warranting a finding of "*misconduct*" and a formal reprimand, rather than justifying a warning with no formal finding of misconduct and directing financial management training being required. Such a course of action would have been adequate on the basis of the investigator's Finding 1 that Mr Nalder did not properly advise the Overview Committee, with a letter being placed on Mr Nalder's file for a specified period.

The process of the disciplinary investigation was carried out properly in that the investigator and the decision-maker met with Mr Nalder and the decision-maker also gave Mr Nalder an opportunity to comment on the adverse findings.

8.2.1 Conclusion – The KPMG Incident

There were adequate grounds for taking disciplinary action, namely directing a disciplinary investigation into the excess of expenditure in commissioning KPMG to undertake forensic accounting work for the purposes of a prosecution by way of jury trial.

There were adequate grounds for the finding that Mr Nalder did not properly advise the MAF/Fish Operation "*Buster*" Overview Committee in respect of the contracting and costs of KPMG, but there were inadequate grounds for disciplining Mr Nalder in respect of the Investigator's findings 2 and 3, namely that his decision to contract KPMG was not necessary and/or proper and the specifications for the work were not adequate. As a result the disciplinary outcome for Mr Nalder was more serious than the circumstances warranted.

8.3 THE QMR INCIDENT

Quota or permit holders were required to complete and furnish to the Director General quota management reports (QMRs)¹¹⁶ monthly. The QMR provided for "*Signature of quota holder or agent*" and stated "*It is an offence to supply false information*". It was an offence to make

¹¹⁶ Fisheries (Reporting) Regulations 1990

any false or misleading statement or entry knowing that statement or entry to be false or misleading or being reckless as to whether the statement is false or misleading.¹¹⁷

The information in a QMR was entered by MAF/Fish into the computer records which supported the QMS.

The administration system for the QMS made provision for Alteration Reports. As at May 1992 the instructions for the making on Alteration Report were an email dated 17 September 1987 and a Quota Management Systems Operation Manual dated July 1988. The instructions allowed for three types of alteration to the database, of which one was:

“Alteration supported by “Amended” Return and explanation submitted by QH (Quota Holder) or LRF (Licensed Fish Receiver) to Registrar”.

and required that information must be attached sufficient for an “*independent*” person to evaluate the position. The instructions stated that “*there are some VITAL responsibilities on the Registrar*” and “*... it is very important to correct the database*”. There was no evidence before the Inquiry as to whether or not the instructions were held in the Tauranga Office in May 1992.

The QMR incident had its origins in Operation Buster.

On 17 February 1992 as part of Operation Buster, fishing boats and other property of Papakura Trawling were seized. On the same day, the solicitor representing Papakura Trawling interests, wrote to Mr Nalder making an application for the release of his client’s vessels under bond. He submitted that there were a number of families who stood to lose their livelihoods, if the vessels remained tied up.

On 19 February 1992 Mr Nalder responded saying that MAF/Fish had decided not to return the vessels, but would review the position. Eight days later, Mr Nalder informed their solicitor that the vessels could be released under bond. Mr Nalder also informed him that he was examining his client’s quota holdings and would provide him with a year-to-date balance of the quota, which remained available to his client to fish. This was a “reconciliation” between the quota held by Papakura Trawling and the catch MAF/Fish maintained had been caught up to that time. The next day, on 28 February 1992, the solicitor wrote confirming that Mr Nalder would supply the reconciliation relating to his client company’s quota.

On 13 March 1992 MAF/Fish laid informations and issued summonses alleging offences against the Fisheries Act 1983.¹¹⁸

Some two months later, on 21 May 1992 Mr Nalder sent the solicitor the promised reconciliation, which contained a cautionary note and advised that the figures were “*without prejudice*”.

¹¹⁷ Regulation 25(2)
¹¹⁸ s 96 and s 28ZA (3).

Mr Nalder gave evidence that he and the solicitor negotiated a situation which allowed release of the vessels and identified the remaining quota which could be fished. He believed the reconciliation was reasonable, and applied good common sense and generated some good will, but the solicitor disputed this evidence.

Mr Nalder had agreed to issue the reconciliation to the solicitor.

Mr Nalder wished to ensure that proper procedures were followed and that the computer records were correct. He was concerned that, if no entry was made, the records would be under recording the catch of Papakura Trawling and thus be showing an incorrect position. Mr Nalder discussed the position with Mr Boyle, the Registrar and a Senior Monitoring Officer at Tauranga. Mr Nalder says that Mr Boyle was experienced and that he had total faith in him.

Mr Nalder told the Inquiry:

“Mr Boyle told me that we needed to complete a Quota Management Return with the species and quantities of fish we could prove (had been illegally taken), and he would have it processed in the system. Mr Boyle told me that the procedure had been set down by the Ministry but he was unable to find a copy of the written instructions.

I had no reason to doubt Mr Boyle’s expertise and views on this. It was an administrative instruction that had been put in place prior to my joining the Ministry and alterations to quota holdings was not a common occurrence. In fact, I do not believe there had been any other case (at least at that time) in which the Ministry had made covert purchases of such quantities as to have a potential impact on the integrity of the quota management system.

I worked out the quantities, from the evidence we had gathered. Mr Boyle brought me a Quota Management Return with the top portion completed in his handwriting. I filled in the quantities, and signed the form. Mr Boyle had his staff process the form in the usual manner. I produce a copy of the form concerned.

I also wrote to Mr Bush (letter dated 21 May 1992) and confirmed in writing our discussions and what we had done. I also provided a copy to Mr Boyle so as there was a clear audit trail of what we had done.”

Mr Nalder filled in quantities and signed the QMR on 21 May 1992 and on the same day he sent his reconciliation to Mr Bush.

A staff member says that she was directed to add together the QMR Mr Nalder had filled in and signed and an amended February 1992 QMR (signed on behalf of Papakura Trawling) and to enter the total of the two QMRs. The total was entered on 22 May 1992.

Strictly speaking the entry should have been effected by an Alteration Report.

On behalf of Mr Nalder it was submitted that, though they could not locate the applicable instructions, Mr Nalder and Mr Boyle complied fully with the intent and spirit of the instructions and that getting the record straight was a legitimate purpose.

There were no material developments in the QMR incident until a CTC meeting on 19-20 July 1993. Mr Doug Allen, acting DCM, Tauranga, raised issues relating to “*billing*” and whether it was likely to impact on Operation Buster and the Papakura Trawling prosecution.

Mr Doug Allen discussed the position with Mr Cathcart and it was decided to request a report from the NCU.

On 14 September 1993, Ms Hall, reported to Mr Crothers that, arising out of the review of the “*billing*”, the following issues had been identified:

- “Strong indications that the MAF/Fish staff member (i.e. Barry Nalder, then District Compliance Manager, Tauranga, now Senior Fisheries Investigator, Auckland) “altered” the catch information on a statutory declaration, namely the February 1992 QMR filed in the name of Papakura Trawling and Fishing Company Ltd (QRN 8431862)
- the consequences of the “altered” information on MAF/Fish monthly balancing process
- the potential impact of this action on the alleged over fishing by Papakura Trawling and Fishing Company Ltd currently before the Court.

The report advised “*the above issues should be considered by MAF Fisheries’ legal advisor and if considered appropriate communicated to the Crown solicitor responsible for the prosecution case*”.

Mr Crothers, supplied a copy of the report to Mr Persen, Investigating Solicitor, NCU, and asked him to report.

Mr Persen reported to Mr Crothers on 23 September 1993. The report refers to the “Effect on Prosecution” and says:

“The Crown solicitor in Rotorua should be informed of the fact of the alteration and the existence of the “inflated” deemed value invoices. I will brief him on the details available to date.”

Mr Persen did not give evidence. There was no written record of any brief given by Mr Persen to Mr Cathcart. Mr Cathcart did not have any recollection of any briefing from Mr Persen. However, an inference can be drawn from the correspondence between Mr Crothers and Mr Cathcart that there may have been some communication from Mr Persen to Mr Cathcart. If there was, Mr Persen did not pass on any information.

On 23 September 1993 Mr Crothers wrote to Mr Shallard, stating that the Hall Report and the Persen Report indicated a reasonable cause to believe that actions of staff members may have

“(i) Been in “bad faith and illegal/fraudulent

- (ii) *Corrupted the QMS database and potentially threatened the integrity of MAF and the Quota Management Systems*
- (iii) *Threatened the viability of legal proceedings flowing from Operation "Buster"*
- (iv) *Placed MAF staff in a position of Civil Liability".*

The letter concluded:

"I recommend that we immediately brief the Group Director and the Director-General with the view to mounting an internal/Police investigation."

On 23 September 1993 the matter was discussed at a meeting of Dr Ballard, Dr Allen, Mr Shallard, Mr Hart and Mr Fergusson, where a decision was made to suspend Mr Nalder forthwith on ordinary pay until the investigation or investigations had been completed. Also that Mr Crothers should be requested to inquire of the Police as to whether or not the Police wished to conduct the investigation. Mr Fergusson was instructed to carry out an investigation and report to the Director-General.

There was no suggestion at the meeting that there should be a meeting with Mr Nalder prior to his suspension in order to discuss the position with him and to ascertain his views.

Dr Allen signed a letter to Mr Nalder reading:

"This is formal advice to you of suspension forthwith on ordinary pay from MAF Fisheries pending an investigation into allegations made that you have fraudulently misrepresented MAF Fisheries information.

MAF Fisheries is formally initiating an investigation into these allegations. You will be given the opportunity to respond to the allegations made during this investigation and it is expected that this will be completed within 10 working days from the date of this letter.

In terms of the "MAF Way" and MAF Fisheries Discipline and Dismissal Procedure, if these allegations are proven, they will constitute serious misconduct and may lead to dismissal.

Your employment contract and MAF Fisheries procedures entitle you to seek independent representation on your behalf."

Mr Crothers communicated with the Police. After some coming and going, MAF/Fish's understanding was that it should carry out an investigation and, if the investigation reached the point where there was evidence sufficient to suggest a crime, the Police should be advised.

Also on 23 September 1993 Mr Walshe visited Mr Nalder at his home about 7 pm. Mr Walshe gave Mr Nalder the letter from Dr Allen and explained that the issue related to the QMR alteration Mr Nalder had authorised in February 1992 for Papakura Trawling. Mr Walshe noted:

“Initially Barry could not remember anything about the incident. However on reflection he remembered that Donal Boyle had informed him that he should alter the QMR to increase the catch by the amount that we could confidently demonstrate PAPAKURA TRAWLING had over fished. Barry stated that Donal had made the necessary calculation and passed the alteration on to Barry to sign, which he did. Barry said the procedure they had used was used by “Beagle” (Mike Sullivan) in “ROUND-UP”. Barry also remembered that he discussed the matter with Sullivan at a CTC meeting. Barry also expressed concern that MAF Fisheries should have discussed with him first, before deciding to undertake the audit”.

At all times Mr Nalder has protested that his suspension was unlawful as there was no opportunity for him to address either the suspension or the basis of it before the direction was given that he be suspended from duty. The cases of **Association of Staff in Tertiary Education v Northland Polytechnic Council** [1992] 2 ENZR 943 and **Tawhiwhirangi v Attorney General** 1993 2 ENZR E46 are relevant. In these cases the employee was suspended without any prior discussion and the Employment Court held that the employer acted unlawfully by failing to observe the rules of natural justice before considering and deciding upon the employee’s suspension from employment.

In **Birss v Secretary of Justice** [1984] 1 NZLR 513 at 521 Richardson J said,

“Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary”.

In final submissions MFish said (para 357):

“In terms of the relevant provisions of the Collective Employment Contract, MAF was entitled to suspend Mr Nalder on ordinary pay for such a serious matter.”

The Ministry made reference to relevant collective employment contracts which provided under the heading “Discipline and Dismissal (Exhibit AD) that “If the offence is sufficiently serious an employee is to be placed on suspension pending an investigation”. The MAF Way (Exhibit AC) contained a provision reading “The employee may be suspended on ordinary pay while an investigation is taking place”.

In the view of the Inquiry, the provisions referred to by MFish do not displace the application of the general principle of employment law that the employee should normally be heard prior to a suspension.

The Inquiry considers that MAF/Fish acted unlawfully in its suspension of Mr Nalder in that it failed to discuss the issue with him before suspending him.

On 28 September 1993 Mr Crothers wrote to Mr Cathcart. The letter expressed a concern by Mr Crothers that

“altered information and the manner in which it occurred might reduce our chances of success in the current prosecution”

against Papakura Trawling. Mr Crothers asked for information from Mr Cathcart in order

“to better advise the Director-General of Agriculture and Fisheries of the possible ramifications of the alteration.”

On 18 October 1993 Mr Cathcart responded:

“Accordingly, the quota management reports which were submitted by Papakura Trawling and Fishing Co Ltd for the period of February 1992 will have no impact on the conspiracy case.”

Mr Crothers forwarded a copy of Mr Cathcart’s letter to Mr Persen. Mr Persen filed the letter. There was a breakdown in communication as the letter from Mr Cathcart was not forwarded to Mr Fergusson. Mr Fergusson conducted his investigation in the belief that the QMR had the potential to adversely affect the prosecution.

Mr Fergusson set out the Terms of Reference for the Inquiry he was to undertake as:

“Whether there is any apparent criminal liability resulting from what appears to have occurred;

Whether there has been any “offence” in the context of the employer/employee relationship;

Possible implications for the prosecution that has been commenced involving the fishing company; and

Possible civil liability.”

Mr Fergusson conducted an investigation which included:

- Considering copies of the Hall and Persen reports.
- Commissioning Morley Security Limited to report. The intent was that the Morley Security Group should report on whether or not there had been a criminal offence.
- Putting questions in writing to Mr Nalder (or his solicitors) and others and considering responses received.
- Sending a series of questions to Mr Boyle, former SFO, and receiving a reply from the solicitors for Mr Boyle.
- Communicating with Mr Sullivan from whom he received the email of 17 September 1987.
- Receiving a list of the charges in Operation Buster from Mr Nicholson, Fisheries Officer. The list did not contain any relevant dates.

Mr Fergusson did not ascertain the details of the case against Papakura Trawling (except to the extent that he received a list of charges).

On 22 November 1993 Mr Nalder wrote to the Director-General making a formal complaint about his treatment, and the delay in the investigation by Mr Fergusson.

The Director-General replied, acknowledging unavoidable delays and giving an assurance that the investigation would be pursued as quickly as it could be.

On 6 December 1993 Mr Fergusson received a report from Morley Security Group Limited.

A significant matter in the report was what degree of understanding existed as a result of Mr Nalder's discussions with Mr Bush. The report reads:

"It may well be inferred, if not taken as read from his (Mr Nalder's) explanation that the QMR was completed with the complete knowledge and consent of Papakura Trawling and Fishing Company's solicitor. This however is a grey area and is open to interpretation as Nalder does not say explicitly that BUSH was told that a QMR would be created. Without actually talking to BUSH the area of knowledge and understanding as previously mentioned between them remains unclear."

Under the heading "*Unsolved mysteries*", which the report recommends "*could be best left untouched*", there is further reference:

"It is still not known, without asking BUSH, if he knew that a QMR was going to be created, hence the issue of authority and consent"

Mr Fergusson did not make an enquiry of Mr Bush or any endeavour to resolve the "*grey areas*".

In relation to the period covered by the QMR and the period covered by the charges in Operation Buster, the Morley Report advised:

"It is the writer's understanding that QMRs are to be submitted on a monthly basis and cover a fishing period of that particular month. The point is raised because the writer is unaware if the figures of the suspect QMR relate only to the month of February or in fact relate to a wider time frame namely, the length of Operation Buster."

Mr Fergusson did not make any enquiry to ascertain about the periods covered by the QMR or the prosecution. He relied on Mr Persen having communication with Mr Cathcart and then advising him. There was no communication between Mr Fergusson and Mr Persen.

On 9 December 1993 the draft report was forwarded to Mr Nalder and his solicitors, for comment. A response was requested not later than 20 December 1993.

The day before expiry of the time limit, Mr Nalder's solicitors advised they did not accept the draft report, that counsel's advice was being taken, and that they expected to respond in full by the end of the day.

On 22 December 1993 Mr Fergusson forwarded his report to Mr Shallard. He advised that no response had been received from Mr Nalder. In his letter Mr Fergusson suggested that Mr Shallard should discuss with Ms Hinds the question of whether or not, if the Director-General accepted his findings, the conduct of Mr Nalder should be considered serious misconduct or simple misconduct.

The conclusions reached in the report were:

“I consider that you are entitled to conclude that:

NALDER did complete the QMR;

NALDER was not expressly or impliedly authorised to do so and should not have believed that he was;

In doing so NALDER displayed an appalling understanding of the ramifications of what he did given his position as a Fishery Officer (let alone a DCM);

His actions constitute:

Serious misconduct (in the sense that the acts amount to gross negligence, carelessness, or unacceptable incompetence or were such as to seriously impact on the credibility of the Ministry at the worst and NALDER at least);

Misconduct (in the sense of negligence, carelessness or unacceptable incompetence, or were such as to adversely affect the credibility of MAF and/or NALDER).”

And in an accompanying letter he said:

“For myself I consider the conduct to be serious misconduct and cannot see how Nalder can be kept on as an FO in the light of the findings. However there may be matters of mitigation which should come into play given what I understand of Nalder’s history.”

Later on 22 December 1993 Mr Fergusson received an extensive response by Mr Nalder.

Mr Fergusson sent a second report giving comment on Mr Nalder’s response and said that Mr Shallard would need to obtain advice from a Senior Administration Fisheries Officer.

The tenor of the report is that Mr Fergusson is critical of the explanations given by Mr Nalder. The report states

“Nalder’s actions could have “blown” the success of the prosecution, or at the very least made it considerably more difficult to have successfully prosecuted”.

This statement is not consistent with the evidence given by Mr Cathcart. If Mr Fergusson had asked about the dates of the charges and the QMR, he would have been informed of Mr Cathcart’s advice. The erroneous concept of “*blowing the prosecution*” was a serious flaw in the report of Mr Fergusson.

Mr Fergusson records that he did not speak to Mr Bush and said that this was “*something we would rather not do in the circumstances*”. Fairness required that, before making inferences in relation to Mr Bush that were adverse to Mr Nalder, reasonable steps be taken to obtain evidence from Mr Bush.

On 12 January 1994 Ms Hinds, gave a memorandum to Mr Hart and Dr Ballard, who was to be the decision maker. In relation to the QMS, the advice was:

“However, the particular situation in which he [Mr Nalder], found himself required absolute and thorough understanding if he was to avoid the circumstances in which he now finds himself, and to have known the implications for the system of his actions.

It is acknowledged that the instructions in place at the time were arguably informal and imprecise.

However, at the time this was the only method of instruction provided to monitoring staff. The network of SFMOs at the time was such that all matters of concern were raised and resolved amongst the group. There was a Help-Desk in operation at the time from which service on technical issues should be gained (none was sought). In every other office and SFMO in the country at the time were operating under the principles outlined in this particular instruction, and there is no excuse for an officer with the expertise of this FMO to give advice as claimed by Nalder.”

The last sentence noted above is directed largely to the knowledge of SFMOs. The Inquiry was advised that SFMOs reported to DCMs (Mr Nalder’s position). Mr Nalder however, came from a police and enforcement background, rather than fisheries administration.

The above advice was significant as it conflicted with the statement in the Fergusson Report that Mr Nalder displayed an appalling understanding of the ramifications of what he did. Dr Ballard, should have had the advice of Ms Hinds fully in his consideration when making his decision.

Mr Nalder submitted to the Inquiry that the process was flawed as he was not given an opportunity to view and comment on the Hinds memorandum. Also that advice of Ms Hinds given to Mr Hart and Dr Ballard that Mr Nalder should be advised what decisions were likely to be taken as a result of the investigation and that Mr Nalder should be given an opportunity to respond was ignored. The Inquiry accepts these submissions.

On 13 January 1994 Dr Ballard wrote to Mr Hart, setting out his reasoning for his finding of serious misconduct. The letter reads:

“I have read the reports provided by Larry Fergusson following the investigation and Helen Hinds together with the responses from Barry Nalder.

The information available to me indicates this is a borderline case between misconduct/ serious misconduct.

There can be little doubt that Barry Nalder's actions are inconsistent with the expectations MAF has of a senior officer. His actions and comments indicate an understanding of the QMS well below that expected of a compliance officer and a failure to understand the full implications of his actions to the PF and T case, the integrity of the QMS and the reputation of MAF. However, there does not appear to have been any wilful intent to defraud or misled.

In considering this and previous factors as they related to the KPMG Contract Inquiry, on balance I conclude that Barry Nalder's actions constitute serious misconduct but do not justify summary dismissal. He has shown by his actions and comments that he lacks the competence and judgment required of a senior compliance officer, and as such should be removed from his current position of Fisheries Investigator. Barry Nalder should be advised of this decision, counselled and best efforts should be made to find him an alternative position more fitting to his skills and competence"

Dr Ballard did not meet with Mr Nalder prior to giving his decision. Submissions for Mr Nalder pointed out that he had a right to be heard by the decision maker and referred to **Quinn v BNZ** 1991 ERNZ 1060 at 1070 where Goddard J said:

"The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision-maker."

In **Irvine Freightlines Ltd v Cross** 1993 I ERNZ 424 at 442 Palmer J said:

"It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with."

Also **Tawhiwhirangi v Attorney-General** [1993] 2 ERNZ 546 where Goddard J said at 565:

"But most unsatisfactory of all is that the decision-maker will be making the final decision purely on the papers".

On 13 January 1994 Mr Hart wrote to Mr Nalder's solicitors with a finding of serious misconduct not justifying summary dismissal, a direction removing Mr Nalder from his then current position and a reference to the finding of an alternative position. A meeting to "discuss fully what options Mr Nalder has" was offered. A copy of the letter from Dr Ballard to Mr Hart was enclosed.

Whilst there were some grounds to initiate a disciplinary investigation, there were inadequate grounds for the findings made against or for the penalty imposed on Mr Nalder in respect of the QMR incident.

The process by which MAF/Fish's conclusions were reached in its disciplinary procedure were flawed in the following respects:

- The Director General was acting on two reports from Mr Fergusson which were flawed.
- The Director-General failed to give Mr Nalder the right or opportunity to be heard.
- Mr Cathcart's evidence makes it clear that there were no material adverse implications to the prosecution arising from Mr Nalder's completing the QMR, contrary to Mr Fergusson's report.
- The integrity of the QMS and the reputation of MAF/Fish were not adversely affected by the alteration of the QMR.
- Mr Nalder acted reasonably and in good faith in relation to the alteration of the QMR.
- In reaching a finding of serious misconduct on the QMR incident, an irrelevant consideration, namely the KPMG incident, was taken into account. This was wrong.

8.3.1 Conclusion – The QMR Incident

There were some grounds to initiate disciplinary action, but there were inadequate grounds for the finding against or the penalty imposed on Mr Nalder in respect of the QMR incident. The process by which MAF/Fish's conclusions were reached in its disciplinary procedure was flawed.

8.4 CIRCUMSTANCES SURROUNDING THE ENDING OF MR NALDER'S EMPLOYMENT

On 4 February 1994 there was a without prejudice meeting between MAF/Fish and Mr Nalder's Counsel to endeavour to negotiate a settlement of Mr Nalder's termination of employment.

As a result of the meeting, on 7 February Mr Nalder's Counsel wrote, setting out his understanding of the matters agreed as follows:

- Retirement allowance (including time with New Zealand Police) calculated in accordance with the usual formula
- Retirement leave
- Compensation for humiliation etc of \$35,000.00.

- Loss of future earnings (taxable) \$25,000.00.
- Contribution to legal costs \$5,000.00.

On 11 February 1994 Ms Hinds wrote setting out Option 1 which had been discussed, and Option 2 which was the Ministry's preferred option.

<u>"Option 1 (Discussed Without Prejudice)</u>	<u>Gross</u>	<u>Net</u>
Voluntary Retirement WEF 6 May 1994 77 days retiring leave	\$13,983.00	\$9,956.00
26 Weeks Recognition of Loss of Potential Earnings	\$23,617.00	\$16,815.00
Ex Gratia Payment	\$35,000.00	\$35,000.00
TOTAL	<u>\$72,605.00</u>	<u>\$61,771.00</u>
 <u>Option 2</u>	 <u>Gross</u>	 <u>Net</u>
Enhanced Early Retirement WEF 6 May 1994 (includes 77 days cessation leave)	\$67,465.00	\$48,575.00
Ex Gratia Payment	\$13,200.00	\$13,200.00
TOTAL	<u>\$80,665.00</u>	<u>\$61,775.00</u>

The effective date for both options was to be 6 May 1994, which recognised three months notice. Negotiations proceeded on Option 2 and on 7 April 1994, Ms Hinds wrote to Mr Nalder's Counsel confirming "We now have a settlement".

As part of the settlement, Dr Ballard signed a letter dated 7 February 1994 to Mr Nalder stating "You have been exonerated from any allegations of wilful intent to defraud or mislead".

The agreed monetary payments and the other elements of the settlement were provided for in a Confidential Agreed Settlement dated 26 April 1994.

Ms Hinds gave evidence that:

"What the settlement actually involved at the end of it was provided within his employment contract at the time and the process to do that had been followed under the then Collective Employment Contract to try and reach settlement and resolve the issues. So, Mr Nalder didn't get anything that his contract didn't entitle him to."

MFish said in its final submissions that the "imperfections in the disciplinary process were reflected in the compensation sum".

In the negotiations leading to the settlement there was no claim by Mr Nalder that the ending of his employment was in any way connected with his investigations of the alleged offending by Simunovich.

The circumstances surrounding the ending of the employment of Mr Nalder were deep-seated and complex and include:

- The difficulties experienced between Mr Nalder as DCM Tauranga and staff at Tauranga.
- The dispute between Mr Nalder and Ms Hall as to the forensic accountancy requirements for Operation Buster was perceived by MAF/Fish as being caused, to a large part, by Mr Nalder or as being an issue for which he was primarily responsible. MAF/Fish kept its perception in mind. On the other hand Mr Nalder perceived that he had acted properly and in accordance with the directions of Mr Cathcart.
- The KPMG incident hardened attitudes in the MAF/Fish and a sense of dissatisfaction on the part of Mr Nalder. The relationship between MAF/Fish and Mr Nalder was not helped by Mr Nalder being taken off current investigations (which included Operation Export), being assigned to snapper enquiries, being confined to the office and the manner in which that was effected.
- Following the decision of Dr Allen on the KPMG incident and his advising Mr Nalder that he could resume normal duties, Mr Nalder was not returned to normal duties and remained confined to the office. This accentuated Mr Nalder's dissatisfaction with MAF/Fish.
- The inquiry into the QMR incident brought attitudes to a head. Based on flawed and erroneous reports and a defective procedure MAF/Fish was firmly of the view that Mr Nalder had been guilty of serious misconduct which warranted his removal from his position as a Fisheries Officer. The attitude of MAF/Fish was that, given MAF/Fish's perception of the QMR incident and Mr Nalder's past employment, they would be happy to see him go.
- The QMR incident, his suspension, Mr Fergusson's flawed investigation and report, and the resulting decision of the Director-General were undoubtedly factors which increased Mr Nalder's dissatisfaction further.
- His previously expressed sentiment of a wish to resign from MAF/Fish must have been in the minds of both parties. Mr Nalder was in a situation where a negotiated ending of his employment on terms acceptable to him was desirable. In his final submissions Mr Nalder said he "*no longer had a wish to work for a Ministry capable of treating him in the way he had been treated*".
- The letter from Mr Hart, inviting a meeting to "*discuss fully what options Barry has*" could be read as an invitation by MAF/Fish to discuss the ending of Mr Nalder's employment. The message appears to have been so understood by Mr Nalder and accorded with his wishes.
- Both parties faced the prospect of lengthy, bitter and expensive litigation. Mr Nalder had grounds for a personal grievance claim relating to his treatment by MAF/Fish. MAF/Fish appreciated, or should have appreciated, that there was substance to the personal grievance claim.

- The option most acceptable to both MAF/Fish and Mr Nalder was a negotiated ending of Mr Nalder's employment on terms and conditions acceptable to both parties.

That was the context for the negotiations surrounding the ending of the employment of Mr Nalder, and it involved a hardening of attitudes by MAF/Fish towards Mr Nalder, to the extent that they were happy to see him go. Equally Mr Nalder's increasing dissatisfaction with the way MAF/Fish had treated him meant he no longer wished to work for MAF/Fish. Both parties faced the prospect of lengthy, bitter and expensive litigation. Negotiations led to the termination of his employment by an agreement which was appropriate to the circumstances.

8.4.1.1 Connection to the Scampi Fishery?

There was no connection between the ending of Mr Nalder's employment with MAF/Fish and his investigation of alleged offences relating to the scampi fishery.

The Terms of Reference refer to a "*dismissal*". There was no "*dismissal*" as Mr Nalder's employment came to an end by agreement. This term of reference is addressed on the basis of whether there was any connection between the ending of Mr Nalder's employment and his investigations of alleged offending in the scampi fishery.

The final submissions for Mr Nalder read:

"It is not his [Mr Nalder's] intention to draw any conclusions as to the relationship between the Simunovich investigation and the way in which he was treated; first, over the Peat Marwick issue when he was assigned to other duties and, second, over his suspension on the spurious grounds of amendment of the quota records"

and a similar statement was made by his counsel in opening.

The KPMG incident had its origin in the Operation Buster Overview Committee meeting of 28 September 1992. At that time Mr Nalder had not done any work on the scampi fishery. The KPMG incident was then dormant until late March 1993 when Dr Allen received information as to the cost levels and instructed Mr Williams to investigate and report. The only association between the KPMG incident and the scampi fishery was that, on the direction of the Dr Allen, Mr Nalder was directed to cease work on current investigations (which included Operation Export). However, he continued to work on Operation Export on a limited basis from his office. Whilst no satisfactory explanation was given for the direction to cease work on current investigations (which included Operation Export) and the assignment to a snapper investigation, there was no evidence to indicate that the direction was in any way connected to or motivated by Mr Nalder's work on Operation Export.

The QMR incident had its origin when Mr Nalder signed the QMR on 22 May 1992. At that time Mr Nalder had not done any work on the scampi fishery. The QMR issue was dormant until raised on 19-20 July 1993 when Mr Doug Allen raised "*billing*" issues in relation to Operation Buster at a CTC meeting. The "*billing*" issue gave rise to Mr Nalder being suspended on 23 September 1993. There then followed the decision of Dr Allen. The QMR

issue, the “*billing*” issues, the decision to suspend and the decision of Dr Allen had nothing to do with the scampi fishery. The Reviewers are satisfied that there was no connection between the QMR incident and Mr Nalder’s investigation of alleged offences relating to scampi.

8.4.1.2 Conclusion – End of Mr Nalder’s Employment

Following the flawed disciplinary process and the findings, which contributed to Mr Nalder’s increasing dissatisfaction with MAF/Fish as his employer, negotiations led to the termination of his employment by an agreement which was appropriate in the circumstances.

Mr Nalder was not dismissed, as his employment came to an end by agreement. The circumstances surrounding the termination of his employment had no connection with his investigation of offences relating to the scampi fishery.

8.5 CONCLUSIONS TO TERM OF REFERENCE 3

Did the former Ministry of Agriculture and Fisheries have adequate grounds for taking disciplinary action against Mr Nalder on each occasion?

KPMG

There were adequate grounds for taking disciplinary action, namely directing a disciplinary investigation into the excess of expenditure in commissioning KPMG to undertake forensic accounting work for the purposes of a prosecution by way of jury trial.

There were adequate grounds for the finding that Mr Nalder did not properly advise the MAF/Fish Operation “*Buster*” Overview Committee in respect of the contracting and costs of KPMG.

There were inadequate grounds for disciplining Mr Nalder in respect of the Investigator’s findings 2 and 3, namely that his decision to contract KPMG was not necessary and/or proper and the specifications for the work were not adequate.

As a result the disciplinary outcome for Mr Nalder was more serious than the circumstances warranted.

QMR Incident

There were some grounds to initiate disciplinary action, but there were inadequate grounds for the finding against or the penalty imposed on Mr Nalder in respect of the QMR incident. The process by which MAF/Fish’s conclusions were reached in its disciplinary procedure was flawed.

What were the circumstances surrounding the termination of his employment?

Following the flawed disciplinary process and the findings, which contributed to Mr Nalder’s increasing dissatisfaction with MAF/Fish as his employer, negotiations led to the termination of his employment by an agreement which was appropriate in the circumstances.

Did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery?

Mr Nalder was not dismissed, as his employment came to an end by agreement. The circumstances surrounding the termination of his employment had no connection with his investigation of offences relating to the scampi fishery.

9.0 TERM OF REFERENCE 4: RELATIONSHIPS BETWEEN MINISTRY OFFICIALS AND COMMERCIAL SCAMPI FISHERS

4. Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times professional and at arms' length?

Introduction

To examine the relationships of the officials of the two Ministries and commercial scampi fishers at the relevant times specified in the Terms of Reference, we have divided this Term of Reference into two parts.

Part I develops definitions and understandings of the terms “*professional*” and “*at arms length*”.

Part II examines the contacts between the scampi fishers and the two Ministries (MAF/Fish and MinFish) relating to permit issues, vessels registration, policy development, and other administrative processes, which had been identified both in the correspondence and documentation before the Inquiry, and the evidence which the Inquiry received.

9.1 PART I - “PROFESSIONAL” AND “AT ARMS LENGTH”

9.1.1 Public Service Manuals on Conduct

There are two Public Service documents relevant to the period of the Inquiry:

- The Code of Conduct dated 1983, pursuant to the State Services Act 1962
- The Public Service Code of Conduct dated 1990, which was revised in 2001 pursuant to the State Sector Act 1988.

The 1983 Code of Conduct is made up of four elements:

- Sections 53-60 of the State Services Act 1962;
- Part VII of the Public Service Regulations 1964;
- The Public Service manual and, in particular, section L; and
- Departmental Manuals or Handbooks, setting out specific instructions to employees of given department during their employment in that department.

9.1.2 1983 Code of Conduct

In the 1983 Code of Conduct, certain sections from the State Services Act 1962 are imported into the Code. Section 56 of that Act created offences for which employees could be charged. These included:

- Failure to comply with the Act, regulations or official instructions;
- Disobeys, disregards or is in wilful default of a lawful order or instruction;
- Negligent, careless, indolent, inefficient or incompetent discharge of duties; and
- Improperly uses for private purposes any information acquired by him as an employee.

A public servant could also be guilty of improper conduct in an official capacity or any other improper conduct which affects adversely the performance of duties or brings the Public Service into disrepute.¹¹⁹

A person could also commit an offence who directly or indirectly solicits or endeavours to influence the Commissioner or any Commissioner or any other person or persons to whom the Commission has delegated its powers under s 14 of this Act.¹²⁰

Part B of the Code of Conduct contains an extract from the Public Service Regulations 1964¹²¹ and of relevance is Regulation 47. This prohibits either directly or indirectly, solicitation or acceptance of gifts or presents from any member of the public concerned either directly or indirectly with any matter connected with the duties of an employee or in connection with the Public Service.

Section L.1 of The Public Service Manual provides:

“All employees are expected to maintain a high standard of ethical conduct in relation to their official duties and otherwise. The Commission will not tolerate in an employee action which, even though strictly legal, falls short of the high standard of integrity and conduct expected of a public servant”.

Section L.2 provides that an employee who commits an offence against the State Service Act 1962 is guilty of improper conduct which brings the Public Service into disrepute.¹²²

Apart from the reference to the requisite high standard of conduct, there is nothing in section L of the Public Service manual which specifically deals with either the definition of “professional” or the concept of “arms length” conduct.

¹¹⁹ S 56 State Services Act 1962

¹²⁰ S 76 State Services Act 1962

¹²¹ Part VII Code of Conduct

¹²² S 56(i) State Services Act 1962

9.1.3 The Public Service Code of Conduct 1990 (Revised 2001)

The State Services Commissioner, by s 57 of the State Sector Act 1988, has the power to prescribe Codes of Conduct covering minimum standards of integrity and conduct that are to apply to the Public Service.

The Code has two purposes:

- To provide guidance to public servants on the standards of behaviour required of them; (this also includes members of the senior executive service) and
- To provide a basis for more detailed Codes that are required to meet the particular circumstances of individual Departments.

The Code of Conduct sets out three principles of conduct for all Employees. These are:

- Employees should fulfil their lawful obligations to the Government with professionalism and integrity;
- Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public and their colleagues;
- Employees should not bring the Public Service into disrepute through their private activities.

The Code observes that the principles do not specify every potential act or behaviour, but establish obligations generally expected of public servants in the relationship with the Government, the Chief Executive, colleagues and the public.

The Code also provides minimum standards of integrity and conduct for the Public Service. The observance of these standards and those required by chief executives is intended to increase the sensitivity of employees to those matters and encourage the pursuit of the concept which gives the public service its greatest strength, namely *“a spirit of service to the community.”*¹²³

9.1.3.1 The First Principle of the Code

This states that employees shall fulfil their lawful obligations to the Government with professionalism and integrity.

The Code observes that this first principle is concerned with public servants’ obligations to Government in the performance of their official duties. In broad terms, it sets a first priority

¹²³ Public Service Code of Conduct: State Services Commission 1990, p.7

for public servants to carry out Government policy. Public servants' actions are expected to sustain the closest public scrutiny.

The content of this principle requires public servants to serve Ministers within the law and with integrity to the best of their ability. Public servants are expected to have a recognised role in development and implementation of policy. Part of that role is to provide honest impartial and comprehensive advice to Ministers. Public servants are required to alert Ministers to possible consequences of following particular policies irrespective of the Minister's views. Final policy decisions are for Ministers. Public servants must not usurp that decision by withholding relevant information obstructing, delaying or undermining or influencing Government policy.

Generally public servants have the same rights of free speech and independence as other members of the public. However, general comment made on issues of public policy which might be associated with a public servant's official role will normally be regarded as unacceptable if it reveals advice given to the Minister, or:

- Uses or reveals information gained in the course of official duty that is not readily available to the general public;
- Criticises or offers alternatives to proposed actual ministerial policy or departmental programme;
- Purports to express or imply a departmental view rather than a clearly expressed personal view;
- Gives partisan support to or criticism of a political party;
- Constitutes a personal attack on a minister or departmental colleague.

Public servants should also avoid criticism strong enough or persistent enough that the public servant's impartiality is called into question.

The Code notes that the above actions of this kind could be considered misconduct, depending on the circumstances of the case.

9.1.3.2 The Second Principle of the Code

This requires Employees to perform their official duties **honestly, faithfully** and **efficiently**, respecting the rights of the public and their colleagues.

This principle is concerned with the general obligations¹²⁴ of public servants to give satisfactory service. It also requires them to refrain from conduct that might lead to conflicts of interest or failure to meet the requisite standards of integrity.

In the performance of duties, public servants are to carry out their duties in an **efficient** and **competent** manner, and avoid behaviour which might impair their effectiveness.

The Code warns that there is a common law obligation¹²⁵ to perform duties for which public servants are paid. In respect of the requirement to carry out duties with integrity and to avoid conflicts of interest, the Code notes that public servants should perform their duties **honestly** and **impartially**.

The impartiality and integrity of public servants is described as being central to the maintenance of public and Governmental trust and confidence in the Public Service. Public servants are required to act with personal integrity and ensure that their actions are able to bear the closest public scrutiny.

The Code emphasises that the public must have confidence that decisions are made or policies are applied impartially. Public servants are required to observe the principles of **fairness** and **impartiality in all official dealings**. The Code notes as an example that no individual or organisation with which a public servant is involved may be given preferential treatment (whether by access to goods and services or access to “*inside information*”) over any other individual or organisation.¹²⁶

9.1.3.3 The Third Principle of the Code

The third principle is less relevant to this Inquiry. It provides that public servants should not bring the Public Service into disrepute through their private activities.

The only reference in the evidence before the Inquiry which bears on this principle was an acknowledgement of receipt by an official in his private capacity of an invitation from a fishing company to a function. Even if the invitation was offered to the official in his personal capacity, the perception of compromise to the performance of official duties should be considered closely before accepting such an invitation.

9.1.4 The MAF Way

MAF, in 1991, compiled its own Code of Conduct called “*The MAF Way*”. The MAF Way was prepared for the whole Ministry of Agriculture & Fisheries, not just the MAF Fisheries Group. Under the heading “*Shared Expectations*”, “*The MAF Way*” states:

¹²⁴ P.18 *ibid*

¹²⁵ P.19 *ibid*

¹²⁶ P. 21 *ibid*

“... MAF expects its people to maintain proper standards of integrity, good conduct and concern for the public interest as well as a commitment to the performance of the organisation. To help with this, MAF will provide a traditional set of minimum standards of behaviour, with a framework for disciplinary procedures and more importantly encourage MAF employees to raise and want to raise ‘their own performance standards.’

Noting that the relevant clauses of the State Sector Act 1988 also apply to all MAF staff, the ideals that MAF values are:

- *Achievement*
- *Innovation*
- *Professionalism*
- *We maintain a balance between being strong individual performers and team members*
- *Equity*
- *Integrity*
We are trustworthy and prize our credibility
- *Impartiality*
- *We are objective and therefore open, in our dealings with Government, Parliament, our clients and the public*
- *“Working” these ideals contribute to success at MAF*

Under its expectations of its people, the personal responsibilities include:

- Be trustworthy
- Act honestly
- Honour the spirit of the MAF Way
- Respond to all reasonable directions.

Under the heading “*Client Relationships*” MAF employees are expected to:

- Respond promptly to all client requests while being polite and helpful
- Respect the rights and property of individual and corporate clients
- Discuss any potential conflicts of interest between public and commercial activities with your supervising officer.

9.1.5 Gifts

“*The MAF Way*” is the code applying to MAF from June 1991.¹²⁷ This provides under the section marked “*MAF’s expectation of its people,*” that employees are not to undertake any private activity, including other work (or accept gifts that could conflict with the employees work with MAF or compromise MAF’s integrity).

The most recent (November 2000) policy formulated by MFish regarding the receipt of gifts and entertainment provides that:

“If it is possible that a gift could be seen as an inducement or a reward, or to constitute conflict of interest, it should be politely declined. It is the policy of the Ministry of Fisheries that received gifts with a total intrinsic value of 0-\$100 must be recorded in the official Gifts Register.

As the general policy of the Ministry of Fisheries that received gifts, with a total intrinsic value of \$100 and over must be politely returned. When a gift is received that may exceed that value or the staff member is unsure, guidance should be sought from the Chief Executive. ...

Acceptance of entertainment is on occasions appropriate but should be related to building relationships with stakeholders whilst not compromising or being seen to compromise, the proper performance of the Ministry’s functions.”

The Public Service Code also prohibits public servants from abusing their official position for personal gain. They must not **solicit or accepts gifts**, rewards or benefits which might **compromise or be seen to compromise** their integrity. As a general rule a Public Servant should not accept a gift as the gift could be seen by others as placing the employee under an obligation to a third party. Where offers or gifts or inducements are made they should be reported by the Public Servant to his or her manager or Chief Executive. An accepted gift should be declared to the manager or chief executive for a decision on final disposal.¹²⁸

9.1.6 UK and Australian Codes of Conduct

The New Zealand Codes of Conduct are similar to Codes of Conduct in both the United Kingdom and Australia.

In the United Kingdom the framework for maintaining standards in the Civil Service is laid down in a series of documents covering the conduct of the civil service.¹²⁹

¹²⁷ “*The MAF Way*” June 1991

¹²⁸ [Emphasis in these paragraphs is added] 1990 Code, p.23

¹²⁹ These are “*The Duties and Responsibilities of Civil Servants in relation to Ministers: a note by the Head of the Home Civil Service*” (123 HC official report) (6 series)(2 December 1987); The Civil Service Management Code (1996).

The Code states a duty on civil servants to conduct themselves with integrity and impartiality and honesty; to give honest and impartial advice to Ministers. Civil Servants should also endeavour to deal with the affairs of the public sympathetically, efficiently, promptly and without bias and maladministration.

Similarly, in Australia specific duties are imposed upon the Australian public service and public service of the various states. These duties include the duty to perform with skill, care, diligence and impartiality to the best of an officer's ability.

In NSW, The Independent Commission against Corruption Act 1988 defines "*corruption*" to include not only criminal corrupt behaviour but also conduct "*in the breach of public trust.*" The conduct which, when engaged in by a public official, will be considered improper may satisfy the statutory definition of "*corruption*".

9.2 DEFINITIONS OF "AT ARM'S LENGTH" AND "PROFESSIONAL"

The two Codes of Conduct and the Public Service manual discussed above do not contain the definition of either "*arms length*" or "*professional.*" The following are various definitions contained within legal dictionaries and cases:

The Dictionary of Canadian Law states:

"Parties are said to be at arms length when they are not under the control or influence of each other"

In ***Swiss Bank Corp & Swiss Bank Credit Bank v. Minister of National Revenue***¹³⁰ Chief Justice Thurlow considered the concept involved in the expression "*dealing at arms length*". His Honour held that parties are not dealing at arm's length, where the mind, which directs the bargaining on behalf of one party, is the same mind that directs the bargaining on behalf of the other party.¹³¹ Or in other words, where the evidence reveals that the same person was "*dictating*" the terms of the bargain on behalf of both parties.

In Australia in ***Granby Pty Ltd v. Federal Commissioner of Taxation***¹³² Lee J noted that whatever the meaning of the expression may be in equity, for the purposes of the Income Tax Assessment Act 1936 the term "*at arms length*" means at least the parties to a transaction have acted severally and independently in forming their bargain. His Honour also noted that whether the parties have dealt with each other at arms length will be a matter of fact. His Honour also noted that parties at arms length may also not act at arms length in a particular transaction. As was noted in ***Minister of National Revenue v. Merritt***¹³³ where the parties to

¹³⁰ (97) 71 TDC 5235

¹³¹ The Canadian Annual Cumulative Supplement (June 2003 Volume 1(a-b) of the Digest)

¹³² (1995) 129 ALR 503 at 506-507

¹³³ 69 TDC 5159 at 5166

the transaction were parties at arms length, the terms of the loan transaction made between them had been dictated by a unilateral decision of one of them and no independent will in the formation of that transaction had been exercised by the other. It followed that it could not be said that the parties had dealt with each other at arms length at the material time.¹³⁴

Granby was followed in **Pontifex Jewellers (Wholesale) v. FC of T**¹³⁵. This case was dealing with s 94 of the Sales Tax Assessment Act 1992. This section only applied where there was the presence of a non-arms length transaction. His Honour Burchett J noted that the expression was ambiguous in that it was uncertain whether it referred to a transaction between parties who are not at arms length or whether it referred to a transaction which was not conducted at arms length whether or not the parties themselves would be described at arms length from each other.

His Honour concluded that the section did not refer to the relationship between the parties to the transaction but to the manner of their dealing although any relationship will obviously be important for the inferences it may raise.

In Osborn's Concise Law Dictionary,¹³⁶ "*at arms length*" is defined as:

"The relationship which exists between parties who are strangers to each other and who bear no special duty, obligation or relation to each other, eg vendor and purchaser."

Term of Reference 4 requires an examination by the Inquiry of the relationship between officials and commercial scampi fishers against a requirement to be conducted professionally and at arms length. This examination is different in nature to the application of judicial review principles to decision making. The examination is concerned with maintaining public and Government confidence in the Public Service. The decision in **R v. Monopolies and Mergers Commission**¹³⁷ referred to in MFish's submission refers to the considerations that a Court takes into account in exercising its discretion whether to grant review. As such it has no direct relevance to the examination outlined above except that we agree that it is the substance of the relationship, and the perception which people have of that relationship, which are at issue, not the form.

The key thing which emerges from the respective Public Service Codes of Conduct is the requirement to demonstrate the following:

- Honesty, impartiality, integrity and faithfulness
- Efficiency and competence leading to effectiveness
- To carry out duties with integrity and to avoid conflicts of interest

¹³⁴ In Australia, (Butterworths Words & Phrases Legally Defined (3rd Edition)

¹³⁵ 69 TDC 5159 at 5166

¹³⁶ Osborn's Concise Law Dictionary: 9th Edition London Sweet & Maxwell 2001

¹³⁷ R v. Monopolies and Mergers Commission ex parte Argyll Group plc [1986] 2 All ER 257, 266

- Observe the principles of fairness and impartiality so that the public have confidence that decisions are made or policies applied impartially.
- Refrain from giving, or being seen to give, preferential treatment to any individual or organisation.
- Avoid being open to a complaint of partiality by the avoidance of acceptance or solicitation of gifts rewards or benefits.

In our view, adherence to these requirements, informs the definition of “*professional*” or acting in a “*professional*” manner.

The meaning of “*at arms length*” is also contained within the above requirements. We are guided by the principles in the cases of *Granby* and *Pontifex*, that what is important for the content of arms length is not the description of the relationship between the parties but rather the manner of dealings with each other.

As the Courts note, this will be a matter of fact in all instances. For the purposes of this Inquiry, we consider the last three requirements above to be the most relevant in our consideration of “*at arms length*”, namely to:

- Observe the principles of fairness and impartiality so that the public have confidence that decisions are made or policies applied impartially
- Refrain from giving or giving the impression of giving preferential treatment to any individual or organisation
- Avoid being open to a complaint of partiality by the avoidance of acceptance or solicitation of gifts rewards or benefits.

These three requirements are relevant to all the functions of MAF/Fish and MFish which were the subject of evidence before us. Each of those functions has its own work processes and interactions with industry, so that ascertaining if the requirements are met will involve assessing each of those different types of work processes and interactions, as follows:

- Policy development and decision making has a strong requirement for a consultative process which ensures that relevant interests are heard and taken into account in decision making in a balanced way which achieves the overall public interest (but that does not mean that all interests have to be given equal weight). Thus in deciding whether and how to introduce the section 65 moratorium in the scampi fishery, for example, the interests of management of the fishery and those of the existing and prospective fishers should all have been ascertained and considered with impartiality and integrity.
- Administration and regulatory management (e.g. permitting, vessel approvals, monitoring) carry an expectation of even-handed treatment. That means that applications and enquiries will be handled as efficiently and consistently as possible, and that relationships with industry participants are managed in a way that sustains that expectation and perception of even-handed treatment.

- In enforcement and compliance, there are particular risks in compliance officers being seen to get too close in their relationships with individual industry participants. Some “high level” relationships to ensure adequate understanding of the business and markets, and to support prevention objectives are appropriate, but these should be very carefully managed. When specific enforcement investigations are under way, there should be no relationships between investigators and fishers who are competing with the alleged offending fisher. The strictness of current protocols around management of informants illustrates this point.

These are the standards and requirements against which we assess the relationships between the Ministries and commercial scampi fishers in the following sections.

9.3 PART II - CONTACTS BETWEEN OFFICIALS AND COMMERCIAL SCAMPI FISHERS

It has been submitted to us that MFish’s relationships with stake-holders are key to MFish’s strategic vision for the future. Sections of the Fisheries Act 1996 have been brought to our attention, to illustrate the requirement on MFish to consult with representative groups when making decisions on sustainability for fish stocks or areas, including decisions such as area closures, setting total allowable catches or setting catch limits,¹³⁸ introducing a stock under the QMS,¹³⁹ setting or varying total allowable commercial catches.¹⁴⁰

MFish placed reliance on the need for close working relationships between officials and commercial scampi fishers, to ensure that the statutory scheme of consultation is complied with and that MFish’s strategic goals of optimal compliance and best fisheries management were achieved. It was submitted that consultative relationships were part of MFish’s culture.

In relation to the issue raised by this Term of Reference, MFish defined it as where relationships with stakeholders are seen to be too close to ensure MFish’s roles as regulator and enforcer are appropriately carried out. MFish asserted that despite considerable pressure from some stake-holders, decisions were made in accordance with law and policy and by the appropriate decisions makers.

9.3.1.1 The Culture of MAF/Fish in the Late 1980s and 1990s

Whilst there is no equivalent provision in the Fisheries Act 1983, one of the principal functions of the former MAF/Fish under the Ministry of Agriculture & Fisheries Act 1953, which was repealed in 1995, was:

¹³⁸ Sections 11 and 12 Fisheries Act 1996

¹³⁹ Section 19(7) *ibid*

¹⁴⁰ Section 21(2) *ibid*

“To promote and encourage the development of ... all phases of the fishing ... industries in New Zealand ... with a view to maintaining and improving the quality of the products derived from those industries and increasing production of those products.”

It would appear that the statutory framework governing MAF/Fish in the 1980s and early 1990s and under a different legislative framework MFish from 1995, conferred on the respective Ministries a dual role of encouragement on the one hand and enforcement on the other, in both the areas of permitting and compliance.

There is ample evidence to demonstrate that MAF/Fish actively sought the views of some of the industry players and convened working parties with certain industry representatives on them.

It is appropriate to examine a number of factors, which arose as a result of MAF/Fish’s culture at the time and are relevant to Term of Reference 4. They are:

- MAF/Fish forged relationships with larger companies, in contrast with smaller fishers
- Closer relationship with industry players on working parties
- Relationships with previous MAF/Fish personnel
- The relationship with Simunovich
- Gifts
- Relationships with compliance staff.

9.3.2 MAF/Fish Fostered Relationships with Larger Companies

Consistent with MAF/Fish’s approach to foster a relationship with the industry, the evidence confirmed that MAF/Fish officials regularly visited certain industry participants, who were the larger and more corporate participants in the industry.

The evidence before the Inquiry showed a pattern of senior MAF/Fish personnel paying visits on a regular basis to the larger fishing companies. These were done to forge relationships with the major players in the industry, to introduce new staff and find out about the concerns of the company, understand the companies fishing operations and advise them of new developments. They also obtained their views on Ministry policy and objectives. MAF/Fish actively sought information about their processes, to build up “*the knowledge base*” and “*to retain current knowledge of what’s happening in it*”.

Mr Chadwick described Mr Walshe, as the Northern Regional Manager, visiting Fletchers (prior to the take-over from Sealord), Sanford, Simunovich, Anton and one other.

Mr Walshe described meetings, where

“we used to go around amongst other people to the major fishing companies and talk to them about, what were the issues?”

In relation to receipt of scampi for a function (to be dealt with under the section on Gifts) he acknowledged that they would have discussed scampi with Simunovich *“since it was a core issue to Simunovich.”*

In the context of regular meetings with industry players, Mr Walshe visited the major companies around the Viaduct Basin in Auckland. When asked whether he saw it as the role of the Regional Manager to forge relationships with certain people in the industry, Mr Walshe agreed that his role was to forge relationships with key people in the industry, the environmentalists and the recreational sector, to obtain information to provide to Head Office.

“Q: That's what I'm coming to. Was it the role of the regional manager to forge relationships with certain people in the industry?”

A. Well, yes. I certainly saw it as that. The key people in the industry, not just the industry, I might say, the environmentalists and the recreational sector as well, was to forge relationships good enough to be able to go and talk to them about issues and get information to be able to disseminate back to head office, was the way that I view it.”

In visiting the major players of the industry, Mr Walshe was accompanied by Mr Chadwick, the District Compliance Manager, the Regional Enforcement Officer, the Regional Scientist and the Quota Management Officer. In addition, Mr Walshe ran sub-regional meetings, inviting *“all fishermen”*.

It appears that many visits were paid to Simunovich. When invitations came in from Simunovich to attend functions, Mr Walshe accepted them as did others who were invited from the Auckland office.

When asked about the fostering of relationships within the industry, Mr Shallard told the Inquiry:

“We certainly talked a lot to the major industry players. That was certainly part of the process. I think Mr Walshe in evidence yesterday was talking about the need to understand the industry, to be alongside it and to appreciate what it was doing, along with the environmentalists and recreationalists we had the same sort of process”.

It is telling that when Mr Wilkinson was employed as Auckland Regional Fishery Management Officer, he was required to take the Corporate Board of MAF/Fish to various fishing companies, including Simunovich in the course of these visits. He described it as follows:

“The Board was led by Mr Malcolm Craig and had a number of senior officials on it. This Corporate Board would conduct meetings from time to time in the different fisheries regions. When it conducted its meetings in Auckland, the Board

was keen to visit fishing companies, and was particularly interested to visit Simunovich from time to time, because of its development initiatives, an approach then being encouraged by the Ministry in its policy. During my employment with the Ministry as Auckland Regional Fishery Management Officer, it was my duty to take the Corporate Board to various fishing companies, including Simunovich, in the course of these visits. When I left the Ministry these visits continued to Simunovich and other companies, with the result that all senior officials including regional officials, such as Mr Brierley from Central Region, and Mr Dick Brown from Southern Region, were fully aware of Simunovich's initiatives and developmental successes in the commercial scampi fishery".

The visits to the major companies by Mr Chadwick in the Northern region were not unique. Mr Bright, the District Compliance Manager in Auckland (after Mr Chadwick had left) described part of his role in compliance and enforcement as meeting with all of the fishing companies.

"Part of my role involved meeting with all of the fishing companies. ... Mr Bell had recently joined the Ministry. His job was to profile catches, get a handle on the companies, how they operate. I have had meetings with most, if not all, of the senior executives of fishing companies in Auckland on that, introducing myself, getting a feel for their operations. It was part and parcel of the role."

When asked if he also met with smaller fishing companies, he replied that it was

"routine for compliance managers to meet Chief Executives, fleet managers, not sales or accounting staff, but mainly the operational side of the business".

He named a number of companies, including a co-op. and a number of owner/operators (although this was not done routinely) but he would ring various people if he wanted information to know what the state of the market was, how the fishing was at the time and general information that was essential to the compliance business.

When questioned as to whether he visited actual premises on a regular or frequent basis, he replied that he had probably been to Sanfords *"half a dozen times, once or twice on investigations"*.

On other occasions he would go down and discuss issues with them, when he was requested to do so. In probing what type of issues he was asked to discuss as a Compliance Manager, he told the Inquiry that he was often asked about operational type of issues, namely questions about permitting of vessels or fishing permits.

Mr Bright described his role as follows:

"My understanding of the demarcation is, as far as policy and law and everything goes, we have been removed, quite rightly, from any interface with industry about what they want to do, whatever. But we still have a relationship with - we can't operate in a vacuum. They know what's going on and we meet with them. Certainly not frequently. My last meeting with Mr Young, for example, would

have been 12-18 months ago. With Sanfords, probably late last year. I had a meeting with Mr Barbarich in our offices two weeks ago of Anton Trawling."

It transpired that the meeting with Anton Trawling was to introduce the new Operations Manager to Mr Bright and there was an issue to do with permitting that Mr Bright referred him to the restructured FishServe to deal with.

The importance of introducing "*his new operations manager*" was on the basis that "*we interact with these people as well*".

Thus, if a Compliance Manager wanted to know anything about one of the company's vessels, he would ring the company's operations manager. "*So, we need to know who they were*".

He confirmed however, that he had never spoken to Mr Penwarden, because despite being a fisher in Auckland, their "*paths have never crossed*".

Mr Bright's explanation was as follows:

"Basically, he was an offshore fisherman. His vessel, from memory, very rarely came to Auckland, it operates outside. But, no, I've never met Mr Penwarden, as there's obviously a number of small operators I haven't met."

Mr Stuart, the current Manager, National Operations for Compliance in MFish and formerly District Compliance Manager in Nelson from 1995, also described the need for District Compliance Managers to know who the fishers are in their constituency, "*especially the major fishers*."

He maintained that DCMs should be "*on speaking terms with the CEOs, managers of the major companies*." The reason for this approach in his view, was that there are a number of compliance issues that could be resolved by discussing issues with the major fishers "*and that saves everyone a lot of time and effort*".

In canvassing the evidence from the witnesses about the type of roles forged with the industry players, it is evident that it was the major companies and major industry players who were visited and consulted on a semi-regular basis. These visits or consultations occurred across MFish personnel, including the permitting side of MAF/Fish as well as the compliance side. From the evidence of the Compliance Managers, it appears that following the restructure of the Ministry in 1995, the Compliance Managers still maintain this approach.

9.3.2.1 MAF/Fish's Attitude to Smaller Fishers

It has been submitted to the Inquiry that as far as the smaller fishers and the more modest fishing companies were concerned, MAF/Fish staff viewed them as nothing more than nuisances.

These submissions are supported by certain passages of evidence. Mr Penwarden told the Inquiry that he was aware on more than one occasion that he was described to MAF/Fish staff as a "*thief*," "*vagabond*", and a "*johnny-come-lately*" by Mr Wilkinson, who was very critical of Barine's operations. He described running into opposition frequently by people in the

industry and at MAF/Fish. He said he was “*aware of an attitude to us*”, and in particular an official

“at the Ministry of Fisheries once said to me that the sooner they get rid of me and people like me the better because then they, the Ministry, would really have control and that their intention was to have five or six large fishers in the New Zealand fishery.”

It has also been submitted that the official’s comment is consistent with a Ministry philosophy to which Mr Shallard refers in an affidavit filed in the scampi litigation where he said:

“MAF wanted commercial fisheries managed in such a way that fisherman were able to catch fish at the least possible cost, thus allowing for better economic investment which would ultimately see the resource developed for the benefit of the nation ... One means of ensuring this was by market transfers of quota from less to more efficient operators. Operators with larger vessels and better capital backing were better able to harvest the resource and invest in the industry to develop it to its full potential. It was recognised that the introduction of the QMS would cause the removal of smaller and less efficient operators. However, this was seen as being beneficial to the industry overall as it would best enable the maximisation of net national benefits for the industry.”

Mr Shallard also indicated that:

“Simunovich ...were clearly the major player in the fishery. The Minister would take some notice of what they had to say: the same as Sanford being the major player in the Northern snapper fishery...”

Mr Penwarden also described to the Inquiry his inability to have his telephone calls returned, including those at the Regional Office and at Head Office, when he left messages for Mr Shallard.

Another example of the different treatment received by Barine is the way in which its application for extra vessels in 1991 contrasts with that for Simunovich at the same time. This is covered in detail in the report on Term of Reference 1.

Other examples of the way in which MAF/Fish managed the processes relating to permit applications and permit issues, and the impact that these had on Barine and other fishers, are contained in the report on Term of Reference 1.

Two examples of the difficulty that the smaller fishers had in contacting MAF/Fish officials include first Mr Jose, who not only rang the Whangarei office, but on learning that his permit application had been forwarded to Auckland, travelled to the Auckland office, to see Mr Wilkinson, who was at that stage the RFMO for the Northern region and whom Mr Jose had been told, was dealing with his application. Mr Jose waited for over an hour and was told by another MAF/Fish official that he could not be seen but was not told that Mr Wilkinson was

away on Quota Appeal Hearings. No-one talked to him about his permit and as the documents have revealed (following the hearing of this Inquiry) a permit was issued but no-one notified Mr Jose.¹⁴¹

Mr Goodship told a similar tale. He described of being referred by the Northern region to the Southern region, constant phone calls to the Dunedin office as well as the Christchurch office but no-one was prepared to take his phone calls or respond to them. This continued for a considerable period before he was finally informed that he was unsuccessful in obtaining a scampi permit.

Further examples of the treatment of smaller fishers include:

- Three months after being granted a permit for the second year in a row, Mr Roderique's permit was revoked without prior discussion.¹⁴²
- The case of Mr Tau and Mr Pohio demonstrates lack of communication by MAF/Fish, difficulty in obtaining a cogent MAF/Fish response and a dismissive approach by MAF/Fish.¹⁴³
- As the Inquiry has pointed out, the case of Tuck – Lanauze shows delay, non-disclosure, and incompetence in replying to correspondence.¹⁴⁴
- Mr Muirson encountered long delays, stark differences in treatment and a failure to communicate.¹⁴⁵

In comparison with the recorded evidence of the contacts between MAF/Fish and Simunovich, the contrast is startling. Complaints from Mr Wilkinson of Simunovich were taken seriously, with a meeting being convened at Head Office to which Simunovich were personally invited to discuss issues of concern regarding their permits on 4 September 1990, directly with Dr Allen of Head Office.¹⁴⁶

Another example of the type of relationship that Simunovich and Mr Wilkinson had with officials is that relating to Mr Howell, who was a scampi fisherman who had received a special permit for scampi in May 1989. In early 1991 he was one of the smaller fishers whose entitlement to an ongoing permit after the section 65 moratorium was under review.

As a result of a complaint by Mr Wilkinson to the Auckland DCM Mr Howell was investigated for illegal scampi fishing. The Auckland DCM (Mr Chadwick) asked Tauranga, where Mr Howell was based, to investigate, and in that request noted:

¹⁴¹ Refer Term of Reference 1: Impact of policy on fishers Northern Region – Mr Jose

¹⁴² Refer Term of Reference 1: Impact of policy on fishers Southern Region – T.Roderique

¹⁴³ Refer Term of Reference 1: Impact of policy on fishers Southern Region – Mr Tau and Mr Pohio

¹⁴⁴ Refer Term of Reference 1: Impact of policy on fishers Chatham Islands and Tuck-Lanauze

¹⁴⁵ Refer Term of Reference 1: Impact of policy on fishers Chatham Islands - Muirson

¹⁴⁶ Refer Term of Reference 1: Head Office Meeting with Simunovich – 4 September 1990

“Vaughan Wilkinson in the Minister’s office, asked if Howell had a fishing permit and was assured by Russell Burnard and Bruce Shallard that his permit for scampi had been declined.”

Two days later Mr Nalder who was the DCM in Tauranga replied to Auckland with an account of the discussion he had had with Mr Howell. In that response Mr Nalder outlined the view that Mr Howell had of the motive behind the complaint from Mr Wilkinson:

“He indicated he knew the issue of his permit was opposed by an Auckland firm who had five vessels fishing the scampi industry and the non granting of his permit for the 1990-91 year was a direct result of an undertaking given by fisheries administrators to the Auckland firm in the presence of the Minister.”

Mr Howell stated it was a clear case of MAF Fisheries submitting to the will of industry. He pointed out the reasons for non issue were completely wrong.”

This incident illustrates both the extent of the contact and influence which Mr Wilkinson had with officials, in that he was able to raise at a meeting in the Minister’s office the issue of whether another scampi fisher had a valid permit and received an immediate response from officials. It also raises the question of the appropriateness of officials providing information on the permit applications of other fishers to third parties.

The reason that Simunovich had such ease of access and contact with MAF/Fish, both in the Regional Office and Head Office, is that MAF/Fish viewed Simunovich as the principal scampi fisher, from whom research was obtained and whose views and threats were taken seriously.

This is demonstrated by reference to a number of the documents surrounding the imposition of the scampi moratorium. When delegated responsibility to undertake an evaluation of all permit applications for scampi after the moratorium was imposed, Mr Arbuckle reported that historical permit holders will challenge any decision not to issue a s 65(2) exemption and:

“Simunovich Fisheries Limited have informed MAF (Auckland) that they will legally challenge any decision to allow an increase in the number of fishers authorised to fish scampi, particularly in QMA 1 and 2. They have asked MAF to inform any additional fishers who are issued with permits in QMA 1 and 2 of the likelihood of this challenge.”

Dr Allen, who convened the Task Force on Scampi Management on 14 January 1991, directed Mr Hore to ask Simunovich

“If they have any additional material that would be useful in determining sustainable yields and the Greta Point representatives should collect all the catch and effort data we can access as well as any additional research views on likely yields.”

He refers in the papers to a letter Mr Wilkinson wrote on 10 September 1990 advocating restriction on scampi fishing and the total allowable catch. Dr Allen notes that MAF/Fish should ask Simunovich for the basis of its view, because its data or analysis has gone further

than that available in MAF/Fish. He also asked if it is sound to use it, in MAF/Fish's assessment of whether a quota should be set for part or all of the fishery and if so, how much. It is pertinent that no other fisher in the QMA 1 and 2 Area was similarly asked, in order for MAF/Fish to be fully informed about the catch effort results. Given Simunovich's strong views about restraining scampi fishing in Areas 1 and 2, it is ironic that MAF/Fish did not factor this concern in, when Simunovich introduced the *Drysdale* (an extra vessel) into the fishery, where it fished Area 1 in the 1990-91 year and Area 2 in the 1991-92 year.

When Mr Shallard came to brief the Minister on 20 February 1991, he described the development of the scampi fishery. After initial development of the fishery by one trawl vessel based in Tauranga in 1986-87, further commercial interest in the fishery was shown by Simunovich Fisheries Limited, who conducted trials using an Australian scampi vessel in early 1988:

"Since that time this company (and others on a lesser scale) have used a number of their own vessels for short term exploratory fishing along the North-East Coast (Bay of Plenty and Wairarapa area)".

It seems clear that MAF/Fish was regarding Simunovich as the major player in the scampi industry. By 1990 Simunovich had the most vessels and was the company which had taken the most financial risks and put effort into the fishery. The issue is the way in which MAF/Fish responded to the significant position which Simunovich had in the scampi fishery.

The focus of MAF/Fish in forging relationships with industry players was on the larger companies or industry fishers, with whom they maintained contact and sought information. The perception by the smaller fishers, who presented their case histories to this Inquiry, that because they were smaller fishers or little players they did not feature in MAF/Fish's eyes, is understandable. As Mr Penwarden put it:

"Clearly, apart from the consultations that involved permit holders, I think it's fair to say that when there was an issue to be consulted on about scampi, that MAF were contacting Mr Wilkinson at Simunovich."

The ease of access for a company like Simunovich or Sanford, compared to the problems encountered by Barine, Mr Goodship and Mr Jose emphasised the perception that MAF/Fish was unevenhanded in their approach to the scampi fishers and favoured the big companies, and in particular Simunovich.

9.3.3 Closer Relationship with Industry Players on Working Parties

In the same way that the larger and more corporate interests had an advantage over smaller fishers in their respective relationships with MAF/Fish, there was also an advantage for those that served on the working parties. The Inquiry was informed that in each fishery, such as scampi or hoki or orange roughy, a combined working party of MAF/Fish officials and industry fishers met on a regular basis to deal collaboratively with management issues in the

fishery. These meetings were convened at MAF/Fish premises, either at Greta Point or in Head Office.

The smaller fishers grouped under their own federation, usually with one designated spokesperson. In the scampi fishery, the Independent Scampi Group (ISG) corresponded with MAF/Fish, through their solicitor.

Dr Ballard thought that:

“small fishers had the same level of access to staff in MAF as larger commercial companies because they had their own federation of commercial fisherman, whom he dealt with, along with the Fishing Industry Association, the Fishing Industry Board and the stakeholder organisations.”

On the documents in the evidence before the Inquiry, a number of representatives from the larger companies were members of the working groups. On those occasions, the larger companies had access to MAF/Fish’s decision makers to follow up their companies individual interests.

Mr Birdsall from Sanford described being at Greta Point coffee shop/lunch room, when he was attending on an industry research matter and he saw Mr Shallard, from whom Sanfords was awaiting an answer about whether Sanfords could obtain a permit to put another vessel into the scampi fishery. Mr Birdsall approached him and asked him when he was going to get an answer and Mr Shallard told him it was being decided and he would receive it in writing.

Similarly, Mr Patchell of Sealord described attending TAC Council meetings with Dr Allen and other people and he was able to have discussions with the officials on company business.

Mr Patchell said:

“I was attending meetings on - TAC meetings in Wellington, TAC council meetings with Robin Allen and other people, there would have been discussions on the margin somewhere.”

Referring to his notes that he made in his discussions with Dr Allen, he notes Mr Brierley’s comment that *“Allen agreed there was an anomaly”*. The subject of discussion was whether Sealord could *“carry over”* its fishing permit. Nevertheless, Sealord was not successful in getting its permit and a vessel in place to enable it to fish for scampi.

The importance of having access to Ministry officials was to ensure that applications or permit questions did not disappear without trace.

Mr Birdsall described taking permit applications to the registry *“personally”* so that there was a known face to the permit. The reason that Mr Birdsall did this was to ensure they did not disappear. He said, otherwise

“I think it sometimes goes into a black hole because it is in an area that there is no policy or precedent.”

If one of their applications had disappeared “*into a black hole*” Mr Birdsall or someone working for the company would make contact both by letter and by telephone and diary the response.

The emphasis by Mr Birdsall on following up Sanfords permit applications reinforces the perception that MAF/Fish responded to those persons who were prepared to confront MAF/Fish. The success of Simunovich in this regard is amply demonstrated by the numbers of frequent contacts, by phone, in person and in correspondence, which brought results. This is discussed in the subsequent section on the relationship with Mr Wilkinson.

In describing his relationship with MAF/Fish, Mr Birdsall told the Inquiry that he and MAF/Fish would talk to one another because “*they were fearful of me*”. Because of the importance to Sanford of obtaining a permit, Mr Birdsall was not prepared to let things lie.

The approach of MAF/Fish to applications by fishers depended on the frequency of contact and the strength of the approach made by the fisher. The little fishers who described their lack of success in making contact with MAF/Fish again contrasts starkly with representatives from the larger companies, such as Sanfords or Simunovich, being able to threaten legal action or fronting up personally to demand answers, with the latter approaches being successful.

Larger companies were also more likely to be at industry meetings where they could pursue their own interests outside the formal meetings.

MAF/Fish’s expectation that if fishers wished to pursue something, they should make a personal approach, did not reflect an even-handed approach to the administration. This emerges not only from the evidence set out above, but it also illustrated by the expectation from Mr Shallard that Mr Penwarden would have pursued his application for additional vessels, even though Mr Shallard’s letter clearly said he would refuse any more effort in the scampi fishery.

The problem was that it required some understanding or knowledge to pursue matters regardless of the first “no” in an endeavour to achieve the intended result.

The problem for the smaller fishers was that they had no way of knowing, nor did they have the influence to enable them to be taken seriously as their larger competitors were. When to this is added the apparent preference by MAF/Fish for larger enterprises and the focus on developing relationships and making visits to those enterprises, the Reviewers conclude that the interests of smaller fishers:

- Were not given proper weight in policy decision making; and
- Did not receive even-handed treatment in the processing of permit and vessel applications and associated enquiries.

At the least, the interactions with larger enterprises in an industry should not lead to the exclusion of or inadequate attention being given to the smaller fishers. Officials do need to consider if proactive action is needed to bring less forthcoming parties into policy development and administrative processes. In the latter case they should ensure that the

processes established to manage these areas of work, treat all parties consistently, and guard against the risk that larger enterprises or participants who are more active in pursuing their case do not get undue advantage.

9.3.4 Relationships with Previous MAF/Fish Personnel

In examining the relationships between MAF/Fish officials and fishers, an issue squarely raised in this Inquiry is whether ex-employees of MAF/Fish enjoyed a closer relationship with MAF/Fish officials to the benefit of their respective companies. Although this issue has been raised in the context of Mr Wilkinson, having been a former RFMO (Northern region) and moving to then being employed by Simunovich, there are numerous other examples where ex-MAF/Fish employees joined significant industry fishing companies. In defence of his position, Mr Wilkinson advised the Inquiry of three MAF/Fish employees (Messrs Mace, Patchell and Bishop) who joined Sealord.

Other former MAF/Fish officials have left MAF/Fish for the private sector and they include:

Mr K Walshe	Former Regional Manager, Auckland
Mr P Brierley	Former Regional Manager Nelson
Mr R Dobson	Former Director MAF Fisheries Management
Mr B Shallard	Former Operations Director
Mr C Ludeke	Former Registrar of Fisheries
Mr M de Beer	Former Registrar of Fisheries
Dr P Hendriques	Former RFMO (Central)
Mr R Boyd	Former RFMO (Auckland)
Mr P Major	Former Manager Policy Head Office

Apart from these specific examples, there are a large number of ex MAF/Fish or Ministry of Fisheries employees currently working in the fishing industry.

Sealord was another large company which had engaged former MAF/Fish officials, namely Patchell, Bishop and Mace. The efforts made these by ex-employees did not assist Sealord to obtain a scampi fishing permit or to get into the scampi fishery. As far as this fishery was concerned, Sealord did not have in either the Central region or at Head Office, an effective advocacy role in the way that Simunovich did.

When questioned about his relationship with Mr Wilkinson in particular, Mr Shallard told the Inquiry that after Mr Wilkinson left MAF/Fish, Mr Wilkinson was viewed

“as a fairly vociferous representative of one of the companies. That’s where it stopped and started, started and stopped”.

Mr Shallard also described the meetings with industry groups, and the relationship with ex-employees on those groups. Mr Shallard acknowledged he met with Mr Wilkinson

“and a great number of others in terms of those sort of industry discussions ... there were people like Mr Wilkinson, Jim Mace, who went from the Ministry to Sealord, and those sorts of things, they tended to all become involved in the industry organisations once they had taken a jump, so to speak, and you then ended up having those sort of business relationships on that level.

There was quite a few that would fit into that category.”

The issue which has been raised in this Inquiry is that Mr Wilkinson, once he left MAF/Fish, had the advantage of continuing relationships with people within MAF/Fish, which gave Simunovich an advantage.

It was expressed in this way by Mr Sullivan, the former solicitor for Central region:

“There was a concern, and it was a concern held by me and it was a concern I believe held by others, that some of the processes in the Ministry, particularly between people who had been very, very long involved in the Ministry and some people outside the Ministry who have been in the Ministry were - it's not that they were corrupt, it's they were very ad hoc and loose and not - you know, there wasn't this recognition that perhaps has later become much more prevalent.

It may be that it's an expression of culture that existed at the time but, you know, people were much less conscious, or appeared to be much less conscious, of appearances and perceptions about too close a familiarity once you left the organisation. Certainly that was a feeling that there was - some of the relationships were a little too close given that that person was no longer in the Ministry.”

Mr Shallard was given an opportunity to respond to this perception. He emphasised that New Zealand is “a tiny place” and that if MAF/Fish had to worked with people who had been in MAF/Fish and gone to the industry, MAF/Fish could not deal with two-thirds of the major fishers in the industry:

“... , if we hadn't worked with people that had been in the Ministry and gone to the industry, we would have been not dealing with two-thirds of the major players in the fishing industry. They all hired Ministry people.

I don't know how that could have been handled any other way. If person X goes to work for a company and he takes on the role of having the relationship with the government of the day because he's competent, that's why they've hired him, but they've also hired him because he knows people in the government and can work effectively with them. There's a whole industry out there of people that actually do this for a consulting living.

You know, it's part of the way New Zealand business operates. For us to not have done that would have made our life impossible. I mean, if you look at - I just did a quick run down over the last few days of how many people I could name off the top of my head that have gone to work for various parts of the fishing industry during the time I was in the Ministry. Most of them are still there and there's about a dozen of them I could reel off and say where they went to work. Most of those people took on jobs in those companies that required them to interact with the government."

The fact that both Ministries have had to deal with former employees, who would "know the ropes" was a reality which the Ministries have had to and still do deal with.

The Chief Executive, Mr Tuck, told the Inquiry that "collaboration with stake-holders is very important" and that he could see "nothing wrong with MFish staff leaving and going and working for the sector, and nothing wrong coming back the other way." The key to managing any potential conflicts is a "question of ethics and integrity."

In short, he concluded:

"It comes down to the integrity of the Ministry's staff who are dealing with that person and treat that person the same as they would treat somebody in that company who wasn't a former Ministry of Fisheries employee."

On the evidence before the Inquiry, there is no doubt that former employees had easier access to MAF/Fish than other fishers.

Mr Bishop confirmed this, when he acknowledged he had maintained his relationships with Ministry staff when he went to work at Sealord. He did not think Sealord was treated any differently but his ability to contact MAF/Fish and nominate the person he wanted to speak to you certainly helped:

"Q. Were you able to contact the Ministry and nominate the person you wanted to speak to and get easy access to the Ministry, do you think, as a result of that?"

A. I think it helped. I think you'd have to say yes, it did. You knew who to contact about certain things. You knew if they were pulling the wool over your eyes in certain things. You knew the background. You knew how the system operated. So, I think it helped, yep, it definitely did."

We are left in no doubt that as an ex-employee, Mr Wilkinson had ready access to MAF/Fish, in contrast with the other scampi fishers.

Whilst there is conflicting evidence about his presence in the Auckland Office after he had joined Simunovich,¹⁴⁷ nevertheless, on Mr Wilkinson's own evidence, he did visit the Auckland office 10-15 times over a two to three year period, he was able to engage Head Office staff, particularly Dr Allen, Mr Shallard, and Mr Burnard when he wished to, and the correspondence from Simunovich records numerous telephone conversations with both regional staff and Head Office staff.

Mr Wilkinson believed that his ability to communicate was not unique. He responded to the following question:

“Q: there is a pattern here of you being able to communicate often with two reasonably senior MAF officials, follow it up in writing, and then refer back to those telephone conversations to secure the position as you were able to deal with it over the phone?”

A: I'm saying exactly, yes, but I'm also saying that's not unique. Anybody could have done that. In fact, people were doing that.”

The evidence before this Inquiry does not support that belief. We do not wish to criticise Mr Wilkinson who was clearly competent, able, and an excellent advocate for his company, nor are we criticising Mr Wilkinson for using all of his resources, including his past knowledge, to undertake the position he was hired to do for Simunovich.

The fact that Mr Wilkinson rang the Deputy Group Director, Dr Allen, four times on one day gives testament to the ready access of Mr Wilkinson to the principal senior official dealing with the scampi fishery at the relevant time.

His knowledge of MAF/Fish's processes, the detail of the Fisheries legislation and his knowledge of the regional plans enabled Mr Wilkinson to “*speak the language*” of MAF/Fish and to obtain advantages for Simunovich, by demanding responses or decisions and using the looseness of wording or application of policy to maximise Simunovich's advantage.

Indicative of not only Mr Wilkinson's knowledge of accessing information through OIA requests, is the research and work he had undertaken previously within MAF/Fish. Mr Wilkinson described to the Inquiry that a few days after he had left MAF/Fish, he made his first official information request to Mr Clark of the Fisheries Research Division, saying:

“Could I have all of the information please from the Wanaka surveys that I participated in, which are the research trawls under the OIA. That includes all of the prawn and scampi type catches.”

Mr Wilkinson could not remember whether he had asked for it in writing or over the phone, but he asked for it immediately after he left MAF/Fish and was supplied with it. It appears no-one at MAF/Fish in the Research Division or elsewhere had occasion to question whether

¹⁴⁷ Walshe & Younger say Mr Wilkinson visited the Auckland office more often and more regularly than most industry people: Mr de Beer and Mr Wilkinson deny that (although Mr de Beer did not work in the Auckland office until October/November 1992).

MAF/Fish research should be available to an ex-employee who clearly knew of it, had participated in it and was now wishing to use it for private purposes¹⁴⁸.

The advantage to Simunovich, compared to other fishers, was obvious. Unless such information is readily available to other fishers or being published or drawn to their attention, such a request from a former employee should raise a question as to whether it should also be provided to other fishers, to maintain impartiality and evenhandedness.

Even within MAF/Fish, former MAF/Fish employees recognised the advantage a former MAF/Fish employee had in relation to others. Mr Sullivan described it as follows:

“I only knew Vaughan Wilkinson by reputation until much later, but certainly Steve Bishop and others in the Ministry knew Vaughan Wilkinson at a personal level and their concern was – and by saying this I don’t mean to cast any aspersions on Mr Wilkinson by saying this – the concern was because he was a person who he had been he was able to manipulate the system, unfairly constructed policy process because of his greater knowledge and access to the Ministry. It is natural that an ex-Fisheries science manager from Auckland is going to have a lot more savvy in terms of access to an organisation and knowledge about an organisation that your average Joe Blow fisher, and that was the other concern.”

Indeed, Mr Wilkinson’s general use of the OIA, building on his knowledge brought from MAF/Fish, was considerable. He deposed:

“Information obtained by Simunovich from the Ministry was obtained routinely, and with much frequency, by written requests under the Official Information Act. Numerous of these requests remain on Simunovich’s files and are available as desired.”

and

“Q. ... You are saying that information was asked under the Official Information Act over the phone?

A. Yes. You will find it in plenty of my communications, I keep reminding the Ministry, and there are plenty of Ombudsman’s rulings, OIA requests don’t have to be in writing, they can be oral. The Ministry would have heard that hundreds of time from me. An oral request is a request.

They will say to you, and you’ll find correspondence from me over the years, not just in this fishery, where the Ministry says, “You put it in writing.” I’ll respond saying, “I’m not required to put it in writing. I’ve made my request.

¹⁴⁸ It has been submitted that the information requested by Mr Wilkinson was contained in 4 reports by Clark and King and published in the November 1985 Vol 12 Catch Magazine Nos. 5-9 at p16. The article refers to a trawl survey by Clark and King but does not contain any reference to scampi, so other fishers would not be aware of its relevance.

So, as far as you've understood the request it is an Official Information Act request. Either determine to act upon it or not."

This passage is but one example of Mr Wilkinson being able to assert his knowledge and expertise over MAF/Fish.

The issue of advantageous access to information also arose in the context of a taped telephone conversation between Mr Penwarden and Mr Bright.

In his brief of evidence dated 13 May 2003 Mr Bright provided context for a phone conversation between himself and Mr Penwarden on 5 April 2002. Mr Penwarden had referred to this phone conversation and had annexed a transcript taken from a tape of part of the conversation as exhibit F to his affidavit of 15 May 2002.

The transcript recorded¹⁴⁹:

IB: and he [Wilkinson] made a couple of comments about um

NP: So what did he say Ian

IB: arr, basically he was telling Steve and I, Steve and I looked at each other and couldn't f...ing believe

NP: that he knew stuff from the Ministry

IB: that he knew before we knew

NP: he knew before cause there were people in the Ministry sympathetic to him

IB: that's what he was saying".

This suggestion was based on a conversation between Mr Bright and Mr Wilkinson of Simunovich in 1998. Also at that meeting was Steve Bell who was an investigator in the Auckland compliance office. Mr Bright's evidence was that at that meeting Mr Wilkinson had indicated that on occasions he had early information sometimes receiving that information before other Ministry officials.

Mr Wilkinson gave evidence, which was corroborated, that he received information in April 1997 from a solicitor, who was not then associated with the Ministry, that there was an investigation going on in Auckland relating to the export of undersized snapper to the USA. At the meeting with Mr Bright, Mr Wilkinson advised Mr Bright that, if he had an investigation underway involving undersized snapper to the USA, then that investigation was compromised. Mr Wilkinson did not tell Mr Bright the source of the information. Mr

149 [IB = Ian Bright, (Minfish Official) NP = Neil Penwarden]

Wilkinson asserted that allegations that he or Simunovich had ever sought or obtained from Ministry officials information regarding covert operations were false.

The advantages that Mr Wilkinson brought to Simunovich as a result of being an ex-employee of MAF/Fish were considerable. They included knowledge of research results, administrative processes, Ministry personnel, how to use the OIA, and the easier and more effective access that such knowledge enabled. He and others in that situation are perfectly entitled, and would be expected by their new employers, to use those advantages.

Other employees of private enterprises can build that sort of knowledge and access over a period, but ex-departmental employees can bring it with them. We acknowledge the benefits of such movements between government and industry, and do not recommend constraints on such movement or on the use of such knowledge by ex-employees (unless it amounts to conflict of interest or breach of confidentiality).

The responsibility is on departmental staff to ensure that their processes and decisions do not unduly accommodate the advantages that ex-employees may have. The interests advocated by ex-employees must be properly balanced within the wider public interest. Current staff need to be alert to the risk that a perception of favouritism could develop if those staff do not deal with ex-employees and their interests in ways which are seen to be totally even-handed.

9.3.5 Simunovich Contacts – Frequency, Assertiveness, and Relative Importance

In addition to the matters already raised above it is pertinent to review other characteristics of the contacts that occurred between Simunovich and MAF/Fish officials, particularly those between Mr Wilkinson and officials.

The Inquiry heard evidence that such contacts occurred frequently, particularly at various times when there were significant issues developing in the fishery, that Mr Wilkinson displayed considerable assertiveness and at times dominance in these exchanges, and that particular attention was paid to the views he conveyed because of the fact that Simunovich had achieved a dominant position in the scampi fishery.

In the final submission from Barine and Sealord considerable emphasis is placed on the results of the ongoing exchanges between Simunovich and MAF/Fish from the period 1988 through to 1993. The submission states

“Indeed it is difficult to avoid the conclusion that the entire history of the management of the scampi fishery has been driven and manipulated by Simunovich. A Ministry operating at arms length could not allow this to happen. The history speaks for itself. Virtually all of the pivotal decisions in the history of the fishery have been at Simunovich’s prompting and to Simunovich’s benefit vis-à-vis the other fishers.”

We have referred before to the fact that there is no problem or concern about the way in which Mr Wilkinson and Simunovich acted in pursuing their interests with MAF/Fish. The

issue is how officials should respond to that type of approach. After considering a number of examples of the contacts between MAF/Fish and Simunovich we come back to consider what the appropriate response of officials should have been.

From mid-1989 to July 1992, there are frequent communications exchanged between Simunovich and MAF/Fish. The requests for official information, the correspondence from Simunovich to MAF/Fish, and meetings and phone calls, far outweigh any of the other files of correspondence and documents which we have viewed in the scampi fishery.

In reviewing all of the correspondence and contacts between MAF/Fish and Simunovich, there are the following contacts which we wish to highlight. There are others but these may serve as examples of the relationship which Simunovich enjoyed, and which contrasts with that of other fishers.

Letter Dated 26 July 1988

The first is the letter of 26 July 1988 from Mr Wilkinson to Ms Campbell, the Registrar of Fisheries in Auckland. In his letter, Mr Wilkinson records that he has gained an understanding from the then RFMO, that there was a policy change in the scampi fishery, namely that commercial permits could now be issued rather than special permits.

We have dealt with this issue under the non-QMS policy history,¹⁵⁰ where we note that the policy change was barely noticeable on the policy documents that were later promulgated from Head Office. Importantly, it was this understanding that prompted Mr Wilkinson to seek commercial permits for the scampi fishery. Once commercial permits were issued, they could not be withdrawn and the fisher concerned was given greater comfort, as the permits would be issued as a matter of course on an annual basis. On the evidence and permits in the scampi fishery available to the Inquiry, the change in policy appears to be only signalled to Mr Wilkinson.¹⁵¹

There is no evidence from any other fisher that anyone in MAF/Fish notified them that they could now apply for s 63 permits as a result of the change in policy. The change in permit policy benefited not only Simunovich, but subsequently some other scampi fishers in the Northern region. This assured those scampi fishers that they were fishing a commercial fishery and unlike special permits, the commercial permits would be renewed.

Letter Dated 12 April 1989

In his letter of 12 April 1989, Mr Walshe, the Regional Manager Northern Office wrote to Mr Ivan Simunovich following a meeting held at Simunovich's premises, to discuss the priorities and objectives for MAF/Fish North and the 1989-90 year. This meeting was convened at

¹⁵⁰ Refer Term of Reference 1: 1988/89 Fishing year

¹⁵¹ We note that it is not accepted by the RFMO that no-one in the Northern Office advised other fishers of the change in policy. The evidence from the other fishers at the Inquiry does not reveal advice having been given about a change in policy in July 1988.

Simunovich, where scampi was discussed as “*it was a core issue to Simunovich.*” At the end of the letter, Mr Walshe wrote:

“Thank you once again for the time that you, Vaughan and Peter spent talking to us about the MAF priorities and objectives. Our special thanks for your generous supply of scampi.”

The reference to the supply of scampi is dealt with in the next section under “Gifts”. The reference to the time spent talking about MAF/Fish policy however, highlights the practice that MAF/Fish undertook of visiting Simunovich and other “*major industry players*” to obtain their views.

Apart from industry meetings or working parties, the views of the other scampi fishers, either in the Northern region or elsewhere, are not sought in this way.

4 September 1990 Meeting at Head Office

Following a complaint from Mr Wilkinson, Dr Allen convened an urgent meeting on 4 September 1990 at Head Office in Wellington, at which Mr P Simunovich, Mr Wilkinson, Dr Allen, Mr Arbuckle and Mr Bishop were present. This has already been described¹⁵² and marked the intervention of Dr Allen in the Central v. Northern dispute, with Dr Allen removing all delegations and the management of the scampi fishery into Head Office. The important aspect of this meeting is that Simunovich was granted a special audience in Head Office, but no other scampi fisher was invited or even knew about the reason for the issue to have arisen or the meeting itself. Mr Bishop said he had been surprised to find Simunovich represented at the meeting.

No communications were sent to or received by scampi fishers about the difference in permitting procedures between Central and Northern or the details of the meeting. It is particularly pertinent to note that the file note of the meeting with Simunovich records that, among other things, Simunovich would be advised of MAF/Fish’s position, that depending on the outcome from MAF/Fish, Simunovich were warning that a review under s 63(11) may be sought and the meeting was to elaborate on the reasons and concerns to Simunovich. There is no mention of obtaining the views or concerns of other scampi fishers and what the outcome may mean to the other fishers, apart from Simunovich.

As a result of Simunovich’s meeting with Dr Allen on 4 September, Mr Wilkinson wrote to Dr Allen, thanking him for the opportunity to discuss the management of the scampi fishery in the Central region and requested the Director-General to either take a judicial review application together with Simunovich or provide Simunovich with an independent legal opinion from a leading authority on administrative law.

Again, following the 4 September 1990 meeting with Simunovich, Dr Allen advocates the case for Simunovich in his letter to his regional managers, noting that “*the central proposal*

¹⁵² Refer Term of Reference 1: Head Office Meeting with Simunovich - 4 September 1990

has upset Simunovich” and containing the argument which Simunovich had made to him at the meeting. It was then that Dr Allen indicated his preference that the Northern proposal was a reasonable way to proceed.

MAF/Fish Letter: 27 September 1990

As a result of the meeting in Head Office with Simunovich and MAF/Fish officials and correspondence from Mr Wilkinson, Dr Allen formally wrote to Mr Wilkinson on 27 September 1990 advising him of the new regime to be used to manage the scampi fishery for the 1990-91 fishing year. Mr Wilkinson was personally advised that a s 65 moratorium closure would be announced and that exemptions to the restriction will be given to those who hold commercial permits under s 63 of the Act. He also told Mr Wilkinson that a limited number of special permits would be issued in each area for investigative fishing and advised him that Simunovich’s application for special permits and for scampi fishing are unnecessary but *“if this is not satisfactory to you, please let me know”*.

Dr Allen specifically deals with Simunovich’s concerns about the restriction of the number of vessels and catch in the scampi fishery but advises that a s 65 moratorium would accommodate his concerns. He also said:

“I do not consider the Minister ought to be advised to invoke emergency measures pursuant to s 12 of the Act.”

On 27 September 1990, when Dr Allen informs Simunovich of his intention to issue a s 65 moratorium in the scampi fishery, he advises Mr Wilkinson that he was awaiting a legal opinion on the correct provisions for the management of the fishery, taking into account Mr Wilkinson’s comments. Dr Allen finishes the letter by advising:

“We can understand your concern about the direction MAF has taken with respect to the management of the scampi fishery given the large investment that your company has made in the fishery. The management regime to be adopted by this Ministry will, I hope, doubt [sic] alleviate your company’s concerns. Please advise if there is any further information required.”

No other scampi fisher received this letter or advice. The tone of the letter is placatory towards Simunovich and appears to cater to Simunovich’s every concern raised. The management regime proposed appears to be subject to any further criticism or concern that Simunovich may have and there is no reference at all to the views of other scampi fishers or their circumstances mentioned.

This letter reinforces the perception that Simunovich were regarded as the only scampi fisher that really mattered to Head Office. Again, the advantage that Simunovich had in receiving commercial permits is underscored by Dr Allen’s specific acknowledgment that exemptions would be given to those who hold commercial permits.

MAF/Fish Letter of 24 December 1990

Mr Walshe wrote directly to Mr Ivan Simunovich in response to a needling letter from Mr Wilkinson of 18 December 1990, expressing concerns about the rapid escalation of effort in the scampi fishery.

Mr Walshe, clearly irritated by the letter, writes to Mr Ivan Simunovich expressing his “annoyance”. He wrote:

“Whereas I can understand Vaughan’s anger that there has been no decision on scampi, the tenor of his letter is that I have not sought to have the matter resolved and have not informed Head Office of our concerns for the fisheries and the concerns of your company. If Vaughan was to reflect, he would remember that I have reported to him or had my staff report to him on several occasions, of initiatives we have taken in Head Office and with the Minister on his behalf. At times I have made myself unpopular with my colleagues attempting to goad some action on the scampi issue. I don’t mind that, that’s what I am paid for; but when I also get those I am attempting to help criticising me for apparently not conveying their concerns I get more than a little angry.

I have spoken to Bruce Shallard about the issue ...

I would like to reiterate that I see my job as assisting fishing interests to gain the benefits of the sustainable fishery. In this respect I have been supportive of Simunovich concerns for the scampi fishery, and have pushed hard for the matter to be resolved.

My personal view is that the aggressive attitude that Vaughan has taken on the issue has at times hindered, not helped the process of resolving the scampi issue.

...

That issue aside, I would like to say how much I have enjoyed working with Simunovich in 1990 and look further to further positive and cooperative meetings with you in 1991. ”

This letter appears to be unique in that no similar letter was sent to any other scampi fisher. The relationship of the regional manager with Simunovich appears to be one of an advocate attempting to assist and help Simunovich in the scampi fishery. It is plain, that the regional manager has encouraged his staff “to report to Mr Wilkinson of initiatives we have taken in Head Office and with the Minister on his behalf.”

As he himself describes it, he was not only supportive, but he was clearly advocating the cause for Simunovich. We can find no other similar letter written to any other industry player or scampi fisher.

These examples serve to demonstrate the closeness of the relationship between Simunovich and Ministry officials. Although there are terse comments made in the last example, reflecting that the pressure and expectations coming from Simunovich were reaching a threshold of unacceptability to at least one official, it is plain that by and large Ministry

officials aligned themselves with Simunovich and attempted to either appease or assist Simunovich when it raised concerns.

Other Examples

Other examples serve to highlight the perceived closeness of the relationship between Simunovich and MAF/Fish, with the consequent result that Simunovich was able to influence the decision makers.

- When the Central region signalled its intention to cancel Simunovich's commercial fishing permit in QMAs 2, 7 and 8, Mr Wilkinson requested "*an office solicitor's opinion*" on MAF/Fish's intention to cancel those permits.
- The inconsistent decisions which were made in allocating ICE in SCIs 1 and 2, 4 and 6A, which followed Simunovich's urging that ICE be allocated in those regions. However, when four other scampi fishers urged that ICE allocations be made also for QMAs 3 and 6B, a position which Simunovich did not support, MAF/Fish did not allocate ICE.
- Mr Sullivan, the former office solicitor in Nelson, in describing to the Inquiry the discovery that Auckland had been permitting Northern fishers, and in particular Simunovich, he said:

"... it immediately struck myself, Steve Bishop and others in the management team that there was something not right about this process because it all seemed to be favouring Simunovich ... but what it appeared to me and others was this had a clear process to favouring someone in the know versus and I didn't know anything about Barine at the time. I was thinking about Central Region fishers and so were the others in Central. We didn't even know this fishery was open."

- As he described it, there were very few permits being issued, if any, to Central region based fishers and he was conscious that they had been disadvantaged:

"because the race it became apparent that the race for the fishery had already commenced in Auckland without anybody really realising it."

Added to these examples, is our consideration of the unevenhanded treatment which was given to other fishers in the scampi fishery, compared to that of Simunovich. We have addressed this fully in Term of Reference 1, under Impact of Policy on Fishers.

The perceptions within MAF/Fish and in the industry, were that Simunovich was being treated differently. There was an assumption on the part of Mr Wilkinson that MAF/Fish would respond to his demands or requests and would meet with him when asked, and in turn, MAF/Fish appeared to have been influenced by Simunovich to the degree that all the key

decision-making in scampi management created the perception of being driven by Simunovich submission or demand.¹⁵³

In the overall sequence of interactions between Simunovich and MAF/Fish between 1988 and 1993 another period which stands out as a time when the interactions were particularly intensive and the pressure applied by Simunovich was of significance. This period was between September and December 1991 when Simunovich was reacting to delays in the issue of permits for scampi for the 91-92 year, the initial low level of total catch limits in some areas of the scampi fishery, and disputes on vessel approvals relating to the *Drysdale* in particular.

Overall the impression gleaned from examining four to five years of interactions and the nature of the outcomes from those exchanges is that the exchanges with Simunovich were not appropriately counter-balanced by proper consideration of the interests of other sectors of the scampi fishing industry.

MAF/Fish never took care to ensure that it was not allowing Mr Wilkinson to be treated differently to others and obtaining advantages that were beyond other fishers. The onus was on MAF/Fish to ensure that its processes did not allow a knowledgeable and intelligent ex-employee to take advantage of MAF/Fish's inadequate processes; not only was there a perception that Mr Wilkinson was being treated differently to others, the reality was that he was treated as someone who knew what he was talking about and had to be taken seriously.

“ Mr Wilkinson was probably a voice we heard more than most. He was a very assertive person. We thought he had excellent legal advice and so we took all of that very seriously. I imagine, you know, he did contribute to it because everyone that was part of the debate contributed something and, I guess, more often they contributed, but more importantly, the quality of their contribution had an impact on what happened.

So, we listened to people from the industry, from environmental groups, from other Government Departments, and they all had a part to play, but I can certainly say that Mr Wilkinson had a substantial one, simply because of his persistence and what we judged at times was the quality of what he had to say.”

Dr Allen's evidence reinforces the view that MAF/Fish were influenced by assertiveness, those that had excellent legal advice and the quality of the person's contribution. Dr Allen's answer alludes to Mr Wilkinson's substantial contribution to “*the debate*.” This serves to reinforce the perception that MAF/Fish was open to persuasion and despite its policies, could allow a person such as Mr Wilkinson to have a greater influence on it than others. The fact that he was an ex-employee of MAF/Fish, although MAF/Fish denies this gave any advantage to Simunovich, clearly worked in Mr Wilkinson's favour.

¹⁵³

It has been submitted to the Inquiry that Simunovich was “*frequently refused its requests*” and was disrupted in its fishing activities as were other fishers, by decisions of the Ministry and the Minister. Reference is made to Simunovich's request that it sought implementation of fishing plans under Part I. The evidence before the Inquiry showed a prompt reaction on the part of MAF as we have canvassed elsewhere, and the request by Simunovich for a s 12 Emergency Restriction led ultimately to the s 65 moratorium.

MAF/Fish was clearly influenced by him and there is no evidence to suggest that at any time, did the decision-makers stand back and analyse whether they were dealing with Simunovich in a professional and arms-length manner. The perception that Simunovich was already being favourably treated had been raised in the Central v. Northern dispute¹⁵⁴, culminating in the meeting with Simunovich on 4 September 1990. No cognisance was taken of the fact that Mr Wilkinson and Simunovich were being asked to attend the meeting personally with Dr Allen, Mr Bishop and others, and that even the follow-up was to the exclusion of any other scampi fisherman.

MAF/Fish officials failed to gauge whether they were acting even-handedly amongst all the scampi fishers, fairly and impartially. We do not make any finding or suggest that any Ministry official was dishonest in any way, but their inadvertence to ensure that they were acting fairly, has led us to the conclusion that their relationship with Mr Wilkinson and Simunovich was not professional or at arms length.

We acknowledge that outcomes do not have to be equal for all industry players. But they must all be treated impartially and with integrity, taking proper account of all players' interests.

9.3.6 Gifts

During the course of the Inquiry, the issue of receipt of gifts by officials from fishers in the industry arose. We deal with four aspects of this issue.

Scampi from Simunovich

In his letter of 12 April 1989, Mr Walshe (Regional Manager, Northern region) wrote to Mr I Simunovich thanking Simunovich Fisheries for the opportunity of obtaining their *comments on the "priorities and objectives for MAF Fish North in the 1989-90 year"* and in the last sentence of his letter he stated:

"Our special thanks for your generous supply of scampi."

This letter was referred to above and referred to the meeting at which MAF/Fish officials had attended at Simunovich to obtain their views on the 1989-90 MAF/Fish North's policy document.

Mr Walshe's evidence on this issue was that he had attended a meeting at the offices of Simunovich Fisheries Limited and he:

¹⁵⁴ Refer Section The Central v Northern Crisis

“... may have mentioned before or during the meeting that he was hosting a function for MAF Fishery staff at his own residence later that day. At the conclusion of the meeting, Simunovich Fisheries gave him a tray of scampi for his function.”

When questioned about this incident, Mr Walshe told the Inquiry that he had a meeting with the regional staff of the managers at his home and had arranged a barbeque. The reference to a “*generous supply of scampi*” was to two trays that had been given to him by Simunovich.

He told the Inquiry was told that that was the first time he had received fish from any fishing company and it was not something that happened regularly within the industry, although small gifts of fish did occur as “*Sanfords used to give fish at Christmas*”.

Christmas Gifts

The Inquiry was told that Sanford gave chickens and turkeys at Christmas not fish. Mr Walshe’s recollection was that:

“Sanford Ltd had a policy of providing fish to MAF staff during Christmas, although I did not take any such fish. I cannot recall any other fisher having such a policy.”

Whilst stating that the practice of giving gifts to MAF/Fish was not normally done Mr Shallard indicated that “*Sealords made a practice of supplying Christmas cakes every year to the staff in Head Office.*” Sealord submits that if this occurred at all, it was a one-off and unusual event.

Mr Chadwick, as Northern region’s DCM also acknowledged that he had accepted a gift of processed salmon from an old police friend he had served a formal warning on and accepted the gift on the basis it was “*not a bribe, but market sampling*”. He saw this as a joke, not as a formal gift, which would have been given to the rest of the staff.

He told the Inquiry that he did not find the practice of gift giving unusual although he personally had been warned about getting too close to bigger companies.

Entertainment and Invitations

Mr Walshe also gave evidence that on 11 January 1994, he wrote to Mr Wilkinson, thanking him for inviting his wife and he to a Simunovich function at the new restaurant The Kermadec. His evidence was that Mr Wilkinson invited them to come back to watch the Kiri Te Kanawa Concert the following week, which was to be held directly below the restaurant and Mr Walshe accepted his invitation. He had tried to get tickets for himself and his wife to attend the concert but was unsuccessful “*and it may be that I had mentioned this fact to Mr Wilkinson.*”

This evidence was contradicted by Mr Wilkinson to the extent that he did not formally invite Mr Walshe to attend the Kiri Te Kanawa Concert, but rather the concert was taking place at the time The Kermadec was having a private function, to which Mr Walshe was invited. Mr Wilkinson remembered that this was only one occasion, not two as described by Mr Walshe.

“Q. *Let's just deal with the Kiri Te Kanawa concert. As I understood Mr Walshe's evidence, that's the following week?*

A. *He's wrong*

Q. *It's the same day?*

A. *It's the event that we invited him. That was our opening. The restaurant wasn't finished and we had been endeavouring to get it finished and we didn't, so we decided to celebrate informally and have that function to coincide.”*

Mr Wilkinson did not see any difference between an invitation to the opening function and the launching of his ship. Mr Wilkinson recalls that about a week after the official opening Mr Walshe and his colleague were at the Kermadec restaurant and spoke with him. In his view Mr Walshe “*got his events back to front*”.

Whatever the exact circumstances Mr Walshe agreed “*being objective, it was the wrong thing to do. I could see how people would perceive it in a different light*”.

Policies on Gifts

As noted earlier in this section, the Public Service Code of Conduct 1983 imported Regulation 47 of the Public Service Regulations 1964. This Regulation prohibited either directly or indirectly, acceptance of gifts or presents from any member of the public concerned directly or indirectly connected with the duties of an employee or in connection with the Public Service.

In addition, MAF/Fish had its own Code of Conduct entitled “*The MAF Way*” and under the section headed “*MAF's expectation of its people*” paragraph 6 stipulates:

“6. *Private Activities*

Do not undertake any private activity (including other work), or accept gifts that could conflict with your work for MAF or compromise MAF's integrity.

Note: Sometimes this can be a difficult line to draw. Impropriety does not necessarily involve dishonesty. Propriety is often a matter of public perception. Therefore, MAF people must not only be honest and impartial, we must also be seen to be honest and impartial. If in doubt talk to your supervisor and make a record of any resulting agreements.”

The respective Codes make it abundantly clear that the acceptance of gifts is expressly forbidden. The “MAF Way” encapsulates the reason for such prohibition, stressing that propriety is often a matter of public perception and the importance for MAF/Fish people to be seen to be honest and impartial. It stresses that impropriety does not necessarily involve dishonesty and we have already expressly made it clear that we do not believe there is any dishonesty involved on the part of any MAF/Fish personnel.

However, the acceptance of gifts, invitations to restaurants and/or concerts feeds a perception that MAF/Fish personnel are not impartial.

Whilst attendance by MAF/Fish personnel at opening functions for a particular company may be acceptable, the question must always be asked: *“Is attendance at this company’s function something which would give rise to a perception that MAF are being partial or unevenhanded?”*

These questions must always be asked in a context of consistent practice. If MAF/Fish are invited to attend certain functions on a regular basis by one company only, the question must be raised why are MAF/Fish attending: is it consistent with other industry players: does it give rise to the perception that MAF/Fish are only interested in big businesses who hold important functions or is the behaviour of MAF/Fish consistent with all players in the industry.

These questions, as the *MAF WAY* suggests, should be discussed and taken into account in the practice of either the regional officers or the direction of Head Office.

In turning to the examples which have been raised in this Inquiry, the acceptance by the Regional Manager of the Northern Office of scampi from Simunovich to entertain other MAF/Fish officials at his own home function is unprofessional and gives rise to a perception that the relationship between the regional manager and Simunovich is not at arms length.

Similarly, invitations which Mr Walshe perceived to be extended to him in a private capacity, to the Kermadec Restaurant, with the attendant concert, gives rise to the same perceptions. This is not to say that the Regional Manager was dishonest in any way, but this conduct raises questions about his ability to remain impartial, even-handed amongst all fishers and his ability to be fair.

With Mr Walshe’s letter to Mr Ivan Simunovich of 24 December 1990¹⁵⁵ in which he makes statements that *“those I am attempting to help”* and *“I have been supportive of Simunovich concerns for the scampi fishery and have pushed hard for the matter to be resolved,”* it gives rise to serious concern that MAF/Fish have not been professional in their relationship with Simunovich, have aligned themselves too closely with Simunovich’s concerns and have acted in support of Simunovich, instead of appraising their actions in light of the Codes requiring professionalism, even-handedness, fairness and impartiality.

¹⁵⁵ Refer to previous section: Simunovich contacts – frequency, assertiveness and relative importance

The acceptance of gifts and entertainment offers, and in particular the acceptance of gifts from certain companies which were also having influence in the development of fishery policy, where MAF/Fish was involved in ultimately allocating valuable property rights, compromised the independence and integrity of MAF/Fish.

9.3.7 Relationship with Compliance Staff

The evidence before the Inquiry revealed that staff of the Ministry, both in the late 80s up to the present time, used and still uses certain fishers to detect offending by others.

Simunovich, when asked, allowed MAF/Fish to access its premises in the Viaduct basin at night, for a period of approximately four years, to conduct covert surveillance of other fishers activities. There is some discrepancy as to the length of time this occurred but both Mr Wilkinson and MAF/Fish confirmed that access was utilised on a number of occasions.

Similarly, Sanford has offered to assist the compliance staff, by having compliance staff on its boats, watching the activities of other fishers. Mr Bright, when questioned, could see no difficulty in using competing fishers to help detect offending fishers, even if they were competing in the same fishery in the same areas.

He told the Inquiry that at a meeting with one of the “*big companies, they were giving me some information about some offending that they had witnesses. That was probably twelve – eighteen months ago.*” The company was Sanford and Mr Bright, together with one of his fishery officers, went to Sanford to obtain the information. Sanford was reporting one of their competitors in the snapper fishery. Sanford offered to take some of the MAF/Fish compliance staff out on their vessels to observe what was happening. When asked what his reaction would be to such an offer, Mr Bright told the Inquiry:

“We would have taken it up but staffing and weather precluded it. Their offer was to take some of my staff out on their vessels to observe what was happening. We don’t have the capability on the West Coast, our vessels aren’t big enough to get there. So it was a genuine offer and I was quite happy to put two staff on board, but it didn’t happen.

...

Q *So if it the weather had permitted, you would have put two staff people on board?*

A. Yes

Q *Gone on board a Sanford vessel to view potential offending by one of their competitors?*

A. Yes”

A different view was held by Mr Stuart, the current Manager, National Operations for Compliance in MFish and former DCM in Nelson from 1995. If a proposal was made by a large company to take fishery officers on their boat to detect offending by a fisher, he would decline on the grounds that it was not appropriate. He also was concerned that it would create a perception that MFish were too close to a particular company in the industry.

“Q What would you say to a proposition by a large company in the industry to a district compliance manager that they suspected offending by one of their competitors and offered to take fisheries officers on their boat to detect that offending; what would you say to that?”

A. Well, I would probably thank them for their generous offer and decline on the basis that it would not be appropriate, nor could we allow the perception to be circulated that we might be too close to any particular company in the industry.”

Mr Stuart was also questioned about the regular visits DCMs undertake to industry players. In his view, it is important that DCMs visit companies on a “*semi-regular basis*” to build up the knowledge base and to retain current knowledge of what is occurring within it.

He was specifically asked whether it created a perception that district compliance managers in undertaking those visits were only forging relationships with large companies so that smaller fishers who did not receive those visits are perceived to be treated differently. Mr Stuart stressed that he did not think that perception would arise, provided the relationship is even-handed across the industry. He explained:

“You are never going to be able to get around to all people, but the bigger companies would have a number of boats and so you are probably covering the majority of an industry in any one place anyway, if you are dealing with the larger companies.

So, I don’t think that perception would arise, unless it was found that these relationships amount to more than what one would expect in the circumstances”.

In relation to contacts from the industry, with complaints of offending by other fishers, Mr Stuart believed it was unavoidable that people would contact MFish, either by phone or personally, and MFish would have to deal with the industry at that level. At all times, the importance is to ensure that the relationships with industry players are at arms length.

“I think the point is not so much the visits, it’s to making sure that people’s relationships are at arms length and that they know what the boundaries are of those relationships.”

Mr McKay, DCM Napier, also was of the view that while some general contact with the industry was unavoidable for compliance managers, he kept at a distance to ensure there was an arms-length relationship on compliance investigations. He would not take up an offer to place officers on a vessel to look at possible offending by a competitor.

It has been submitted that informant information is likely to increase as the fishing industry moves towards greater self-regulation and that industry members may be in a unique position to observe fisheries offending that cannot be accessed by MFish.

The receipt of information is a necessary part of compliance activity and observation by others can be received as part of MFish offence detection network within the industry.

We are of the view, however, that there is a distinction between receiving information and using premises or vessels of a competitor to carry out surveillance by MFish staff. Even a covert operation requires the knowledge and agreement of the industry player as is demonstrated by the use of Simunovich's premises already referred to.

It is of concern that certain companies were or could have been used by MAF/Fish, to assist in detecting offending or offenders. For this Inquiry, the two companies are Simunovich and Sanford, who have either made available their premises from which surveillance could be undertaken (Simunovich) or in the case of Sanford, offered the use of their vessels to detect offending by Sanford's competitors. It is not professional nor at arms length for the compliance officers of MAF/Fish to be using the resource of certain major industry players to detect offending in others. It compromises MAF/Fish's integrity in its compliance procedures; it gives rise to a perception of unevenhandedness and partiality and, of more concern, leads to an inference that these companies are not offenders. In the context of this Inquiry, Simunovich's premises were used over a four-year period, namely 1988 to November 1992.

As can be seen from the investigations into Simunovich in that period, Mr Wilkinson was able to say on behalf of Simunovich that if Simunovich had anything to hide, why would it give its keys to MAF/Fish to assist them in undertaking surveillance work. Mr Wilkinson deposed:

"At that time Mr Archer had a complete set of keys to our premises and free unattended access to all our records. Had a covert inspection of our records been desired, we would never have known it had even occurred. I had given the keys to Mr Archer in 1988 to facilitate a covert operation the Ministry was undertaking at the Viaduct Basin and he wished to use our premises at night, which he did for a considerable period of time when no-one from Simunovich was present, and he and any other Ministry official who wished had the complete free run of our premises, including all our records. The Ministry retained those keys right up until the fire in 1992 when the premises were vacated for restoration and the locks changed in the normal course of that process."

To use, or be prepared to use, such offers from major industry players as MAF/Fish did in this period was to compromise the integrity of MAF/Fish's ability to be even-handed, impartial and undertake compliance procedures with the rigor, integrity and independence that compliance activities demand. We conclude that MAF/Fish did not act professionally or at arms length, in undertaking detection of offending by using the property of major industry players.

Mr Tuck referred to "collaboration with stake-holders as being very important," but this is the very concept that should not be applied to independent and robust compliance activities. Collaboration on administrative functions is appropriate and positive provided it is

evenhanded and impartial. But if a Ministry with enforcement and compliance responsibilities uses major industry players' facilities or takes up offers to assist the compliance activities against competitors, the "collaboration" takes on another and less positive meaning, and is inappropriate.

9.4 CONCLUSIONS TO TERM OF REFERENCE 4

There is no basis or evidence to support the allegations of corruption or impropriety on the part of MAF/Fish and the Ministry of Fisheries or their current or past employees, in relation to the management of the scampi fishery or in relation to the investigations into illegal offending.

As we concluded in Term of Reference 2, there is no basis or evidence to support the allegations that Mr Crothers and Mr Wood were responsible for stopping the investigations into alleged offending by Simunovich, nor to support any allegations of corruption or impropriety on their part in relation to any other aspects of the management of the scampi fishery.

Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times professional and at arms length?

The relationships between MAF/Fish and scampi fishers in the period 1988 to 1992 were not professional and at arms length. The outcome was that Simunovich was treated in a favourable way, in contrast to the other fishers in the scampi fishery.

The factors which lead us to this conclusion are:

- MAF/Fish forged relationships with larger companies or fishers whereas smaller fishers featured much less in MAF/Fish's consideration. In this way, MAF/Fish was unevenhanded in its approach to the scampi fishers and favoured Simunovich.
- There was an advantage for fishers who were members of industry working groups, as they were able to ensure their interests were taken into account in policy discussions. They also had opportunities to resolve their own issues in discussion with officials at those meetings.
- Ex-employees of MAF/Fish working for fishers bring benefits to their new employers by virtue of their knowledge and ease of access to officials. The advantages that Mr Wilkinson brought to Simunovich were considerable.
- MAF/Fish were influenced by assertiveness and knowledge on Mr Wilkinson's part to the extent that he and Simunovich had early access to information and policy discussions. These exchanges were not appropriately counter-balanced by proper consideration by MAF/Fish of the interests of other fishers in the scampi industry.
- The acceptance of gifts from companies which were also influential in the development and implementation of fisheries policies at a time when valuable property rights were being established as a result of those policies, compromised the independence and integrity of MAF/Fish.

- Relationships with compliance staff included two situations where companies either provided or offered their facilities for use in surveillance operations to observe possible offending by their competitors. This compromised the integrity of enforcement procedures, and led to inferences that the fisher whose facilities were so used was not subject to rigorous compliance monitoring.

10.0 TERM OF REFERENCE 5: OTHER MATTERS

- 5. Any other matter concerning the former Ministry of Agriculture and Fisheries or the Ministry of Fisheries that the reviewers consider relevant to the foregoing questions.**

In this Term of Reference, we are to raise any other matter concerning MAF/Fish or MFish that we consider relevant to the foregoing Terms of Reference and the questions specifically asked.

There are a number of matters which arise out of the Terms of Reference and the questions posed within them.

The relevant matters are:

- (1) The impact of the Quota Management System on MAF/Fish's capability in both policy and compliance functions;
- (2) The failure of MAF/Fish and MFish to respond to criticism appropriately and effectively;
- (3) The two year limitation problem for prosecuting offences under the respective Fisheries Acts.
- (4) The Inquiry's response to issues raised during the Inquiry, namely:
 - Independence of compliance activities
 - Gifts policies
 - Ex-employees and their relationship with MAF/Fish
 - Submissions on allegations.

10.1 (1) THE IMPACT OF THE QMS SYSTEM

The Inquiry accepts the evidence that the introduction of the QMS was a world first, in implementing a system, which encouraged both development and conservation of New Zealand fisheries. The move was radical. As we have already canvassed, the system was seen to be *“the first, and still really is the only comprehensive system ... for a whole fisheries management system”*.

Although MAF/Fish understood the introduction would create *“an enormous change in the industry”* and that MAF/Fish *“had to change dramatically in all of its functions”* the realisation did not lead to the required change happening quickly or effectively enough.

Dr Allen told the Inquiry that the dramatic changes in all of MAF/Fish's functions would include research functions, which would have to provide an orientation for total allowable catches; the administrative functions would be completely changed to provide for a quota management system; and enforcement would focus on crimes associated with documents "*rather than standing round inspecting catches*".

Despite his view that "*we basically foresaw a revolution both in the Ministry and in the industry*" it was only evidenced by the legislation and the requirement on the industry to comply with the document trails, which the legislation demanded. The change to the administrative and enforcement functions did not occur quickly, in the way and to the extent it should have.

The regional structure was inappropriate for both the administration and management of policy and its implementation, as well as being highly inappropriate for a complex compliance system. Those matters have been canvassed in depth in Terms of Reference 1 and 2.

It is self-evident, that when a revolutionary change such as the introduction of a QMS system impacts on fisheries management, the tasks to be completed will be many and various, but will inevitably involve more resources. The Inquiry has received submissions about the paucity of resources during the late 1980s and early 1990s and in particular, the impact of the "*sinking lid*" drive by the Government and Treasury during the early 1990s.

The failures in the policy and permitting of fishers in the scampi fishery illustrate a lack of a national or strategic means of implementing a nationally based controlled fishery. Management of the non-QMS fisheries such as scampi which were in transition to the QMS particularly demanded a national strategy, but the structures in place at the time, with the regions developing their own fisheries (as they did prior to the 1986 amendment which effected the QMS) was going to inevitably lead to conflict, particularly where individual catch entitlements, or quota was going to be allocated ultimately.

Even when Head Office intervened and managed the scampi fishery from October 1990, there was no overall planned national approach which ensured consistency or fairness to the scampi fishers. Head Office made the choice and implemented a management strategy for scampi before obtaining adequate information about the scampi fishery and those fishers within it. Criteria for fishing permits or vessel permits were developed after the declaration of a moratorium on the scampi fishery in 1990 and the vessel restriction in 1991 was made with retrospective effect and implemented in such a manner that allowed one fisher a major advantage over the others in the fishery.

In compliance, whilst lip-service appears to have been paid to the different approach from "*standing around inspecting catches*" to document-based crime, no-one took action to ensure adequate resourcing to undertake the complex nature of forensic accounting and prosecution on a national basis.

The gradual realisation about the enforcement complexities occurred over the 1990s period, which saw the successful prosecution of Operation “Buster” (in which Mr Nalder had been involved) as a Crimes Act offence and *R v. Walters* which was a test case for prosecuting Fisheries Act offences under the Crimes Act.¹⁵⁶ Those prosecutions did not occur until 1993, seven years after the introduction of the QMS and just following the timing of Operations “Export” and “Dog”.¹⁵⁷

The Inquiry has been urged to take into account a number of factors which the former MAF/Fish had to deal with at the relevant time, namely the Maori fisheries injunction, inadequate resourcing and the effect of the QMS system on events in the late 1980s and early 1990s.

Whilst it is acknowledged that the introduction of the QMS was positive and important for New Zealand fisheries, it is equally important to remember that as a result of the QMS, valuable property rights were being allocated to fishers for the first time.

We have been reminded that the scampi fishery is worth approximately \$100 million. For a policy to create millions of dollars of tradeable property rights in this fishery with a system that was operating in an ad hoc and inconsistent way, treating fishers unevenhandedly, is contrary to the standards and expectations of the public service.

The Inquiry also had evidence that the scampi fishery was seen at that time as a small part of the overall fishing industry. Yet while the initial steps in the implementation of the QMS in this fishery in the period examined by the Inquiry were creating considerable potential wealth, a significant proportion of the fishers in the fishery were adversely affected in their access to that wealth by poor administration and management.

In addition to the findings which we set out at the close of each of the Terms of Reference, we are of the view that the introduction of the QMS and the requirements this placed on the management of the non-QMS fisheries such as scampi overtook MAF/Fish’s capability. It appears that insufficient time, resources and thought went into the implementation of the QMS, to ensure adequate and robust systems for permitting and compliance.

The key problem is that there was no recognition that when systems and resources were so stretched, even more attention had to be placed on ensuring impartiality and integrity. The reverse occurred.

10.2 (2) FAILURE TO RESPOND

We have canvassed in both Term of References 1 and 2, internal memoranda and external reports, an Ombudsman’s report into Goodship, and the Court decisions, all of which have been critical of the management and administration of MAF/Fish.

¹⁵⁶ *R v. Walters*[1993] 1 NZLR 533

¹⁵⁷ Term of Reference 2 under headings “Operation Export” and “Operation Dog”

In summary, they are:

- 30 August 1990: RFMO from Dunedin, Mr Rayns, internal memorandum critical of MAF/Fish's management.
- December 1990: The Joint Report of the Auditor-General and the Parliamentary Commissioner for the Environment finding a system struggling to provide the necessary information for management decisions to control fishing at sustainable levels and warning that because of insufficient information there was greater risk and greater personal judgment in making decisions.
- On 30 August 1990: Senior Fisheries Officers from the Southern region's Dunedin office expressed their dissatisfaction with the ad hoc decision making and bad management practices in respect of the non-QMS strategy. Although Head Office ultimately took over the scampi fishery, no-one investigated the cause of dissatisfaction in the Southern region and whether the criticisms of inter-regional conflict and frustration on the part of industry fishers should be ascertained, before a national strategy was devised to manage the scampi fishery.
- May 1991: an internal audit of MAF/Fish enforcement critical of a lack of resources and the perception that only minor offending was pursued.
- April 1992: Report of the Fisheries Taskforce critical of organisational issues in the compliance area and lack of robust structures in the policy area.
- 1993: The Ombudsman's report into Mr Goodship's circumstances.
- 1993: Petromont decision criticising MAF/Fish's unlawful and inappropriate use of permitting provisions.
- 1994-2004: Court decisions critical of MAF/Fish's administration and process.

In December 1990, a joint report of the Auditor-General and the Parliamentary Commissioner for the Environment was critical of deficiencies in both the policy making decisions of MAF/Fish and MAF/Fish's compliance activities. The deficiency in compliance has been described in Terms of Reference 2.¹⁵⁸ The joint report found a system struggling to provide the necessary information for management decisions which could control fishing at sustainable levels, namely there was insufficient information about fish, difficulties in reducing catches and quota, insufficient constraint on individual fishing activity and problems in ensuring compliance.

Importantly, in the policy and administrative area, the report found that because of insufficient information available to MAF/Fish:

¹⁵⁸ See section "The Problem with the Regional Structure" in Term of Reference 2

“... there is greater risk and greater personal judgment in making decisions. So far, this decision making process is not sufficiently open to identify the basis of decisions or the accountability of the participants”.

The report notes that the lack of information provides little confidence that fish were being harvested at a sustainable rate.

The comment on the greater risk of personal judgment in making decisions with an insufficiently open decision-making process was also of significance, given the ad hoc nature of decision making in the scampi fishery.

In May 1991, the internal audit of MAF/Fish enforcement was critical of a lack of resources and the industry perception that only minor offending was pursued. The terse response from Dr Allen, was the subject of evidence before the Inquiry of Mr Sullivan, who remembered the “*stir*” which the audit created. He said:

“The audit was a little bit critical and I do believe that there was a reasonably testy response to it. Yes, ... it’s attached to a letter of 6 June 1991, from Robin Allen criticising the report in various aspects.”

In November of the same year, Mr Crothers was making submissions to the Fisheries Taskforce on fisheries enforcement, specifically referring to resource problems and “*institution structural management difficulties*”.

In 1993, the Ombudsman’s report into Mr Goodship’s inability to obtain a permit found that other fishers who were granted permits had made no greater commitment than Mr Goodship and in the absence of evidence that there were no valid grounds for distinguishing Mr Goodship from five other successful permit holders, Mr Goodship was unjustly declined a permit. The Ombudsman, on Mr Goodship’s behalf made representations to MAF/Fish prompting a second review, but again MAF/Fish upheld the decision not to grant the permit.

Mr Goodship issued judicial review proceedings both in the High Court and in the Court of Appeal, both Courts holding that MAF/Fish was flawed in its decision under s 65(2) to deny Mr Goodship an exemption. The process of the Ombudsman’s report, that MAF/Fish review and the court decisions span a period of time from 1993 to October 2003.¹⁵⁹

In 1993 Petromont took judicial review proceedings, on the grounds that it had been excluded from the scampi fishery unfairly. The Court upheld **Petromont’s** application and found that s 63(9) required consistency in conditions on permits and left open the question whether s 63(9) enabled the Director-General to impose permit conditions for the purpose of economic management of the fishery. Anderson J considered it arguable that this was not a valid purpose. It must be noted that the Court of Appeal in 2002 in **Westhaven** overruled **Petromont** on the s 63(9) substantial sameness point. Ellis J in **Vautier** held that s 63 could not be used as a management tool.

¹⁵⁹ *Goodship & Pranfield Holdings Ltd v. Ministry of Fisheries & anor* (Court of Appeal 236/02 2 October 2003)

The Court cases ruling on decisions by MAF/Fish in the scampi fishery are numerous (as already explored in Term of Reference 1) and challenged the decisions by MAF/Fish in the scampi fishery. In addition, an analogous decision on non-QMS policy in ***Westhaven Shellfish Limited v Chief Executive of the Ministry of Fisheries***¹⁶⁰ is extremely critical of the Ministry and its approach to managing the non-QMS species and the respective fishers.

The Inquiry has heard evidence and received submissions that despite successful Court action, MFish refuses to accept that it may have been wrong and fails to change the import of its decision-making.

Even before this Inquiry, the attitude of MFish to strong criticism in a minority decision of the Court of Appeal is illustrative of its approach to criticism. In ***Vautier Shelf*** Thomas J was extremely critical of MFish, observing that it had given an undertaking to the Select Committee in 1999 to look at allocations in the scampi fishery with a clean slate. Thomas J specifically noted the advantages gained by Simunovich.

MFish has submitted that the comment should be disregarded because it was a minority judgment and an obiter comment.

We have received submissions that despite two Court of Appeal judgments (***Vautier*** and ***Westhaven***) contemplating new ICE regulations, MFish has abandoned ICE, the key component of its management regime for over ten years, and will rely on the same 1990-92 catch history to allocate scampi (this submission was before legislation was introduced to effect that allocation) relies on the same allocation outcome as previously reached. Because the majority of the Court of Appeal in ***Vautier*** did not criticise the policy of choosing catch histories as a mechanism for allocating individual catch histories, MFish was proposing to proceed on the decisions which MAF/Fish reached prior to 1992.

Both MAF/Fish and MFish throughout the period covered in this inquiry have faced considerable litigation risk. This was indeed a real risk. The previous paragraphs and Term of Reference 1 outline the significant court cases brought to challenge fisheries administration in both the scampi and other fisheries.¹⁶¹

Each Ministry's response, both before and after court cases were brought, illustrates that it was defensive in its approach to dealing with litigation risk.

Examples of this defensiveness include:

- The way MAF/Fish responded to frequent requests for reviews and threats of court action by Mr Wilkinson on behalf of Simunovich. This is particularly illustrated in the discussion under Term of Reference 1 for the period between September and November 1991, when the issue of scampi fishing permits was delayed, and there was a dispute between Simunovich and MAF/Fish over which vessels Simunovich could use in the fishery.

¹⁶⁰ Unreported High Court Wellington, CP102/00 21 July 2003

¹⁶¹ See also Appendix 9

- Mr Shallard commented in reference to the “*no entitlement to future rights*” clause in special permits issued under section 64:

“our colleagues at Policy at that stage had some concern about the substance of those clauses as to whether they would hold up down the track if it got to a court case and the litigious fishing industry arguing that that was unreasonable and it shouldn’t have been applied etc... a bit of paranoia was sort of floating around at this stage.

Q Paranoia or litigation risk?

A I guess my perception at the time would have been that it was a thing we put on to act as a brake but it wasn’t meant to be totally definitive. It was a thing that allowed some flexibility in the future.”

These comments indicate that the clause was included at least in part to maintain a degree of flexibility in the face of challenge from fishers aiming to either get or prevent others getting quota.

- The actual responses of MFish to various court cases were consistently seen by parties in those cases whose grievances had been acknowledged by the courts, as preventing satisfactory outcomes for them. In particular the reaction by Barine and Mr Penwarden when MFish declined to allocate ICE in the scampi fishery after the 2001 Court of Appeal decision, leaving the fishery as competitive, led to Barine making the allegations which triggered this inquiry.
- It is also noticeable that MFish places heavy reliance on the retrospective validation provision (s 329) which has effectively precluded any re-examination of permitting decisions made before October 1992.

This overall defensiveness in respect of litigation is still a strong characteristic of MFish and continues to the present day. This was illustrated most graphically by the responses of the current Chief Executive, Mr Tuck, who when asked how MFish took into consideration issues of unfairness of outcomes which had affected some fishers in the scampi industry, responded to a series of questions on this issue, along the lines that the expectation was that Ministry staff should “*comply with the law*”.

We have understood his answers in the context of his evidence, as meaning that MFish would comply with the strict requirements of the Fisheries Act, and Court directions, without addressing the criticisms of unfairness and unevenhandedness which the Courts had expressed.

MFish has consistently had a strong aversion to litigation risk in relation to policy and permitting issues, and this appears to be particularly noticeable where larger industry players are involved. This defensiveness has flowed through into its persistence in finding ways to maintain policy positions rather than reconsider them.

MFish's concern is that a different approach would open up the possibility of a challenge to the long-standing and overall policy regime put in place in the industry. This position was strongly supported by Seafic in its submissions and evidence. However, we note that this contrasts markedly with the view taken by the Court of Appeal in the **Goodship** case which characterised this argument as a contention that:

“any advantage other fishers may have gained from the injustice done to the appellants in 1990-91 should continue. We find that proposition unattractive.”

We do not consider that reasonable efforts to ensure fairness and impartiality would put a highly regarded QMS system at risk.

On a separate issue relating to the responsiveness of MFish, the Inquiry also heard that MFish currently do not have a complaints system to record and analyse the volume and nature of complaints from fishers about the decisions and management of its systems and processes. Although the volume of complaints appeared to be reducing, there was no formal system to verify that. MFish should introduce a system to enable trends in fishers' perceptions and concerns about the Ministry's decision-making to be analysed and monitored.

10.3 (3) TWO YEAR LIMITATION FOR HISTORICAL OFFENDING

Arising out of the questions in Term of Reference 2, we have described how the two year limitation on prosecuting offences under the respective Fisheries Acts has hampered the ability of MAF/Fish and MFish to investigate historical offending.

As the Term of Reference 2 discloses, the concerns by the enforcement officers about misusing Fisheries Act powers to investigate matters which occurred beyond two years hampered their ability to resolve serious allegations dating back to the early 1990s.

This in turn has led to the perception by certain members of the industry, including Mr Penwarden, that the serious allegations were not pursued because members of MAF/Fish were protecting Simunovich. We have found this concern and those allegations to be baseless, but again mindful of the limits of our jurisdiction, we raise this matter as being relevant to investigations undertaken within the QMS framework. Because of the similarity to serious fraud, a two year limitation for dealing with historical offending within the Fisheries legislation is not helpful.

We also note that the Fisheries Taskforce, in its report of April 1992, also made a recommendation that the limitation on the bringing of Fisheries Act prosecutions should be extended, but no legislative enactment resulted.

10.4 (4) ISSUES RAISED DURING THE INQUIRY

10.4.1.1 (i) Independence of Compliance Activities

The reviewers note that as discussed in Terms of Reference 2 and 4 relationships with industry by compliance and enforcement staff in the Ministry of Fisheries should be somewhat more constrained than is the case for officials engaged in administrative and regulatory activities.

However, one aspect of this relationship which appears to be unclear in MFish at present, is the use of facilities or vessels owned and operated by a fisher for covert operations or surveillance by enforcement officers, when investigating activities by other fishers in the industry.

It is accepted that MFish receives informant information from members of the fishing industry and that it is a useful source of information.

However, the reviewers consider that the use of facilities or vessels owned by fishers is not appropriate because of the need to retain independence in enforcement activities and the likelihood that it suggests bias in the activities of those officers.

10.4.1.2 (ii) Gifts Policies

In the report dealing with Part II of Term of Reference 4 the reviewers discussed the fact that a number of gifts were made by industry participants to MAF/Fish officials during the timeframe covered by this inquiry.

We consider that the current provisions in the Public Service Code of Conduct and in MFish's current gifts and entertainment policies, along with staff training, are sufficient to ensure that any offers of gifts from industry are or should be managed well by MFish. However, this is an issue which needs constant reinforcement and staff training.

10.4.1.3 (iii) Ex-Employees and their Relationship with MAF/Fish

The issue of the potential advantages gained by employees who leave a regulatory department, move into a related industry, and proceed to deal with administrative and regulatory issues from the private sector, has been squarely raised and dealt with in this Inquiry in Term of Reference 4.

Whilst employees cannot be restrained from employment opportunities, there needs to be safeguards to ensure that undue advantage does not accrue to the new employer, as a result of such moves.

10.4.1.4 (iv) Submissions on the Allegations

MFish has submitted that the Inquiry should make strong criticism of Barine's approach, particularly of making allegations of impropriety without foundation.

We have made our conclusions clear that there was no foundation for the allegations of impropriety or corruption on the part of any of the former MAF/Fish or present Ministry officials. Those tags of corruption were not used during this Inquiry and a number of witnesses resiled from the earlier affidavits which had been promulgated. The Inquiry has been asked to strongly condemn those that made the allegations or prepared them, to mark the unacceptability of the damage which such allegations cause.

We are satisfied that there is no basis for the allegations that MAF/Fish and its officials acted corruptly or with impropriety and we are recommending to the State Services Commissioner that he takes no further action to investigate these allegations further. No one official acted from an improper motive, and nor did anyone receive bribes or indulge in any criminal conduct which would justify the labels or "*corruption*" or "*impropriety*". We have concluded also that there is no basis upon which legal offending can be further investigated.

The Inquiry does not condone the making of serious allegations without foundation. Nevertheless, the combination of factors in the overall management of the scampi fishery, without adequate explanation, was likely to raise suspicion. Together with the failure of MAF/Fish to conduct and conclude an investigation into allegations of offending, when the fisher involved is the same fisher who had received valuable and substantial benefits by way of permitting, it was inevitable that suspicions were fuelled and related incidents, such as the ending of Mr Nalder's employment and the cessation of investigations, allowed the development of more serious and sinister allegations.

10.4.1.5 (v) Costs and the Transcript

We have received submissions urging an amendment to the State Sector Act to empower Reviewers to award costs. It was also recommended that the Inquiry approve the release of the transcript of this Inquiry to the public and to the Law Society for Simunovich to pursue a complaint against the solicitor for Barine.

We do not propose to make any recommendations on the powers of Inquiries to award costs.

The transcript for this Inquiry was taken for the purposes of this Inquiry only. Copies were released to Counsel for the parties on the basis of an undertaking of confidentiality. The Inquiry excluded the public and the media on the basis that:

- Some details of the employment of fisheries personnel was private and personal information.
- Some of the evidence was commercially sensitive and the Reviewers received unmasked documents which were not available to the parties to ensure all information was disclosed to the Inquiry. Some of the unmasked documentation revealed the identity of informants.

- The free and frank giving of evidence by witnesses was encouraged and enhanced.

We do not propose to release the transcript of the Inquiry or the evidence received and consider it is inappropriate to do so.

The recommendations which follow arise from all of the foregoing Terms of Reference.

11.0 RECOMMENDATIONS

The Terms of Reference indicated that:

“the inquiry will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries’ current management and systems meet public expectations.”

and

“the reviewers will recommend to the State Services Commissioner, on the basis of their findings on these matters, what further action, if any, should be undertaken, whether by the State Services Commissioner or by other parties. The focus of such subsequent action would include the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.”

11.1.1 (i) Recommendations Relating Specifically to the Ministry of Fisheries:

- The Ministry should reduce the defensiveness which is presently characterised in the evidence and the hearing for this Inquiry. This defensiveness appears to be the legacy of the long and difficult introduction of the QMS system and the years of associated litigation. The Ministry should give greater emphasis to fairness and evenhandedness in its decision-making, as well as continuing to emphasise legal compliance.
- The Ministry should introduce a system to record the nature of complaints received from the fishing industry and fishers, which would enable trends in fishers perceptions of the Ministry’s decision-making to be analysed and monitored. This system could include complaints about the current system which have been contracted out or devolved.
- In enforcement activities the Inquiry recommends that the Ministry ensure that no facilities or vessels owned by fishers be used as part of surveillance or compliance activities by enforcement officers to investigate possible offending by a competitor in that fishery, to maintain the independence and integrity of investigations and the prosecution process.
- If the legislation, policy and process for the allocation of scampi quota finally adopted allows administrative discretion, then the reviewers recommend that to the extent such discretion allows, those exercising it consider, when coming to an overall view of the relevant public interest, the exercise of the discretion be informed by the findings of this Inquiry. Such an approach would assist in meeting the public expectations of fairness and impartiality in the administration of fisheries and also meet the requirements of the Public Service Code of Conduct.

- MFish should ensure that there is a consistent and fair process for the statutory right of review against decisions on fishing permits under s 94 Fisheries Act 1996 by prescribing clear procedures for the conduct of a fair and transparent hearing.

11.1.2 (ii) Recommendations which Apply to the Ministry of Fisheries and have Wider Application in the Public Service

- Departments engaged in developing advice on, administering, or monitoring regulatory processes should periodically review their processes and behaviours in such administration to ensure that all interests are taken properly into account in assessing the overall public interest in regulatory decision making;
- In undertaking such reviews departments should consider whether specific attention to or support for smaller or less forthcoming enterprises in the industry being regulated may be required;
- Departments should alert and train staff on the need to counter balance the effects of lobbying, greater information and persistent inquiries by major enterprises in an industry, with a view to ensuring that a proper balance of interest in regulatory decision-making is achieved. The reviewers note that this does not necessarily mean weighting all interests equally but ensuring that a proper balance of interests is recognised, and the processes leading to that view have the fullest integrity;
- Departments should ensure that in exit interviews with employees departing to work in the industry regulated by that department, such employees are made aware of the fact that future approaches by them to officials in relation to regulatory matters will be treated carefully and with a degree of caution, to ensure that undue advantage is not being given to their future employer;
- Departments should train the staff administering regulatory processes on how they should deal with ex-employees relative to others – that all care should be taken to ensure that transactions and relationships with such ex-employees is fully even-handed and if necessary cautious, to ensure that no undue advantage is given to them or to their new employer.
- All Departments or Ministries should reinforce in staff training and by other means the importance of the Public Service Code of Conduct on Offers of Gifts or Gratuities. It is particularly important for Departments administering regulatory processes to ensure that it's employees do not compromise or be perceived to be compromising their integrity, particularly when they are entrusted to administer and allocate valuable commercial property rights.

11.1.3 (iii) Recommendations to the State Services Commissioner

- The State Services Commissioner should take no further action in respect of the allegations of corruption and impropriety which were made against the Ministry of Agriculture and Fisheries and the Ministry of Fishers.
- The State Services Commissioner should consider if further supporting material for the Public Service Code of Conduct should be developed to enable departments to train staff better on the ethics and behaviours needed to ensure that advisory and administrative processes give proper and balanced recognition to the interests of different enterprises in a regulated industry.

11.1.4 (iv) Other Issues Raised in Final Submissions

- We do not propose to make any recommendations on the powers of inquiries under the State Sector Act to award costs.
- We do not propose to release the transcript of the Inquiry or to recommend its release.

12.0 APPENDIX 1 – PROCEDURE FOR THE INQUIRY

IN THE MATTER OF THE STATE SECTOR ACT 1988

AND IN THE MATTER OF AN INQUIRY INTO FISHERIES MANAGEMENT MATTERS

Minute No. 1

Date 16 December 2002

1. Timetable

- 1.1 Counsel should confer and use their own endeavours to agree on a procedure for the discovery, inspection and provision to the Inquiry of all documents relevant to the Terms of Reference.
- 1.2 It is the intention of the Inquiry that all documents should be identified and made available by 20 December 2002.
- 1.3 The Inquiry has provided a list of documents which were available to it.
- 1.4 Statements of concern
By 24 January 2003 persons (other than the Ministry of Fisheries) who wish the Inquiry to address a matter or issue of concern (being within the terms of reference of the Inquiry) shall file and serve on any person who has given an address for service:
 - (a) Briefs, statements of evidence or affidavits;
 - (b) Any relevant document related to that evidence (not already disclosed);
 - (c) A list of concerns of that person regarding any documents that have not been disclosed by any other person.
- 1.5 By 10 February 2003 any person (including the Ministry of Fisheries) who wishes to respond to an issue of concern shall file and serve on any person who has given an address for service:
 - (a) Briefs, statements of evidence or affidavits;
 - (b) Any relevant document related to that evidence (not already disclosed);
 - (c) A list of concerns of that person regarding any documents that have not been disclosed by any other person.
- 1.6 By 19 February 2003 any person who wishes a right of reply shall file and serve, on any person who has given an address for service, briefs, statements of evidence or affidavits in reply.

1.7 On 3 March 2003 the hearing will commence at 10.00 am at the State Services Commission Board Room, Level 5, 100 Molesworth Street, Thorndon, Wellington and will continue sitting until 14 March 2003.

1.8 If necessary, the Inquiry will resume on 24 March 2003.

1.9 If further hearings are required, dates will be fixed.

2 Counsel to assist

2.1 The Inquiry appoints John Stevenson as senior counsel assisting. Nerissa Barber, barrister and solicitor, will be acting as junior counsel.

3 Conduct of hearing

3.1 The hearing will be conducted with the public and media excluded. The reviewers are acting under delegated authority from the State Services Commissioner who has stated that the report of the Inquiry will be made available and that the Inquiry would be in private. The reviewers have considered the issue and have decided to exclude the public and media taking into account the following factors:

At the preliminary hearing on 10 December 2002 only one person indicated a desire for the hearing to be in public;

Some details of the employment of some Fisheries personnel is private and personal information;

Some of the evidence to be considered by the Inquiry will be commercially sensitive;

The frank and free giving of evidence by witnesses is likely to be enhanced;

The Select Committee Inquiry is a more appropriate forum, open to the public on issues of public interest;

The focus of this Inquiry is principally to review the processes and administrative systems within the Public Sector.

3.2 Persons who have given an address for service, and their counsel, may be present throughout the hearing. Subject to any order that may be made, witnesses may also be present throughout. If any other person wishes to be present, an application may be made and will be considered by the Inquiry.

3.3 The hearing will be conducted on an inquisitorial basis. Persons who are present and who have given an address for service wishing to raise questions or issues with a witness may seek to have questions put through the Inquiry team. Consideration will be given to allowing cross-examination of certain witnesses on issues or matters that the Inquiry considers warrant cross-examination.

- 3.4 It is proposed to have a transcript of evidence made. On request, the transcript will be made available electronically or in hard copy to counsel or parties who have given an address for service, provided that there is a signed undertaking that the transcript will be kept confidential, used only for the purposes of the Inquiry, will not be copied, and will be returned to the Inquiry following the issue of the report (and/or where provided in electronic form, an undertaking as to deletion is to be provided).
- 3.5 After 19 February 2003, counsel are to confer on the order of witnesses. It is the intention of the Inquiry that the order of witnesses will be:
- (a) Those witnesses who address issues of concern;
 - (b) Those witnesses who wish to respond;
 - (c) The Ministry of Fisheries.

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Helen Cull QC

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David Smyth

13.0 APPENDIX 2 – RULINGS AND MINUTES NO. 2-8 OF THE INQUIRY

Fisheries Management Inquiry

Minute No. 2

22 May 2004

To all persons who have given an address for service.

The Inquiry has now received material pursuant to paragraph 1.4 of Minute 1 and in addition has received the following correspondence.

- letter 31 January 2003 from Crown Law Office;
- fax 1 February 2003 from Alan Ivory; and
- letter 3 February 2003 from Francis Cooke.

In the event that parties have not received copies of the above correspondence, copies are attached to this email.

It is important to reiterate the purpose of the procedural meeting and the reason for the Directions within Minute 1. In order to deal with the Terms of Reference, those parties with concerns were directed to provide briefs, statements of evidence or affidavits to enable the responding parties to properly reply. It was intended therefore, that in providing briefs, statements of evidence or affidavits, those deponents would be called as witnesses and would be available to the Inquiry for examination. For this reason, any affidavits to be relied on, should be clearly identified, e.g. by name of the deponent, the date of swearing and (where appropriate) the proceedings in which they were used.

As the correspondence from the Crown Law Office and Mr Ivory identifies, some of the material filed refers to affidavits in a general way and some material does not make it clear whether or not the deponent will even be called as a witness. It is also unclear whether earlier material, which has been forwarded to the Inquiry by way of sworn and unsworn affidavits, are still being relied upon by the parties expressing concern.

In the interests of clarity, would parties who have supplied material pursuant to paragraph 1.4 of the Minute file and serve a list no later than 5 p.m. Wednesday, 5th February 2003 clearly indicating:

1. The briefs, statements of evidence to be relied on by the party.
2. The affidavits to be relied on by the party (with the affidavits being clearly identified by name of the deponent, swearing date and the proceedings in which they were used).
3. Confirmation that in each case the maker of the brief, statement of evidence or affidavit will be called as a witness.

If evidence is to be relied on, the deponent must be available for examination. In the event that the deponent is no longer available or will not be appearing, this must be stated clearly and the reasons why that person cannot attend. It is the Inquiry's concern that where evidence is being proffered, the deponent should be available to speak to the brief of evidence, or affidavit, and be examined.

A similar list should be filed and served by parties supplying material under paragraph 1.5 or 1.6 of Minute 1.

In response to some further matters raised by Crown Law the following comments apply:

1. Once the confirmation regarding the affidavits to be relied on, and the witnesses to be called, has been received, the Inquiry believes the matters of concern to relevant parties will have been reasonably identified. If there is particular confusion caused as to the nature of a concern, this should be clarified either between Counsel or in writing to the Inquiry.
2. Where evidence of "concerned people....adjusting their statements and evidence" occurs, those matters will be dealt with in the course of the hearing, as would normally be the case during the course of any hearing.
3. In relation to the concern in paragraph 11 as to the status of those who are interested members of the public but who have not expressed concern, the Inquiry considers that the position is sufficiently addressed by paragraph 3.1, 3.2 and 3.3 of Minute 1, and that there is no need for any further determination in relation to party status.
4. In relation to the statutory prohibition on disclosure, the Crown's position is noted. However, if Sealord Group Ltd and Barine Developments Limited require an independent analysis of fishing returns, that analysis should be undertaken with their returns and if disclosure of the return of another fishing company is required, then that request should be made. At this juncture, the Inquiry is unclear as to whether it will be necessary to have an independent analysis of the fishing returns and until the evidence is heard, that analysis may become pivotal or may be unnecessary. The Inquiry intends to reserve its position but in the interim, independent parties should provide such analysis as they think fit for the purposes of expressing their concerns fully to the Inquiry.

The issues raised by Mr Ivory appear to be covered by the responses set out above.

In response to the letter from Mr Cooke, and in particular to the assertion that Barine and Sealord do not act as prosecutors or as parties required to prove allegations, the Inquiry comments that if a party has a concern within the Terms of Reference that it wishes to pursue before the Inquiry, the party must place before the Inquiry the evidence in support of or in relation to those concerns. It is important therefore that Barine and Sealord clarify which affidavits or statements they are relying on and whether those deponents will be available.

The Inquiry intends to keep to the timetable discussed prior to and set out in Minute 1.

Helen Cull QC and David Smyth

Fisheries Management Inquiry

Minute No. 3

21 February 2003

To all persons that have given an address for service

The Inquiry or Counsel Assisting has been in communication with counsel for the Ministry of Fisheries in respect of the Ministry not having complied with Minute 1.

At the present time the hearing is scheduled to start on Monday 3 March 2003.

In light of the delays the Reviewers have decided to hold a directions conference.

Parties may wish to make submissions on the timetable. This may be done:

In writing to be filed and served by 11am on Tuesday 25 February 2003; and/or
By attendance at a telephone conference which will be arranged for 12 noon Tuesday 25 February 2003.

Please advise Megan George, as soon as possible, if you wish to be joined to the telephone conference.

Helen Cull QC and David Smyth

Fisheries Management Inquiry

Minute 4

1. Telephone Conference of 25 February 2003
 - 1.1 Helen Cull QC and David Smyth, the Inquiry Reviewers, conducted a Telephone Conference on 25 February 2003. Those in attendance were:

J B Stevenson and N Barber as Counsel Assisting the Inquiry

W Wilson QC, G Liddell, U Jagose and A Riddell for the Ministry of Fisheries

F Cooke and S Gray for Barine Developments Limited and Sealord Group

C Toogood and Mr Nalder

T Sissons for Vautier Shelf Company

K Reid for United Fisheries

T Castle for Goodship and Pranfield Holdings

B Scott for NZ Seafood Council

A Ivory for Simunovich Fisheries
 - 1.2 The Telephone Conference was convened by the Reviewers, because of serious defaults under the Timetable, specified in Minute 1.
 - 1.3 Of particular concern to the Reviewers was the omission to provide a list of documents and evidence by the Ministry of Fisheries to the evidence received by the Inquiry and the effect of late compliance on the existing Timetable.
 - 1.4 In addition, Trevor Goodship/Pranfield Holdings had recently indicated its intention to express concerns and be heard at the Inquiry and the timetabling of their evidence was also required. New Zealand Seafood Council had not yet filed its evidence or statements and clarification was needed to identify when the material would be received.
 - 1.5 As a result of the defaults under the existing Timetable as specified in Minute 1 and after hearing Counsel, the Reviewers accepted that the hearing of the Inquiry, to be commenced on 3 March, was not feasible. Of particular importance to all parties, including the Reviewers, was the opportunity to obtain or peruse relevant documents in the possession of the Ministry of Fisheries, before the commencement of the Inquiry hearing.
 - 1.6 All Counsel were agreed that the hearing of the Inquiry needed to commence without undue delay. To ensure compliance with the Inquiry's Timetable and to ensure efficiency, the Reviewers make the following orders contained in paragraphs 2-9 of this Minute, pursuant to the Inquiry's powers under s 4 Commissions of Inquiry Act 1908.

- 2 List of Documents by Ministry.
 - 2.1 The Ministry shall file and serve a verified list of documents (including specification of documents in respect of which privilege or confidentiality is claimed) on or before 14 March 2003.
- 3 Inspection of Ministry documents.
 - 3.1 The Ministry shall ensure that its documents are available for inspection by other parties, including the Inquiry, from and including 14 March 2003.
- 4 Issues relating to verified list or inspection.
 - 4.1 Any party who wishes to make any application relating to the verified list of the Ministry and/or inspection (other than issues relating to section 66 of the Fisheries Act 1983) shall file and serve an application on or before 31 March 2003.
 - 4.2 The Ministry shall file and serve any reply to the application on or before 7 April 2003.
- 5 Other Evidence.
 - 5.1 The Ministry shall file and serve all evidence (including responses) on or before 21 March 2003.
 - 5.2 All parties (other than the Ministry) shall file and serve responses on or before 4 April 2003.
- 6 Application relating to fishing records and returns.
 - 6.1 If any party wishes to make an application to the Inquiry pursuant to section 66 of the Fisheries Act 1983 or otherwise in relation to the production or disclosure to the Inquiry of fishing records or returns, such application and the grounds upon which the application relies, and any material in support, shall be filed and served on or before 4 March 2003.
 - 6.2 If any party wishes to object on such application the party shall file and serve an objection and any material in support on or before 11 March 2003.
- 7 Hearing dates of the Inquiry.
 - 7.1 The hearing will commence at 10.00am on 28 April 2003.
 - 7.2 The hearing will continue until 16 May 2003.
 - 7.3 Further hearing time will be allocated, if required.
- 8 Evidence before the Inquiry.
 - 8.1 From the evidence and material received by the Inquiry to date, and from the responses to the request in Minute 2 for parties to advise which affidavits or briefs of evidence were being relied upon and whether the deponent was being called, the Inquiry apprehended that the following witnesses may not be called in person by either Barine Developments Limited, Sealord or the Ministry of Fisheries. The Reviewers have indicated in their Telephone Conference call that they wished to hear from the following witnesses:
 - Mr Penwarden
 - Mr Patterson
 - Mr Younger

- Mr Hunt,
- Mr Claudatos
- Mr Chadwick
- Mr Reid

And further:

- Mr Prescott
- Mr Crothers
- Mr Wood
- Mr Walshe
- Mr Boyle
- Mr Shallard

8.2 Following the Reviewers indication that they wished to hear these witnesses, Barine Developments/Sealord and the Ministry of Fisheries, shall file a notice specifying whether they propose to call those deponents as witnesses. Such notices shall be filed with the Inquiry and served on the parties on or before 14 March 2003.

8.3 In relation to all other parties to the Inquiry, they shall each file and serve a notice specifying whether or not they propose to call as a witness before the Inquiry the deponents of the briefs of evidence or affidavits filed on behalf of their party. It is noted that a number of parties, including Simunovich, Vautier Shelf, and United Fisheries have indicated that certain witnesses will be called but they will advise the Inquiry as to whether other deponents will be made available. All parties are to file a notice detailing the witnesses to be called to give oral evidence and examined, such notice to be filed and served on the Inquiry on or before 14 March 2003.

8.4 The Inquiry reserves the right to call such further or other persons as it considers necessary.

9 Compliance with Timetable

9.1 As a result of the defaults under the Timetable and the cost to the Inquiry of postponing the hearing, any party seeking an extension of time must apply to the Inquiry by way of a formal application for an extension of time, together with supporting evidence being filed and served.

NOTES:

- (a) It is noted that the present Timetable has been rescheduled with all Counsel in attendance, and there was no disagreement to the revised Timetable.
- (b) There was agreement between Mr Wilson QC and Ms Grey that Barine Developments Limited and Sealord would give particulars of any allegation of corruption or impropriety alleged by Barine Developments or Sealord based on material currently held.
- (c) It is further noted that the Reviewers made it clear that the Inquiry has before it material which does allege among other things:
 - suspicion of illegal fishing,

- whether there was adequate investigation,
- whether relationships were less than professional and not at arms length,

and that the Inquiry was obliged to inquire into these allegations.

Helen Cull QC and David Smyth

Fisheries Management Inquiry

Minute 5

21 March 2003

1. The Inquiry received a letter dated 19 March 2003 from the Crown Law Office making a formal application on behalf of the Ministry of Fisheries for an extension of time to file briefs of evidence.
2. The Inquiry required other parties to make any submissions by 9am 21 March 2003 and required the Ministry to reply by 2.15pm on that date. The Inquiry received a submission from Barine and Sealord and a reply from the Ministry.
3. The Inquiry has considered the material filed.
4. This is the second time that the Ministry has failed to comply with timetabling directed by the Inquiry. The timetable in Minute 4 was established with all Counsel present and with no disagreement. Furthermore all counsel were agreed that the Inquiry needed to commence without undue delay.
5. It is of serious concern to the Reviewers that the Ministry has again omitted to provide documents within the time specified in the timetable. Also of concern is the possible effect of the current omission on the existing timetable.
6. Notwithstanding the above concerns, the Inquiry is of the view that an extension of time may be granted to the Ministry without jeopardising the commencement of the hearing which is scheduled to commence on 28 April 2003.
7. The application by the Ministry states that the briefs of evidence of Messrs Wood and Crothers will not be available by 21 March 2003 due to the late 'particularisation' of the allegations of corruption made by Barine Developments Limited. As recorded in Minute 4 matters of 'particularisation' were agreed between Mr Wilson QC and Ms Grey and do not constitute a valid ground for seeking an extension of the timetable.
8. With a considerable degree of reluctance and noted as a final extension, the timetable is amended as follows:

8.1 Paragraph 5.1 of Minute 4 is deleted

8.2 The following paragraph 5.1 is substituted;

The Ministry shall file and serve the evidence of (including evidence relating to responses) on or before 28 March 2003 of:

W Tuck
R Ballard
B Shallard
S Driscoll
R Burnard
R McKay
A Bedford
S Stuart
R Thurston

T Prescott
K Walshe
H Hinds
L Fergusson
and on or before 31 March 2003
T Crothers
D Wood
Dr R Allen

provided that, as stated in its application, the Ministry will make its best endeavours to have as many as possible briefs completed, filed and served prior to 28 or 31 March 2003 as may be appropriate.

Helen Cull QC and David Smyth

Fisheries Management Inquiry

Minute 6

20 June 2003

By fax/post to all parties

Re: Privilege

Attached are letters dated 13 June 2003 from the Crown Law Office and 16 June 2003 from Goodman Stevenson Tavendale. Also attached is a copy of an article from the Independent.

The matters relating to privilege referred to in above letters arose during the course of the Inquiry's hearing on Monday 9 June and Tuesday 10 June 2003.

It appears that matters relating to privilege have come to the knowledge of the media.

The Inquiry draws to the attention of all parties that the media has been excluded from the hearing (Minute 1 dated 16 December 2002, paragraph 3.1 refers), and that the passing of any information to the media from the proceedings in relation to privilege would be improper. The disclosure of the transcript to the Media would also be improper.

Can the Inquiry please have your assurance in writing that neither you nor your client has passed any information to the media in relation to privilege.

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Helen Cull QC

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David Smyth

Fisheries Management Inquiry

Minute 7 – December 2003

1 Introduction

It is a convenient stage at which to issue a minute to advise parties of the position and of some developments since the hearing of evidence concluded on 18 July 2003.

2 Reporting Date

The time for reporting has been extended to early 2004.

3 Primary Production Committee Report

The Report of the Primary Production Committee has been made public and the Inquiry holds a copy.

4 Supplementary Lists of Documents Disclosed by Ministry

Subsequent to 18 July 2003 the Ministry has disclosed 30 additional boxes of documents, and provided a document list No 9, a file of documents said to be relevant from list No 9 and a box of documents provided to Mr Wilkinson pursuant to an Official Information request.

Some parties have made submissions on those documents as late as 3 December 2003.

The Inquiry has been supplied with copies of some of the documents. Counsel Assisting has been instructed to inspect the remaining documents and expects to undertake inspection in the near future.

Parties may make submissions in respect of such documents in accordance with the timetable below.

5 Report of Counsel Assisting

Attached is a copy of a report dated 4 December 2003 from Counsel Assisting to the Reviewers. Copies of the Report are being provided to Mr Patterson and Mr Hunt. The letters to Mr Chadwick and Mr Jurgeleit have been sent. Mr Patterson, Mr Hunt and the parties may file evidence or submissions in relation to the matters in the Report in accordance with the timetable below.

6 Goodship and others v Director-General of Fisheries (CA236.02 2 October 2003)

The Inquiry has received submissions from two parties in respect of the above judgement the last of which was received on 27 November 2003.

If any other party wishes to make submission it should do so in accordance with the timetable below.

6 Timetable

Any evidence or submissions in relation to the documents, report of Counsel Assisting, or Goodship and others v Director General of Fisheries are to be filed and served by Monday 22 December 2003.

Dated 5th day of December 2003.

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Helen Cull QC

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David Smyth

Fisheries Management Inquiry

Minute 8

27 January 2004

1. Reporting Date

The reporting date has been extended to 8 April 2004.

The Reviewers consider it is important that every effort is made to adhere to this date. Paragraph 9 is directed to achieving this end.

2. Mr Hunt – Report of Counsel Assisting

In its final submissions dated 19 December 2003 Barine submitted:

“Mr Hunt worked on the Ememelay until he left Simunovich in 1995. Area 3 was fully fished (i.e. at some stage the “flag went up”) not only in January 1993 but also during 1993 to 1994 and 1994 to 1995 fishing years (see FARD, PB1/75). It appears Mr Hunt has not been asked to consider records from those two periods to see if he can identify whether the incident occurred in a later year”

On inquiry, Counsel for Barine has advised Counsel Assisting that the relevant times cover Area 3 from midnight on 5 November 1993, from midnight on 25 October 1994, and from midnight on 16 October 1995. Counsel Assisting has been instructed to investigate and report in relation to the dates specified by Counsel for Barine. The report of Counsel Assisting will be circulated to all Counsel.

3. Additional Documents held by Ministry

Counsel Assisting has carried out an inspection of 186 cartons of documents held by the Ministry and his report will be circulated.

4. Barine Application – Wilkinson Affidavit

The Inquiry has before it an application dated 18 December 2003 to take into its records and consider the affidavit of Mr Wilkinson dated 3 May 1992. Notice of any opposition and any evidence or submission should be filed and served on or before 10 February 2004.

5. Chadwick Application – Further Evidence

The Inquiry is circulating by mail a combined affidavit and application dated 17 December by Mr Chadwick. The affidavit and application are circulated on the basis that they are confidential to Counsel and the parties and are not to be used except for the

purposes of the Inquiry. To protect his informant, Mr Chadwick has requested that masked copies be circulated to parties other than the Ministry and the clients of Mr Squire QC.

Mr Chadwick had forwarded to Counsel Assisting the document headed “Stan Crothers Evidence” dated 7 August 2003 (a copy of which is attached to his affidavit dated 17 December 2003). Counsel Assisting referred the document to the Crown Law Office and Mr Squire QC. The Crown Law Office and Mr Squire QC indicated that their clients had objection to the document being placed before the Inquiry. Counsel Assisting advised Mr Chadwick of the objection and that, if Mr Chadwick wished the document or additional material to be placed before the Inquiry as evidence, it would be necessary for him to give it on oath. The combined affidavit and application has been filed.

The Inquiry considers it appropriate to indicate in a preliminary way that:

- Mr Chadwick’s response to evidence affecting him is admissible;
- The Inquiry does not have before it the questions by and answers to Mr Andrews as referred to by Mr Chadwick in para. 4.2 of his affidavit;
- The Inquiry considers the detail of the *Over the Border* raid may have some relevance to the issue of communication with the Ministry, but otherwise is largely irrelevant to the Terms of Reference;
- Allegations against Mr Buckley are being raised at a late stage and have little relevance to the Terms of Reference.

Notice of any opposition and any evidence or submission should be filed and served on or before 10 February 2004.

6. Tuck/Lanauze submission

Circulated by mail is a copy of a letter of submission from Lanauze on behalf of Mr Tuck. If any submission or evidence in reply is to be filed, it should be filed and served by 10 February 2004.

7. Letter dated 19 December 2003 from D. Edwards

The supplementary submission of Simunovich referred to a letter dated 19 December 2003 from Mr Edwards, Manager – Policy and Treaty Strategy Ministry of Fisheries. If any Counsel wish to file submissions in respect of the letter, these should be filed and served before 10 February 2004.

8. QMR signing

The evidence before the Inquiry is that the QMR was signed by “B Nalder”. The report of the Primary Production Committee reads:

Mr Nalder signed the amended QMR adding ‘Fisheries Officer’ underneath his signature”.

This document is not in the possession of the Inquiry and Counsel Assisting has been asked to sight the original QMR and report.

9. Further Applications, Submissions or Evidence

The Inquiry is concerned at the volumes of applications, submissions and evidence that have been presented since the conclusion of the evidence on 18 July 2003, and the timetabling of final submissions. No further application, submission or evidence (other than those provided for above) will be entertained by the Inquiry unless prior leave is sought and granted.

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Helen Cull QC

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David Smyth

14.0 APPENDIX 3 – INTERIM DECISIONS OF THE INQUIRY

Fisheries Management Inquiry

IN THE MATTER of an application to call Ms Grey as a witness

DECISION OF THE REVIEWERS

DATED THE 23RD DAY OF MAY 2003

Introduction

- [1] The State Services Commissioner, pursuant to his powers under the State Sector Act, appointed two Reviewers to undertake an Inquiry into the allegations of corruption and impropriety concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, [the Ministry] to assess the quality of the administration and management at the time referred to in the allegations and to determine whether there is a need to take further action to ensure the quality of the Ministry of Fisheries current management and systems meet public expectations. The specific Terms of Reference are:

1. Given the legislation and Government policy framework within which the former Ministry of Agriculture and Fisheries was operating, did it act reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992?
 - 1.1 Did the former Ministry of Agriculture and Fisheries have adequate, appropriate and consistent administrative systems and processes for the granting of such permits and licences at the time?
 - 1.2 If so, did the former Ministry of Agriculture and Fisheries comply with those systems?
- 2 Did Fisheries Officers in the former Ministry of Agriculture and Fisheries in 1993, and in the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery?
 - 2.1 If so, did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries respectively carry out adequate investigations into the allegations? If not, why not?
 - 2.2 Did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences, and did the Ministries comply with those systems?
- 3 Did the former Ministry of Agriculture and Fisheries have adequate grounds for taking disciplinary action against Mr Nalder on each occasion? What were the circumstances surrounding the termination of his employment? Did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery?
- 4 Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times professional and at arms' length?

5 Any other matter concerning the former Ministry of Agriculture and Fisheries or the Ministry of Fisheries that the reviewers consider relevant to the foregoing questions.

- [2] At the commencement of the Inquiry, a number of Counsel appeared for the parties to the hearing. Mr Cooke appeared for Sealord Limited [Sealord]; Ms Grey appeared for Barine Developments Limited [Barine]; Mr Castle and Mr Reid for United Fisheries Limited, Pranfield Holdings Limited and Trevor Goodship; Mr Ivory and Mr Keall for Simunovich Fisheries [Simunovich]; Mr Squire QC for Crothers and Wood; and Ms McDonald QC and Ms Jagose for the Ministry of Fisheries. At the hearing of the present application Mr Wilson QC appeared for the Ministry, Mr Zindel appeared for Ms Grey and Sir Geoffrey Palmer appeared for Barine Developments Limited.
- [3] During the first day of the Inquiry, 28 April 2003, Counsel for the Ministry, Ms McDonald QC foreshadowed that the Ministry may make an application to have Ms Grey called as a witness to the Inquiry.
- [4] On the eighth day of the Inquiry, Counsel for the Ministry Mr Wilson QC, signalled his intention to make an interlocutory application to have Ms Susan Grey, Counsel for Barine, called as a witness to the Inquiry.
- [5] A number of Counsel wished to be heard and a hearing time was scheduled for 12 May at 2 pm.
- [6] At the request of Counsel for Sealord and Barine, a written application in the form of a letter dated 9 May 2003, was filed on behalf of the Ministry of Fisheries setting out the grounds for the application and addressing matters of relevance to the Terms of Reference and jurisdiction.
- [7] In response to a similar request from Counsel for the Ministry, written grounds of opposition to the Ministry's application were filed by Counsel for Barine and Counsel for Ms Grey.

Background

- [8] In the introduction to the Inquiry's Terms of Reference, it is noted that there have been allegations of corruption and impropriety on the part of the Ministry of Agriculture and the Ministry of Fisheries, in relation to the management of the scampi fishery. The allegations are contained in the affidavits, which were presented by Barine to the Rt. Hon. Winston Peters, MP and were later referred to the Solicitor-General and the Serious Fraud Office. During the debate in the House, reference was made to the allegations of corruption and following receipt of the affidavits, the Serious Fraud Office, the media, and a Television New Zealand "Assignment" programme have publicly repeated that these allegations are about corruption. It should also be noted that Mr Tuck for the Ministry, and the State Services Commissioner respectively, issued press releases referring to the allegations of corruption having been made.
- [9] The "original" affidavits which were presented to the Rt. Hon. Winston Peters and were later referred to the Solicitor-General, the Serious Fraud Office and ultimately the State Services Commission, consist of nine affidavits, one of which is unsworn.

- [10] Each of the deponents of the affidavits have been called as a witness to the Inquiry and their evidence has been examined by the Reviewers and cross-examined by Counsel, where allegations of impropriety or allegations affecting a party's interest adversely have been made.
- [11] On 25 February 2003 by teleconference, Counsel for the Ministry requested particulars of any allegation of corruption, or impropriety alleged by Barine. In Note (b) to Minute 4, the Reviewers noted there was agreement between Counsel that particulars would be given and in Note (c) the Reviewers made it clear that the Inquiry has before it material which does allege among other things:
- suspicion of illegal fishing,
 - whether there was adequate investigation,
 - whether relationships were less than professional and not at arms length,

and that the Inquiry was obliged to inquire into these allegations.

Application by the Ministry of Fisheries

- [12] In its letter of 9 May 2003, the Ministry set out the contentions for its application. The Ministry contended that the Inquiry “must understand” how the label of “*corruption*” was connected to the allegations made in the affidavits that were co-ordinated by Barine and which led to the Inquiry being established, in order to test the veracity of those allegations. Further, the Ministry wished to be given the opportunity to test fully the evidential basis on which allegations of corruption against it were made.
- [13] In its application, the Ministry referred to the public repetition of the allegations of corruption and noted that the witnesses for Barine in the Inquiry now deny that they have ever made allegations of corruption. Reference was made to Mr Sullivan's evidence before the Inquiry that the briefing notes that accompanied the “original” affidavits were probably prepared by his firm but that Ms Grey was in control of co-ordinating a wide ranging dissemination of the “original” affidavits.
- [14] The Ministry alleged specifically that
- “Ms Grey is the only person who is able to give direct evidence as to the use of the “tag” of corruption that has become the background to this Inquiry into the Ministry of Fisheries and as to her instrumental role in making the allegations of corruption”.*
- [15] In addressing the question of relevance of its application to the Terms of Reference, the Ministry referred to the stated purpose of the Inquiry, namely to sustain public confidence in fisheries management and the specific Terms of Reference which the Ministry contended were established against the backdrop of allegations of corruption and impropriety on the part of the former and current Ministry of Fisheries. In its written application, the Ministry contended that it was essential for continuing public confidence in the public sector for the Inquiry to deal conclusively with corruption allegations in relation to both the Ministry and the two officials, Mr Crothers and Mr Wood.

- [16] Under the heading “jurisdiction”, the Ministry’s application referred to s 25 of the State Sector Act, being the power to summons witnesses and receive evidence as contained under the Commissions of Inquiry Act 1908 and s 4A of that Act which provides the Inquiry with the power to issue in writing a summons requiring any person to attend to give evidence or to produce any documents, that are relevant to the subject of the Inquiry.
- [17] At the hearing of the application, Mr Wilson QC made oral submissions in support of the Ministry’s application. He was supported by Mr Squire QC for Mr Crothers and Mr Wood, and Mr Ivory for Simunovich.
- [18] Mr Wilson QC, on behalf of the Ministry, amplified the grounds of the Ministry’s application. He submitted that the allegations of corruption were both relevant and central to the Inquiry, and given the purpose and scope of the State Sector Act under which the Inquiry was established, it is entirely proper that the serious allegations and examined. He submitted that there was no evidence that supports any allegations of corruption or impropriety of the sort contained in the “original” affidavits and that the Inquiry must ensure that any allegation of corruption is identified by the maker of the allegation, tested by the Reviewers and a firm conclusion as to corruption is made.
- [19] The Inquiry was referred to passages in the evidence from Mr Penwarden and Mr Sullivan for Barine, in which both witnesses have denied making allegations of corruption. Referring to the “*characterisation of corruption*” in the “Scampi Briefing Notes” and the “Briefing Notes re Scampi”, reference was made to the fact that Barine has refused to particularise the allegations of corruption prior to the Inquiry commencing and it is now asserting that it has not made those allegations. Mr Wilson QC urged the Reviewers that the allegations of corruption were initiated by Ms Grey and in the absence of any other evidence, Ms Grey should be viewed as the complainant in this matter and should be required to give evidence to the Inquiry.
- [20] In relation to the relevance of Ms Grey’s evidence to the Inquiry, Mr Wilson QC referred the Inquiry to Term of Reference 1.2 in support of the Ministry’s submission that by the use of the word “*corruption*”, Barine implied that Simunovich received an improper advantage from the Ministry in its permitting decisions.
- [21] In relation to Terms of Reference 2.2 and 2.3, to the use of the word “*corruption*” Barine through its solicitor, Ms Grey, has implied that Simunovich received improper protection from investigation and prosecution for alleged illegal fishing activity.
- [22] The third submission was that Term of Reference 4 is included because Barine has implied through the use of the term “*corruption*” that Simunovich and the two Ministries had a relationship which was improper and not at arms’ length.
- [23] Mr Wilson QC alluded to the letter of Counsel assisting of 19 February 2003, in which the Ministry was directed to the Terms of Reference which “are wide enough” for the Reviewers to consider any relevant allegations, be they allegations of corruption or otherwise, to the extent needed for the Reviewers to answer the questions posed by Terms of Reference 1.2, 2.1 and 4.

- [24] In support of the Ministry's submission that the Inquiry has the jurisdiction to summons Ms Grey as a witness, in addition to referring to s 25 State Sector Act and s 4B(1) Commissions of Inquiry Act, the Inquiry is not bound by the rules of evidence that would apply in a Court and the test for admissibility is whether, in the Reviewers' opinion, the evidence may assist in dealing effectively with the subject of the Inquiry.
- [25] Referring to Ms Grey's position as Barine's Counsel, Mr Wilson QC submitted that Rule 8.06(3) of the Rules of Professional Conduct for barristers and solicitors requires Counsel to retire from the position of Counsel where it is necessary to give evidence or make an affidavit in respect of the matter concerned. As to any issue regarding legal privilege attaching to Ms Grey's evidence, it was submitted that the scampi briefing notes, probably prepared by Ms Grey, were not prepared for the purposes of legal advice or litigation, but for political lobbying. It was submitted that this would not be subject to legal privilege as were the communications with the Ministry, the media and to the Serious Fraud Office by Ms Grey.
- [26] In essence, the Ministry's position was that Ms Grey has evidence that is "directly relevant" to this Inquiry and natural justice requires that she is compelled to give that evidence, in order for the Inquiry to determine the full scope of the allegations made against the Ministry and the two Ministry officials. Mr Wilson QC referred to the "*Erebus*" principle as authority for the proposition that natural justice depends on allegations that are plainly stated and put to those who are the subject of the allegations.
- [27] Mr Wilson QC further urged that the Inquiry must provide "a final definitive assessment of the allegations of corruption" which it cannot do unless it hears from Ms Grey and as the Inquiry is required to recommend to the Commissioner, on the basis of its findings, what further action, if any, should be undertaken, it would be open to the Inquiry to recommend reference be made to the appropriate authorities.
- [28] In support of the Ministry's application, Mr Squire QC also made oral submissions.
- [29] In referring to the introduction to the Terms of Reference Mr Squire QC referred to the fact that there have been allegations of corruption and impropriety and the Terms of Reference, the primary task of this Inquiry is to undertake an inquiry into allegations of corruption and impropriety.
- [30] In referring to the Scampi Briefing Notes (Exhibit "N") reference was made to the claim within the briefing note that the allegations which are made in the document are supported by extensive affidavits, being a clear reference to the "original" affidavits.
- [31] It was submitted that the Inquiry must have evidence from the person now identified as the person responsible for the allegations of corruption and impropriety and in his submission, Ms Grey should be called as a witness. His reasons included the following:
1. The Inquiry must have evidence from Ms Grey because she has not been a traditional solicitor or Counsel and she appears on the evidence, to have been instrumental in having the matter put into the political arena. Her motives for

putting the matter into the political arena where litigation had not succeeded needed to be explored in the interests of fairness to Mr Crothers and Mr Wood.

2. Secondly, the briefing notes were designed to inspire the serious allegations made, and in particular the paragraph implicating Mr Crothers and Mr Wood in matters requiring investigation by the Serious Fraud Office entitles them to have evidence before the Inquiry properly tested as to whether the allegations made by Ms Grey in the subject of her own judgment were warranted and justified.
3. Thirdly, other Counsel is available to Barine to represent its interests at the Inquiry, namely Ms Jurgeleit. In relation to the submissions that Ms Grey would be giving hearsay evidence, it was submitted that her evidence goes beyond other persons allegations to motives of acting as she did and these are legitimate areas of inquiry and natural justice requires Mr Crothers and Mr Wood should have the opportunity to test those views.

[32] Mr Ivory, for Simunovich, also supported the submission and referred to the third to last paragraph of Exhibit “N” in which both Mr Wilkinson and Simunovich are identified as the “private party” side of the corruption allegation.

[33] Mr Ivory also referred to the position of Mr Wilkinson as a former Ministry official being accused of impropriety in respect of scampi permitting for Simunovich whilst he was in the Ministry. He maintained his clients are directly affected by the allegations of corruption and impropriety.

The Opposition to the Application

[34] Parties opposing the application by the Ministry were required to file written grounds of their opposition by 10 a.m. Monday, 12 May.

[35] Two notices were received; one on behalf of Barine and the other on behalf of Ms Grey personally. The grounds on which Barine opposed the application were as follows:

1. Ms Grey can give no evidence that is relevant to the Terms of Reference to the Inquiry and that is the only basis upon which the Inquiry could summons a person to give evidence.
2. It is not necessary to test the veracity of the allegations in the “original” affidavits for the Inquiry to understand how those allegations were characterised as allegations of corruption.
3. Ms Grey is Barine’s Counsel in this Inquiry and is engaged because of her familiarity with and expertise in those matters, particularly under the second Term of Reference, and in respect of counter-allegations made against Barine. In the event that she is required by the Inquiry to give evidence on those one to disqualify Barine’s Counsel, thus prejudicing Barine’s position in front of the Inquiry.
4. Because of Ms Grey’s involvement in this Inquiry as Barine’s solicitor and Counsel, any evidence she might be able to give would attract legal professional privilege and there is no waiver by Barine of that privilege.

5. The Ministry's application is a tactical one to disqualify Barine's Counsel, thus prejudicing Barine's position in front of the Inquiry.
6. The Inquiry's power to require persons to give evidence before it is a discretionary one and the extent to which any evidence Ms Grey might be able to give would be excluded on the grounds of privilege, and would be of limited assistance to the Inquiry.
7. To grant the Ministry's application will compound the breaches of Article 9 of the Bill of Rights 1688, which have already occurred in this Inquiry.

[36] Mr Zindel, for Ms Grey, also submitted grounds of opposition. They are in summary:

1. If Ms Grey was called as a witness to the Inquiry, Rule 8.06 (1) of the Rules of Professional Conduct would disqualify her from acting for Barine and this would prejudice Barine before the Inquiry.
2. The Crown has given late notice of its application and although it was foreshadowed on the first day of the Inquiry and repeated later, work had been undertaken prior to the Inquiry commencing by Ms Grey.
3. Any evidence by Ms Grey will be hearsay, as she has no direct knowledge of the matters before the Inquiry at the relevant periods.
4. The information which Ms Grey currently has is privileged and s 4C of the Commissions of Inquiry Act preserves privilege of a witness.
5. The application is outside the Terms of Reference, namely the Ministry is seeking to find out how the label of "corruption" was applied, which is irrelevant to the question of the investigation of the alleged conduct of certain fisheries officers.
6. Lastly, the application is an abuse of process, as the evidence from Ms Grey would be limited and largely hearsay.

[37] Sir Geoffrey Palmer appeared as Counsel for Barine and made oral submissions in opposition to the Ministry's application. The opening part of his submission on behalf of Barine emphasised that this is an Inquiry into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries; not an inquiry into Ms Grey or into Barine. The emphasis by the applicants on everything relating to "corruption" was criticised and we were referred to the Oxford English Dictionary and the six meanings attributed to "corruption" the most relevant of which is:

"perversion or destruction of integrity in the discharge of public duties by bribery or favour".

[38] The essence of the opening part of his submission was that it was irrelevant as to who has made the allegation of corruption; the point is what behaviour did the Ministry officials engage in. Reference was made to the public debate following the Rt. Hon. Winston Peters statement in the House and the repetition in the Assignment programme, and the reports of the Select Committee that have been published in the media.

- [39] In relation to the briefing notes, it was submitted that it contained a summary of what was in the affidavits and it is not relevant to Ms Grey's role as Counsel if she is summonsed as a witness.
- [40] Five grounds were advanced in opposition to the Ministry's application. They are, in summary:
1. That there is a lack of relevance in anything that Ms Grey could say that would assist the Inquiry to discharge its Terms of Reference. Ms Grey had no involvement with the scampi fishery or with any of the matters, the subject of this Inquiry, until some time after she was engaged by Barine as its solicitor in or about 2000 (refer evidence Mr Sullivan, transcript page 388, lines 27-29). We were informed by Sir Geoffrey Palmer that Ms Grey did not start acting for Barine until October 2001, well after the most recent of the periods covered by the Terms of Reference.
 2. Barine has a right to Counsel and if she were to give evidence, she would be in breach of Rule 8.06 of the Rules of Professional Conduct and would deprive Barine of her position as Counsel.
 3. Any evidence to be adduced by Ms Grey would attract legal professional privilege as her involvement in this Inquiry, and in the preparation of materials, was as Barine's solicitor and Counsel. Barine does not waive its privilege. Further, s 6 of the Commissions of Inquiry Act ensures the same privileges and immunities as witnesses and Counsel in Courts of Law.
 4. The Inquiry has discretion to call witnesses and is not obliged to require any person to give evidence before it. Relevant to the Reviewers' discretion, it was submitted that evidence to be excluded on grounds of privilege, lack of relevance and the compromise of Ms Grey as Counsel for Barine, are factors to be exercised in the discretion under s 4D of the Commissions of Inquiry Act in requiring a witness to attend.
 5. If Ms Grey is called as a witness, this will be a breach of Article 9 of the Bill of Rights 1688, compounding problems that have already arisen in this Inquiry where debates or proceedings in Parliament have been impeached or questioned in any Court or place out of Parliament. Reference was made to certain witnesses appending an unofficial transcript from a Parliamentary Select Committee and questions being put to witnesses which were put and answered in the Select Committee.
- [41] Mr Zindel adopted the submissions of Sir Geoffrey Palmer and submitted that Ms Grey assisted in the harvesting of the information, namely the initial affidavits, which she did in the role of Counsel and as such would be hearsay and cloaked by privilege.
- [42] At the request of the Reviewers, Mr Stevenson, Counsel Assisting the Inquiry, also made submissions. Mr Stevenson addressed us in relation to the jurisdiction of the Inquiry, the protection or immunity available to a witness to this Inquiry and the general principles applicable to the issue of a witness summons. He also addressed aspects of the grounds of the Ministry's application and the status of Ms Grey before the Inquiry as Counsel.

Further application

- [43] On Wednesday, 14th May 2003, during his evidence, Mr Patterson withdrew paragraphs 60 and 61 of his affidavit.
- [44] At the conclusion of his evidence, Mr Wilson QC made a further application, requesting the Reviewers to take into account the answers from Mr Patterson, the annexure of the 1998 diary and the fact that Mr Patterson had indicated paragraphs 60 and 61 were added without authority. Mr Ivory also supported this application.
- [45] The evidence subsequent to the date of the application has addressed some issues relevant to the making of the affidavits and the extent to which they are confirmed by the deponents.

Further submissions

- [46] On Friday, 16th May 2003, the Reviewers informed Counsel that during course of their deliberations of Counsels submissions, an issue had arisen with regard to the emphasis put on the “*tag of corruption*”. Counsel was referred to Mr Wilson QC’s submissions at page 1272 of the transcript, in which he urged the Inquiry to provide “*a final definitive assessment of the allegations of corruption*” and referred to the recommendatory powers of the Inquiry, and that if the Inquiry was of a view that there were serious matters requiring referral, the Reviewers had the power to refer the matter to the appropriate authorities.
- [47] Sir Geoffrey Palmer in his submission referred to the dictionary definition of “*corruption*”. This was in response to the Ministry’s application. We were concerned that Counsel had not addressed the legal definition of “*corruption*”.
- [48] The Reviewers said they had referred to the relevant sections of the Crimes Act and asked Counsel to refer to the wording of the Crimes Act sections regarding corruption and the authorities in relation to the application of the Ministry, the Terms of Reference and the aspect of the referral.
- [49] If Counsel wished to make further submissions, they could do by 5 pm Monday, 19th May.
- [50] The Reviewers received submissions from the Ministry, supported by Mr Squire QC and Mr Ivory, and from Barine and Counsel for Ms Grey.

Jurisdiction of the Inquiry

- [51] Pursuant to s 8 of the State Sector Act 1988, the State Services Commissioner is empowered to carry out the functions in respect of the Public Service, to conduct investigations. That power has been delegated to the Reviewers, pursuant to s 25(2).
- [52] Of relevance to this application, s 25(1) gives power for the purposes of “*carrying out the duties and functions*” imposed on the Commissioner, to summons witnesses and receive evidence as are conferred on Commissions of Inquiry under the Commissions of Inquiry Act 1908 and the provisions of that Act should apply accordingly.
- [53] The relevant sections of the Commissions of Inquiry Act are sections 4A (3) and 4D. Section 4A(3) provides:

(3) Every person entitled, or given an opportunity, to be heard under this section may appear in person or by his counsel or agent.

Section 4 D provides:

(1) For the purposes of the inquiry the Commission may of its own motion, or on application, issue in writing a summons requiring any person to attend at the time and place specified in the summons and to give evidence, and to produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the subject of the inquiry.

(2) For the purposes of this Act, the power to issue summonses or to do any other act preliminary or incidental to the hearing of any matter by the Commission, may be exercised by the Commission or its Chairman, or by an officer of the Commission purporting to act by direction or with the authority of the Commission or its Chairman.

Section 6 gives protection to persons appearing, in that:

“Every witness giving evidence, and every counsel or agent or other person appearing before the Commission, shall have the same privileges and immunities as witnesses and counsel in Courts of law.”

Thus, for the issue of a summons to be granted, it will have to be clear that the issue of the summons is for the “*purposes or functions of the Inquiry*” and that the evidence and any documents are relevant to the subject of the Inquiry.

[54] It is apposite to note the High Court Rules and District Court Rules which relate to a witness summons. The Courts can control a wrongful issue of a subpoena or witness summons, which can be set aside where “*the evidence will be unnecessary*” or “*what is sought is irrelevant*”. (Refer Brookers District Court Practice DR 496.22). It should be noted in this context that under s 4:

“*every Commission shall have the powers of a District Court in the exercise of its civil jurisdiction, in respect of citing parties and conducting and maintaining order at the Inquiry*”.

[55] The second consideration is whether it would be proper to issue a summons if it were apparent that the witness had, and claimed, immunity or was otherwise protected. In this regard, given that the application is to summons a solicitor/counsel for Barine, questions of immunity and privilege also arise in respect of any evidence that she can give to the Inquiry.

The issues

[56] The submissions from Counsel essentially fall into two broad categories. The first is whether the evidence to be given by Ms Grey is relevant to the Inquiry and secondly, whether Ms Grey's position as solicitor and Counsel affect the powers of the Inquiry to issue a summons. We will deal with each under the principal headings of ‘Relevance’ and ‘Solicitor as Witness’.

Relevance

[57] The issues require a consideration of whether or not this is an appropriate case to exercise our discretion to issue a witness summons under s 4A Commissions of Inquiry Act.

[58] The starting point for an Inquiry must be its Terms of Reference.

[59] In the introduction to the Terms of Reference, the background to the establishment of this Inquiry is described. We refer to the second paragraph of the Inquiry’s Terms of Reference:

“There have been allegations of corruption and impropriety on the part of the Ministry of Agriculture and Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery.”

[60] The body of the Terms of Reference then refers to:

“The State Services Commissioner will undertake an inquiry into the allegations concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, which will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries’ current management and systems meet public expectations.”

[61] There is then a direction that the State Services Commissioner will inquire into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries in the following matters and the specific questions numbered 1 to 5 in the Terms of Reference then follow.

[62] In undertaking an Inquiry into the allegations concerning the former and present Ministries, the focus of the Inquiry is to assess the quality of the administration and management at the time referred to in the Terms of Reference. The allegations are those contained in the “original” affidavits, which contain the direct evidence of what is alleged. To this end, the Inquiry has summonsed all of the deponents.

[63] In inquiring into the performance of the Ministry, the following are relevant to this present application:

- *Terms of Reference 1:* Did the Ministry act responsibly in administering the grant of permits to fishers in the scampi industry from the late 1980s to 1992?
- *Terms of Reference 1.1:* Did MAF and the Ministry have adequate, appropriate and consistent administrative systems and processes at the time ?
- *Terms of Reference 1.2:* If so, was there compliance?
- *Terms of Reference 2:* Did Fisheries officers in 1993 and 1998 have a reasonable basis to suspect illegally fishing by any company in the scampi fishery?

- *Terms of Reference 2.1:* If so, did MAF and the Ministry of Fisheries carry out an adequate investigation? If not, why not?
- *Terms of Reference 2.2:* Were there adequate and appropriate administrative systems and processes in place at the relevant times (1993 and 1998) for identification and investigation of alleged offences and was there compliance with those systems?
- *Terms of Reference 4:* Were the relationships at the relevant times (late 1980s to 1992, 1993, and 1998) professional and at arms length?

- [64] The Terms of Reference are specific as to the issues to be addressed and the relevant times, which are the focus of each of the questions to be answered.
- [65] The overall thrust of the Terms of Reference, without detracting from its actual wording, is an inquiry into the management, administration, administrative systems and processes within the Terms of Reference, and whether or not there has been compliance with them. Term of Reference 4, again specific to times, requires a focus of whether relationships were professional and at arms length.
- [66] In addressing each of the issues under the Terms of Reference, the Inquiry is charged, amongst other things, with inquiring into the allegations which have been raised. As specified, the Terms of Reference require the focus of the Inquiry on the late 1980s to 1992, 1993 and 1998.
- [67] Under the recommendatory powers, the Inquiry must assess what action should be taken by the State Services Commissioner or other parties and this includes an assessment of the quality of current (2002) administration and compliance systems, processes, practices and behaviours in respect of fisheries management.
- [68] We turn then to consider the relevance of any evidence which Ms Grey can give, and whether such evidence would assist the Inquiry in answering its Terms of Reference. The allegations contained in the “original” affidavits were made by the deponents on oath. There is one exception to this and that was the unsworn affidavit of Mr Hikuwai. There was no sworn evidence by Ms Grey, although she was the solicitor who attended on the witnesses, sometimes in the presence of Mr Penwarden, drafted the affidavits and sent them back to the respective deponents for checking and swearing. She also appears to have authored the two briefing notes.
- [69] As already alluded to in this decision, the Reviewers have required all deponents to be available and their evidence has been examined and, where appropriate, cross-examined in relation to the allegations of impropriety or allegations which adversely affect the interests of parties. In some cases, witnesses have withdrawn paragraphs from their affidavit, or altered wording or provided explanations which differ from the text of their affidavit.
- [70] Counsel for the Ministry, Crothers and Wood and Simunovich, respectively have been permitted to cross-examine the deponents of the affidavits in which allegations of impropriety have been made, and this cross-examination has included questions about Ms Grey being present at the time instructions were taken, drafting the affidavits, and

the circumstances in which a witness perused and swore the affidavit. Where witnesses have felt more comfortable with alternative wording or deleting allegations or paragraphs as mentioned above, they have done so and provided a description with which they felt more appropriate. We are satisfied that every witness has been given an opportunity to re-assess the content of their respective affidavits and clarify their current beliefs.

- [71] Ms Grey has not sworn an affidavit. She did not commence acting for Barine until October 2001 and any evidence to be given by her will be hearsay at best, or evidence of her opinion. There has not been any suggestion that Ms Grey should be called as an expert and clearly, acting for Barine as she does, she could not be regarded as independent.
- [72] More relevantly, in order to answer the Terms of Reference, the Inquiry must hear evidence relating to the relevant time periods, namely late 1980s, 1990-92, 1993, and 1998. Ms Grey cannot give any relevant evidence in relation to events that took place at those times.
- [73] Given the specificity of the Terms of Reference and the questions to be addressed in them, we are of the view that Ms Grey's evidence would have no relevance.

The “tag of corruption”

- [74] The essence of the Ministry's application is that the Inquiry must understand how the label of “*corruption*” was connected with the allegations made in the “original” affidavits, in order to test the veracity of the allegations (para. 2.1 grounds of application).
- [75] As we note at paragraph 14, the Ministry has urged the Inquiry that Ms Grey is the only person who is able to give direct evidence as to the use of the “*tag of corruption*” that has become the background to this Inquiry and to her instrumental role in making the allegations of corruption.
- [76] After carefully considering the Ministry's submissions and its application and the Terms of Reference, we do not find there is any requirement under the Terms of Reference or otherwise, for the Inquiry to hear from Ms Grey how the label of “*corruption*” became connected with or associated with the allegations contained within the affidavits. However, Counsel have been permitted to cross-examine the original deponents as to the foundation of the allegations, as it affects their clients, in the interests of natural justice.
- [77] What is relevant to the Inquiry is to assess the allegations in the “original” affidavits so far as they are relevant to the Terms of Reference. The Inquiry does not have to determine the “veracity” of the allegations in the “original” affidavits, but should assess and find what allegations in the “original” affidavits are relevant to the Terms of Reference for the periods of time stipulated.

Scampi Briefing Notes

- [78] In its application, the Ministry has identified two scampi briefing note documents. Accompanying the “original” affidavits was one called “Briefing Notes re Scampi”. It has numbered paragraphs. The second, unnumbered and called “Scampi Briefing

Notes” is produced as Exhibit “N”. The Ministry contended that these documents constituted evidence that allegations in the “original” affidavits were characterised as “*corruption*”, by or on behalf of Barine and both Mr Wilson QC and Mr Squire QC referred to these briefing notes as having been authored by Ms Grey, making her the complainant in this matter, who should be required to give evidence.

- [79] We observe that in the numbered version of briefing notes entitled “Briefing Notes re Scampi” under a heading called “Allegations” the paragraphs summarise aspects of the affidavits which allege that serious offending was occurring in the late 1980s, 1990-92 and under a heading called “*Ministry of Fisheries – Incompetence or Corruption?*” the question is raised why Simunovich was never prosecuted when there was “*compelling evidence*” that Simunovich was involved in serious unlawful activities. Paragraph 10 of the briefing notes say the answer would appear to be at best serial incompetence by a Ministry of the Crown, and at worst, possible corruption.
- [80] The concluding paragraphs for both documents, urges that the Serious Fraud Office must investigate Simunovich Fisheries, its manager Vaughan Wilkinson and the senior officials of the Ministry of Fisheries. Specifically, as Mr Squire QC observed, the document urges that the roles of Mr Crothers and Mr Wood should be limited to witnesses and to assisting in the investigation. The Ministry and Mr Squire QC in support, points to the tenor of the document, which implies that there has been corruption.
- [81] The authorship of these documents appears to be Ms Grey. This arises from the evidence of Mr Sullivan, and more latterly Mr Penwarden, indicating that it was possible that the affidavits and the briefing notes emanated from Ms Grey.
- [82] We have given careful consideration to the submissions made by the Ministry and Counsel in support. The briefing notes do place emphasis on the aspects of serious offending described and a request that this must be further investigated. The label “*corruption*” is used as a question and is repeated in the text of “Briefing Notes re Scampi”.
- [83] The briefing notes are not sworn or signed. They cannot be proof of their contents or of the allegations made in them or of the opinion expressed about the allegations contained in the affidavits, which were clearly designed to accompany the briefing notes.
- [84] Counsel assisting has drawn our attention to the fact that the two briefing notes are not dated but are later than the judgment of the Court of Appeal in ***Official Assignee v. Chief Executive of the Ministry of Fisheries*** [2002] 1 NZLR 722 which was delivered on 11 October 2001. This is after the date specified in the Terms of Reference and after the occurrences of matters relevant to the Terms of Reference.
- [85] After careful consideration of the Ministry’s submissions and those of Mr Squire QC and Mr Ivory in support, we do not accept that it is necessary to hear from Ms Grey as to her authorship of the scampi briefing notes, her intention in writing them, or her opinion as to the tenor of the allegations contained in the accompanying affidavits.

- [86] Counsel have been permitted to test the evidence of the deponents as to the making of their affidavits and whether those witnesses still hold to or resile from the allegations contained in them. However, it is not relevant to the Inquiry or to its Terms of Reference, to have Ms Grey give evidence relating to the making of the affidavits or the briefing notes. The fact that there have been allegations of corruption and impropriety forms the backdrop to the establishment of the Inquiry. We are of the view however, that to explore with Barine’s solicitor the events leading up to the establishment of the Inquiry, would be both irrelevant and outside the Inquiry’s specific Terms of Reference.

Definition of “Corruption”

- [87] As referred to earlier, Counsel were asked to address the definition in the Crimes Act of “*corruption*” in relation to the application by the Ministry, the Terms of Reference and the aspect of the referral powers of the Inquiry.
- [88] On Monday, 19 May at 5 pm, submissions were received from the Ministry, supported by Mr Squire QC and Mr Ivory and submissions were received from Mr Cooke on behalf of Barine, in response to the Inquiry’s request.
- [89] The Ministry accepted that the Inquiry did not have the jurisdiction to make findings of criminal corruption. In its submissions, the Ministry and Mr Cooke respectively were in agreement *that* if the Inquiry considers that offending of the type referred in s 105 of the Crimes Act or any other Crimes Act offences have occurred, the Inquiry cannot make criminal findings but can recommend either to the appropriate authorities or the State Services Commissioner in the first instance, that further investigation must be carried out.
- [90] In considering both sets of Counsel’s submissions, particularly in regard to the reference to “*corruption*”, we have had regard to the definition of corruption in the Crimes Act, particularly given Counsels submissions in relation to the referral or recommendatory powers of this Inquiry. The most relevant section is section 105 Crimes Act, which provides:

105. Corruption and bribery of official—

(1) Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

(2) Every one is liable to imprisonment for a term not exceeding [7 years] who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him in his official capacity.

- [91] In *Adams on Criminal Law*, the commentary describes the word “*corruptly*” as describing the mental element an offender must have when giving or accepting a gift.

*“The offender is required to have that degree of deliberate criminal intent necessary, not only to perform the act itself, but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party. The authority is **R v McDonald** (Unreported: High Court, Invercargill, T1/93, 29.3.93, Williamson J).”*

[92] The commentary further notes

*“For a public officer to act corruptly while performing his or her duty, it is not necessary that he or she act in a way that is likely or intended to corrupt another. It is the exercise of authority for an improper purpose, such as a purpose activated by malice, which constitutes the corrupt act, and takes the activity outside the scope of the person’s authority. **R v Willers** (1995) 81A Crim. R 219.”*

[93] Under s 105(2) “intent to influence” does not require that the offeror of the bribe specify at the time of the offer the specific time at which the recipients are expected to depart from their duty :

R v Allen (1992) 62A Crim R 251.

*“It will be sufficient that the inducement or benefit is accompanied by express or implied intimations that at some future time a corrupt favour would or might be sought and further, that the recipient, by accepting the inducement or benefit, is tacitly or expressly agreeing to comply with such corrupt future requests. **R v Glynn** (1994) 71 A Crim R 537 (NSW CCA) at p. 544.”*

[94] It is our view that before this Inquiry can recommend further investigation of activity labelled as “*corruption*”, there must be a sufficient foundation for the definition of “*corruption*” to apply. This Inquiry cannot make a finding of “*corruption*”, but, if satisfied that the facts or allegations warrant it, it could recommend further investigation into alleged activity.

[95] It should be noted that before a prosecution can be brought under any of the relevant sections in the Crimes Act, namely sections 100-105 the leave of the Attorney-General must be given.

[96] The Ministry and all Counsel in support, submitted further that while the Inquiry has no jurisdiction to make a finding of criminal wrongdoing, it is able to make a finding that there was no allegation of, or evidence of, such criminal behaviour.

[97] Further, the Inquiry has been urged by the Ministry that it should not be constrained in its consideration of allegations of corruption and impropriety by the definition in the Crimes Act. The Ministry supports a common meaning of “*corruption*” and “*impropriety*” which should include the following elements:

1. Offering or accepting bribes (be it monetary or other favour) in exchange for certain official actions or failures to act.
2. Officials favouring one or more participants in the industry in the exercise of public duty.

3. Lack of integrity and impartiality in the discharge of public duties.

- [98] We have given careful consideration to the submissions we have received. We have considered the submission of the Ministry in relation to the common understanding of “*corruption*” and our Terms of Reference.
- [99] The specific Terms of Reference, as framed, refrain from the use of the term “*corruption*”. Instead, the questions which we must address do not involve definitions of “*corruption*”, “*impropriety*” or “*fraud*”, but rather ask whether there was a reasonable basis to suspect illegal fishing and whether adequate investigations into allegations of illegal fishing were carried out (Term of Reference 2) and Term of Reference 4 asks specifically whether the relationships between officials at the Ministries and commercial scampi fishers at the relevant times were professional and at arms length.
- [100] Those questions must govern the jurisdiction of this Inquiry. As has been evident from the response from the parties, “*corruption*” has a number of meanings. In the context of this Inquiry, it is our view that the use of the term “*corruption*” should be confined to the Crimes Act definition.
- [101] We have also had regard to the judgment of the Privy Council in ***Re Erebus Royal Commission; Air New Zealand Limited v. Mahon*** [1983] NZLR 663 at 671. In referring to the relevant rules of natural justice, it is said:

“The first rule is that the person making a finding in the exercise of such a jurisdiction (investigative jurisdiction) must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the Inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.”

In amplifying what is required by the first rule, Lord Diplock said:

“What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.”

- [102] This fortifies our view that it would inappropriate for this Inquiry to hear hear-say evidence or opinion evidence on whether the Ms Grey believed the allegations contained in the “original” affidavits amounted to “*corruption*”. The Terms of Reference in the specifically framed questions directs the Reviewers to the wording to be addressed in their findings and it would be inappropriate for this Inquiry to hear such opinion evidence, when the witnesses giving direct evidence are available to be heard and have their evidence tested.

Solicitor as witness

- [103] We turn then to consider the submissions in relation to Ms Grey's status.
- [104] We can find no authority and nor did Counsel direct us to any authority, that an inquiry, tribunal or court can require counsel to appear as a witness. Mr Wilson QC referred to the practice of solicitors withdrawing as solicitor, to give evidence as a witness. In our experience, this is an election made by the solicitor and usually by and on behalf of a party. It has usually occurred when the solicitor is the only person who can give direct evidence of negotiations or circumstances surrounding the signing of a contract by way of examples. The solicitor will withdraw and give evidence as a witness to the events that took place. This is not the position for this Inquiry. If the Ministry's application were granted, it would be the Inquiry which would summons Ms Grey.
- [105] Section 6 of the Commissions of Inquiry Act provides that:
- “every witness giving evidence and every counsel or agent or other person appearing before the Commission, should have the same privileges and immunities as witnesses and counsel in courts of law”.
- [106] Ms Grey is entitled to claim solicitor/client privilege and immunity. Further, Barine has not waived privilege for Ms Grey to give evidence.
- [107] Ms Grey is entitled to the immunity afforded to her under s 6 of the Commissions of Inquiry Act.
- [108] Further, it is evident that Ms Grey's involvement in this Inquiry and in the preparation of materials was as Barine's solicitor and Counsel. In addition to the immunity which she can claim under the Commissions of Inquiry Act, any evidence which she is able to give and which is based on her instructions as a solicitor, attracts legal professional privilege. This will be problematic in her giving evidence as to what witnesses said to her, what documents and notes she made as a result and any further documentation which was made as a result.
- [109] The last issue raised was the prejudice to Barine if Ms Grey was not able to continue acting as Counsel. This submission has been made in reference to Rule 8.01 of the Rules of Professional Conduct for Barristers and Solicitors, which provides that Counsel cannot give evidence and remain as Counsel. We note that in this hearing, Barine Developments Limited has been severally represented by Ms Jurgeleit, Sir Geoffrey Palmer and Mr Cooke, who provided submissions on behalf of Barine. In the event that Ms Grey was required to give evidence, Barine would still have available the other Counsel, particularly Ms Jurgeleit, who has been in attendance almost throughout. In summary, we perceive there is not significant prejudice, because of the presence of other Counsel for Barine at this Inquiry.
- [110] We note the submissions by Sir Geoffrey Palmer regarding the potential breach of Article 9 of the Bill of Rights 1688 if Ms Grey is called as a witness. We have some difficulty in seeing the relevance of this submission to the application made by the Ministry. For the reasons already addressed under the headings 'Relevance' and 'Solicitor as Counsel', we note this submission but address it no further.

Conclusion

[111] For the reasons given above, we have decided, in the exercise of our discretion, to decline the Ministry's application.

[112] From the time these submissions were addressed on Monday 12 May to the notification of our decision to all Counsel, on 19 May, we directed that Ms Grey should not take part in the proceeding as Counsel. A concern was raised by her Counsel, that this was unfair to Barine as Ms Grey was being deprived of the right of cross-examination. The rules in relation to cross-examination have been defined, both in Minute No. 1 and during the first week of the Inquiry's hearing. The Inquiry required the attendance of all the deponents of the "original" affidavits, with the exception of Mr Sullivan, Mr Bishop and Mr Penwarden, who were called by Barine. The evidence given by the remaining deponents did not allege impropriety against Barine or make allegations affecting Barine adversely. Unless there were matters of clarification to be raised, Barine suffered no prejudice. On May 13th, when Ms Grey was present and wished to raise some matters of clarification with Mr Patterson, these matters were raised through the Inquiry.

.....

Helen Cull QC

.....

David Smyth

FISHERIES MANAGEMENT INQUIRY

IN THE MATTER of a number of applications and responses,
pursuant to Minute No. 8

DECISION OF THE REVIEWERS

DATED THE 17th DAY OF FEBRUARY 2004

Introduction

1. The Inquiry has before it a number of applications.
2. In Minute 8 dated 27 January 2004 the Inquiry required any notice of opposition and any evidence or submission in respect of the applications to be filed and served by 10 February 2004.
3. The hearing of evidence before the Inquiry concluded on 18 July 2003 and final submissions were timetabled to be filed on or before 11 August 2003.

Barine Application – Wilkinson Affidavit

Background

4. After the close of the evidence Barine presented to the Inquiry an affidavit sworn on 3 May 1992 by Mr Wilkinson. The Inquiry required Barine to make a formal application. A formal application was made on 18 December 1983.
5. The formal application seeks to have the Inquiry take into its record and consider the affidavit on the grounds that:

“The affidavit contains material relevant to issues before the Inquiry and in some cases, issues on which evidence has already been called specifically:

- 2.1.1 *Simunovich’s entry into the scampi fishery and Mr Wilkinson’s role in that;*
- 2.1.2 *Decisions of the Ministry in late 1991 concerning the management of the scampi fishery;*
- 2.1.3 *Simunovich’s attitude to those decisions;*
- 2.1.4 *Contact between Simunovich/Mr Wilkinson and Ministry personnel;*
- 2.1.5 *The Petersen and its deployment in the scampi fishery and, to a lesser extent, the Drysdale.*

The affidavit was not filed in the Inquiry by Simunovich Fisheries Limited or by the Ministry.”

6. The Inquiry has read the affidavit.
7. The Inquiry already has before it a considerable volume of evidence on the matters specified in the grounds set out in the Barine application.
8. The affidavit is dated 3 May 1992 and there is no evidence that it has only recently come to the knowledge or into the possession of Barine.
9. Simunovich object to the receipt by the Inquiry of the affidavit. They submit that the affidavit has been known to Barine and Mr Penwarden since 1998. Simunovich surmise that they must conclude that Barine is asking the Inquiry to draw inferences that are adverse to Simunovich from the affidavit. Simunovich are not prepared to guess what those adverse inferences might be. Simunovich asks that, if any adverse inferences are to be drawn, they be put and that there be an opportunity to respond. They submit it is too late to receive the affidavit.
10. The Ministry informed the Inquiry that the affidavit was filed in proceedings that were discontinued without being heard and that no evidence was filed by the Ministry. The Ministry submits that if the affidavit is received, it must be examined and tested according to process. It says the affidavit was made available to all parties in the Vautier proceedings in 1998. The Ministry objects to the affidavit being received.

Decision

11. The Inquiry considers the affidavit to be of little or no evidentiary value to the terms of reference it has to consider. The affidavit appears to have been known to Barine since 1998. The grounds advanced by Barine are very general and do not indicate that the affidavit is of any material significance. To the degree that the affidavit may be alleged to reflect adversely on any party or person, issues of natural justice could arise.
12. In the circumstances the Inquiry considers it is not appropriate for it to receive or to consider the affidavit. Accordingly, the application of Barine is refused.

Chadwick Application – Further Evidence

Background

13. Mr Chadwick has filed a combined application and affidavit dated 17 December 2003. Objection is taken by Mr Squire QC to the form of the application. The Inquiry can understand the application and considers that it is in a position to rule on it notwithstanding any deficiencies as to form.
14. Mr Squire QC, objects to receipt of the evidence on grounds which include it being tendered long after the Inquiry has concluded its taking of evidence. There appears to be no reason why Mr Chadwick could not have given the evidence earlier. Mr Chadwick had not raised the matters with other witnesses (in particular Mr Crothers). Mr Squire QC submits that, if this evidence is received, natural justice would require the re-opening of the taking of evidence. Mr Chadwick responded by fax on 9 February 2004.

15. In summary, the position of the Ministry was that, unless the Inquiry reconvenes and takes Mr Chadwick's evidence on oath and the Ministry (and any staff affected) is provided the opportunity to respond, the evidence should not be received.
16. The above objections were supported by Simunovich.

Decision

17. In respect of the heading "*Competence of Ex Police Officers and the Policy Generally*"

Para 1, 3, 23, 24, 25 and 26 will be received as submissions

Para 2 is a quote and does not require any ruling

Para 4 to 22 are a mixture of submissions and evidence. Some of the evidence has already been given. To the extent that paragraphs 4 to 22 are submissions on evidence given they will be received and considered.

18. In respect of the heading "*Stan Crothers Affidavit 2/4/03*" paras 27 and 28 (in part) will be received as submissions. Para 29 is new material making a serious new allegation and will not be received.
19. Under the heading "*Crothers Evidence 6/1-5-03*" para 30 to the extent it is a submission, 31, 32 and 33 will be received as submissions.
20. The heading "*Over the Border Raid*" and "*Tension*" paras 34 to 51 and the heading "*Stan Crothers Memo to Larry Fergusson about the 12 May 1992 Exhibit CM etc*" paras 51A to 77 raise new matters or are an extension of the evidence. The Inquiry has before it evidence relating to the Over the Border Raid which is relevant in a general way to administrative systems and processes for the granting of permits and licenses (Terms of Reference 1.1) and the identification and investigation of alleged offences (Terms of Reference 2.2). It is not necessary for the Inquiry to receive detailed evidence of the nature addressed by Mr Chadwick in respect of the Over the Border Raid or the Memorandum. The evidence relating to the Over the Border Raid and the Memo contains serious adverse allegations. If the evidence were received, principles of natural justice would have to be observed. At all material times Mr Chadwick had the material he now wishes to introduce in relation to the Over the Border Raid and the Memorandum and he could have sought to present it in evidence. In all the circumstances and for the reasons given above, the Inquiry declines to receive the evidence relating to the Over the Border Raid and the Memo.
21. In the grounds of his application Mr Chadwick referred to the Andrews Reports and to his requesting a copy of some questions put by Mr Andrews and the answers given by Mr Crothers. The Inquiry advised in Minute 8 that the Inquiry had a copy of the Andrews Reports but did not have the questions and answers. There appears to be no application for any ruling in respect of the Andrews questions and Mr Crothers answers.

15.0 APPENDIX 4 – SECTION 66 JUDGMENT OF FRANCE J

AND

**BRIAN SYDNEY
DEADMAN & ROBERT
LEES trading as MOUNT
FISH MARKET
PARTNERSHIP**

Eighth Defendants

AND

**PETROMONT HOLDINGS
LIMITED**

Ninth Defendant

Hearing: 29 May 2003

Counsel: A Ivory with M Keall for the Plaintiff
W M Wilson QC with U R Jagose for First and Second Defendants
J B Stevenson with N Barber for Third Defendants
C Jurgeleit for Fourth Defendant
D Turley for Fifth Defendant
T Stallard for Sixth Defendant
Attendance excused for Seventh Defendant
Attendance excused for Eighth Defendants
No appearance for Ninth Defendant
J Pohl for the Ombudsman

Judgment: 11 June 2003

JUDGMENT OF FRANCE J

Solicitors:

D Griffin, Craig Griffin & Lord, Auckland, for the Plaintiff
Crown Law Office, Wellington, for the First and Second Defendants
N Barber, State Services Commission, Wellington, for the Third Defendants
M Logan, Oceanlaw New Zealand, Nelson, for the Fourth Defendant
D J Turley, Fletcher Vautier Moore, Nelson, for the Fifth Defendant
T Stallard, Daniell-Smith, Stallard & Hunter, Nelson for the Sixth Defendant
T J Walker, Simpson Grierson, Auckland, for the Seventh Defendant
Kear & Associates, Tauranga, for the Eighth Defendants

Counsel:

A Ivory, Barrister, Auckland, for the Plaintiff
W M Wilson QC, Wellington, for the First and Second Defendants
J B Stevenson, Wellington, for the Third Defendants
C Jurgeleit, Barrister, Wellington, for the Fourth Defendant
C T Gudsell, Barrister, Hamilton, for the Eighth Defendants

Other Parties:

J W Pohl, Office of the Ombudsman, Wellington (Party directed to be served)

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Introduction

[1] There are three applications before the Court:

- [a] An application by the third defendants (Helen Cull QC and David Smyth, Reviewers) for an order authorising disclosure to them of returns and information (“returns”) furnished by the plaintiff (Simunovich Fisheries Limited) (“Simunovich”) under the Fisheries Act 1983.
- [b] An application by Simunovich for an order authorising disclosure to the third defendants of returns furnished by the fourth and fifth defendants (Barine Developments Limited and Sanford Limited) and Vautier Shelf (No. 14) Limited, Petromont Holdings Limited, Amaltal Fishing Company Limited, and Brian Sydney Deadman and Robert Lees trading as Mount Fish Market Partnership in respect of scampi and by-catch to the third defendants.

[c] An application by the plaintiff for joinder of the following:

- [i] Vautier Shelf (No. 14) Limited;
- [ii] Petromont Holdings Limited;
- [iii] Amaltal Fishing Company Limited; and
- [iv] Brian Sydney Deadman and Robert Lees trading as Mount Fish Market Partnership.

[2] All three applications are dealt with in this decision. The applications turn on whether s 66(6) of the Fisheries Act 1983, which has been repealed, continues to apply by virtue of the Interpretation Act 1999 to prevent disclosure of returns about scampi and by-catch to the Inquiry without an order of this Court. If the Court has jurisdiction under s 66(6), three principal questions arise, namely, whether disclosure should be authorised; of what; and on what conditions, if any.

Background

[3] The background to the matter is as set out below.

[4] The applications are made in the context of proceedings filed by Simunovich on 11 March 2003. The proceedings relate to inquiries being undertaken into various aspects of the scampi fishery. The first inquiry is being carried out by the Primary Production Committee of the House of Representatives (“the Select Committee”). There were some interim proceedings in relation to the Select Committee’s inquiry which were largely resolved by an undertaking from the first and second defendants and no more needs to be said about that aspect.

[5] The second inquiry is being undertaken by the third defendants who comprise an inquiry (“the Inquiry”) established by the Commissioner of State Services under the State Sector Act 1988. The Inquiry is established to inquire into, amongst other things, allegations relating to the administration and management of the scampi

fishery. The Terms of Reference of the Inquiry are set out in the annexure to this decision. The Inquiry has the powers of a commission of inquiry under the Commissions of Inquiry Act 1908.

[6] Simunovich, the fourth (“Barine”) and fifth (“Sanford”) defendants are scampi fishers. The others whom Simunovich seeks to join to the proceedings, namely, Vautier Shelf (No. 14) Limited (“Vautier”), Petromont Holdings Limited (“Petromont”), Amaltal Fishing Company Limited (“Amaltal”), and Brian Sydney Deadman and Robert Lees trading as Mount Fish Market Partnership (“Mt Fish”) are the other scampi fishers. There is one other scampi fisher, Mr Wayne Terrence Howell, but his scampi catch over the relevant years was apparently limited to 40kg. He has not been served and his returns are not sought.

[7] The first and second defendants are, respectively, the Chief Executive of the Ministry of Fisheries, and the Ministry of Fisheries (“the Ministry”).

[8] The Ombudsman is a party who was directed to be served.

[9] The Inquiry wants access to returns furnished by Simunovich to the Minister under the Fisheries Act 1983 relating to scampi and by-catch when targeting scampi.

[10] Simunovich initially opposed the application. But, when the application was called before Durie J on 23 May 2003, Simunovich’s position was that it would not oppose the application were the Inquiry to accept that the order should extend to the other scampi fishers. Counsel for the Inquiry was content to accommodate the plaintiff’s position by an amendment to the application. However, Barine opposed the application. At that point, an adjournment was sought by Simunovich and granted by Durie J until 29 May 2003.

[11] Since then, Simunovich has filed its applications for disclosure and for joinder referred to in paragraph [1][b] and [c] above.

The parties' positions

[12] It is appropriate at this point to summarise the parties' positions.

[13] The Inquiry neither consents nor objects to Simunovich's application for disclosure of the returns of other fishers but does not want this to hold up the Inquiry's application for Simunovich's returns. The Inquiry has a reporting date of 31 July 2003. (Narissa Mary Barber, of the State Services Commission, has filed an affidavit in support of the Inquiry's application.) The Inquiry submits that s 66(6) does apply.

[14] Simunovich will support the Inquiry's application if disclosure of the other fishers' returns to the third defendants is authorised. (Two affidavits in support of Simunovich's position have been filed by Vaughan Hilton Wilkinson, a director of Simunovich.)

[15] The Ministry abides the decision of the Court but makes submissions on the continued applicability of s 66(6) for the assistance of the Court.

[16] Barine does not oppose the application for joinder but opposes the applications for disclosure on the basis that such orders are not necessary because s 66(6) no longer applies. If s 66(6) is applicable, Barine seeks an order in very broad terms permitting the Inquiry to have access to the returns and not limiting the Inquiry's ability to disclose that information to other fishers. (Neil Hugh Penwarden, a director of one of the two shareholders in Barine, has filed an affidavit on behalf of Barine.)

[17] Sanford supports the applications made by the Inquiry and Simunovich and opposes any order which would allow the returns to be disclosed to Barine. (Sanford's managing director, Eric Francis Barratt, has filed an affidavit setting out Sanford's position.)

[18] Vautier does not oppose the applications, provided that the proposed confidentiality terms are observed.

[19] Amaltal formally opposes the applications but in the event that disclosure is to be made to the Inquiry, Amaltal seeks conditions to protect its identity and to limit the ability of other fishers to see Amaltal's returns. (The affidavit of Kerry Potter, a director of Amaltal, refers.)

[20] Mt Fish abides the decision of the Court.

[21] Petromont has been served and an affidavit of service filed with the Court. No documents have been filed by Petromont in relation to the application.

Issues before the Court

[22] To determine the applications before the Court the following issues must be decided:

- [a] Is s 66(6) of the Fisheries Act 1983 still in force in respect of returns furnished by fishers to the Ministry pursuant to the Fisheries Act 1983 when that Act was in force?
- [b] If so, should the Court direct disclosure and of whose returns?
- [c] If so, does the Court have jurisdiction to impose conditions on such disclosure?
- [d] If the answer to [c] is "yes", on what conditions if any?

Statutory framework

[23] There are relevant provisions in the fisheries legislation and in the Interpretation Act 1999.

[24] Taking first the fisheries legislation, it is necessary to set out the legislative history of s 66(6) of the Fisheries Act 1983.

[25] Section 67 of the Fisheries Act 1983 required permit holders and others to keep records and furnish them to the Ministry as required to assist the management and conservation of any fishery resource.

[26] The section limited the disclosure of these records in the following terms:

“(3) Except in respect of a prosecution under this Act, or where the Court so directs, no return or information made pursuant to this Act shall be disclosed or used in any proceedings whatever, and no returns or information shall be released to any person, or published in any form unless summarised so that specific identities or businesses are not revealed except by written permission of the person furnishing the return or information.

(4) Nothing in subsection (3) of this section shall prohibit the Director-General or any officer authorised by him in that behalf from communicating to—

(a) Any officer of the Department of Statistics [in certain circumstances];

(b) The Commissioner of Inland Revenue any information which the Director-General is lawfully bound to disclose.”

[27] Section 13 of the Fisheries Amendment Act 1986 repealed s 67 and substituted s 66. Again, this section dealt with records and returns. It required permit holders and others to keep records in a specified form and furnish them to the Director-General of Fisheries.

[28] Again, there were restrictions on disclosure. Section 66(3) read as follows:

“(3) Except in respect of a prosecution under this Act, or where a Court so directs, no return or information made pursuant to this Act shall be disclosed or used in any proceedings whatever, and no returns or information shall be released to any person not employed by or within the Ministry or acting on the Ministry’s behalf for the purposes of this Act, or published in any form, unless summarised so that specific identities or business are not revealed except by written permission of the person furnishing the return or information.”

[29] Section 66(4) repeated the authorisation of disclosure to the Department of Statistics and the Commissioner of Inland Revenue as in s 67(4).

[30] The Official Information Amendment Act 1987 amended s 66(3) by omitting the words “and no returns or information shall be released to any person not

employed by or within the Ministry ... unless summarised so that specific identities or businesses are not revealed except by written permission of the person furnishing the return or information”.

[31] The 1990 Fisheries Amendment Act s 33 repealed s 66 and substituted a new s 66. Section 66 of the Fisheries Act 1983 dealt with records and returns. Section 66(1) set out the obligations on various persons to keep accounts and records and provide those to the Ministry to assist the management and conservation of any fishery resource. Section 66(6) and (7) provided:

“(6) Except in respect of a prosecution under this Act or any proceedings for the recovery by the Crown of the amount of the deemed value of any fish payable under section 28ZD of this Act, or where a Court so directs, no return or information furnished pursuant to this Act shall be disclosed or used in any proceedings whatever.

(7) Nothing in subsection (6) of this section shall prohibit the Director-General or any officer authorised by the Director-General in that behalf from communicating to—

(a) Any officer of the Department of Statistics any information which that officer is authorised by that Department to receive and which the Director-General considers is not undesirable to disclose and is reasonably necessary to enable that officer to carry out any official duty lawfully imposed by the Statistics Act 1975:

(b) The Commissioner of Inland Revenue any information which the Director-General is lawfully bound to disclose.”

[32] Section 66 was repealed on 1 October 2001 by the Fisheries Act 1996, s 314(1)(t) and the Fisheries Act Commencement Order (No. 2) 2001 (SR2001/179) (Regulation 2(4)).

[33] Accordingly, from 1983 through to 2001, disclosure of the returns has been restricted with particular exceptions, for example, for the purposes of a prosecution or where the Court so orders. Up until 1987, this information could be disclosed in a summarised form so that specific identities were not revealed.

[34] Under the present legislation (the Fisheries Act 1996), there continues to be an obligation to maintain and furnish records (ss 189 and 190) but there is no specific provision governing disclosure of this information in the 1996 Act.

Disclosure, generally, is dealt with under the Official Information Act 1982 (“the OIA”) and the Privacy Act 1993.

[35] In terms of the Interpretation Act 1999, there are a number of relevant provisions. First, s 17 reads as follows:

“Effect of repeal generally—

- (1) The repeal of an enactment does not affect—
 - (a) The validity, invalidity, effect, or consequences of anything done or suffered:
 - (b) An existing right, interest, title, immunity, or duty:
 - (c) An existing status or capacity: ..”

[36] To similar effect was s 20 of the Acts Interpretation Act 1924. Section 20(e)(iii) of the 1924 Act read:

- “(e) The repeal of an Act .. at any time shall not affect—..
 - (iii) Any right, interest, or title already acquired, accrued, or established, or any remedy or proceeding in respect thereof; or ..”

[37] In addition, s 20(g) of the 1924 Act provided that:

- “(g) Any enactment, notwithstanding the repeal thereof, shall continue and be in force for the purpose of continuing and perfecting under such repealed enactment any act, matter, or thing, or any proceedings commenced or in progress thereunder, if there be no substituted enactments adapted to the completion thereof.”

[38] Second, s 7 of the Interpretation Act provides that an enactment does not have retrospective effect.

[39] Finally, s 4 of the Interpretation Act provides that all of the provisions of that Act apply unless the context otherwise requires.

Application of s 66(6)?

[40] I deal first with whether s 66(6) is operative by virtue of s 17 and so whether this Court has jurisdiction to authorise disclosure.

[41] Mr Stevenson for the Inquiry notes that the savings provisions in the Acts Interpretation Act were in force until 1 November 1999. His submission is those provisions together with those in the Interpretation Act were sufficient to continue the prohibition on disclosure without order of the Court.

[42] The relevant dates under the Terms of Reference are the late 1980s to 1992 for permitting issues, and 1993 and 1998 in relation to illegal fishing. The relevant returns had been furnished under a number of permutations of the above Act. However, the submission is that the effect of the various provisions in the Fisheries Act is that at all material times through to 2001, there was a statutory prohibition against disclosure and use and, pursuant to the savings sections in the Interpretation Act, there is sufficient to continue the prohibition on disclosure and use.

[43] Simunovich relies on both ss 7 and 17 of the Interpretation Act for its submission that those sections are broad enough to protect the disclosure provision.

[44] The Ministry refers to the principle behind s 66(6) as considered in *Ruocco v Quota Appeal Authority & The Director-General of Agriculture & Fisheries* (High Court Wellington, CP 1094/90, 28 May 1991, Greig J). In that case, the plaintiffs appealed against a decision of the Quota Appeal Authority refusing them access to the catch records of another fisher. Greig J observed of s 66(6) as follows:

“It is submitted, on behalf of the San Antonio partnership, that in light of the general purposes and policy of the Act .. that it became necessary to have full co-operation of fishers based on a complete disclosure to the Ministry and in turn, where required, to the Quota Appeal Authority, of all relevant information. *In turn this co-operation imposed a corresponding obligation of confidentiality upon the recipient of the information to preserve commercial privacy and sensitivity of that information as it may relate to each provider of it.*

I think that it is a proper submission and does state a principle of the operation of the Act. It is equally plain, however, that confidentiality is not an absolute.” (at pp8-9, emphasis added)

[45] The Court went on to refer to the situations in which there may be disclosure under s 66. The Ministry emphasises the highlighted passage from the decision.

[46] The Ministry also observes that the Fisheries Act 1996 has been commenced in a piecemeal fashion by Order in Council (see s 1) and has also repealed the Fisheries Act 1983 in similar fashion.

[47] Mr Wilson for the Ministry submits that the obligation of confidence in s 66(6) could be categorised as the information's "status" (s 17(1)(c) of the Interpretation Act), or a right given to the person to whom the information relates, or an immunity from disclosure of that material (s 17(1)(b)). Alternatively, it could be seen as a duty on the Ministry to disclose the information only in certain limited situations (s 17(1)(b)). The "right" is not to have the information disclosed.

[48] The submission is that however the prohibition is characterised, s 17 retains its character in respect of returns furnished to the Ministry when the section was in force, despite the repeal of s 66(6).

[49] The Ministry further submit that this interpretation is consistent with the approach to s 17 taken by the Court of Appeal in *Foodstuffs (Auckland) Limited v Commerce Commission* [2002] 1 NZLR 353 ("*Foodstuffs (CA)*"). The Privy Council subsequently decided an appeal by reference to a specific transitional provision (*Progressive Enterprises Ltd v Foodstuffs (Auckland) Ltd* (2002) 10 TCLR 356 (PC)).

[50] The Ministry refers to the following discussion in *Foodstuffs (CA)* at para [20] per Keith J:

"The common law concerning non-retrospectivity and related interpretation legislation have both long recognised the need to strike a balance between giving effect to Parliament's will, aimed at changing the law and introducing new policies, on the one hand, and, on the other, to protecting, for reasons of justice and fairness, positions already established under the old law. In terms of the second matter, Courts and legislatures alike have stated the principle of non-retrospectivity and have protected legally recognised interests – such as rights, titles, immunities, duties, liabilities – which "exist" or have "vested" or "accrued". If the general law lacks means or procedures to recognise, enforce or sanction those legally recognised interests, Courts and especially legislatures may also recognise and save the continued effect of the procedures that supported those interests ... But if, broadly speaking, no existing, vested or accrued legal interests are put in jeopardy the new manifestation of Parliament's will is to be given full effect."

[51] It is submitted that this is not a case where Parliament's statement of the new law (in the Fisheries Act 1996) is being frustrated by allowing s 66(6) to "cast an inappropriately lengthy shadow" over the future (*Foodstuffs* (CA)) at para [41]. In contrast, this is seen as a classic situation to which s 17 of the Interpretation Act applies. Past activity was in the knowledge of the protection against disclosure to competitors contained in the Act at that time.

[52] The further submission is that there is nothing in the history of the legislation which justifies a departure from the principle in s 17.

[53] The Ombudsman in a memorandum filed to assist the Court explains that the Ombudsman's position to date is that the OIA now prevails. Any disclosure of the information in question is now governed by that Act. (The Ombudsman is considering an OIA complaint from Barine about the Ministry's refusal to release Simunovich's returns to Barine.) The Ombudsman's view is that it is unlikely that the secrecy provisions were intended to survive their repeal. Reliance is placed on the Parliamentary Debates on the 1987 OIA Amendment. The then Minister of Justice, the Right Hon Geoffrey Palmer, in his Second Reading speech to the Bill, which became the OIA Amendment 1987, stated:

"The changes to the provisions dealing with commercial information implement the recommendations of the Information Authority. The authority concluded that as a corollary to those changes it was possible to repeal a number of secrecy provisions contained in other Acts. The [OIA] will provide adequate protection for the information at present covered by those secrecy provisions. I share the view of the select committee that it was not necessary to retain those secrecy provisions, except in one area. That area relates to inspections under the Companies Act, the Industrial and Provident Societies Act, the Securities Act, and to hearings conducted by the Commerce Commission. In those few cases the sensitivity of the information is such as to justify a special regime for questions of access to that information. However, under the Bill as reported back the special regime will operate for a finite period. Once the hearing or investigation is completed the [OIA] will apply." ((1987) Vol 477 NZPD at 6903)

[54] For Barine, two main submissions are made. First, s 17 is not applicable because no right or immunity is involved. Second, the context of the Fisheries Act 1996 requires a different interpretation.

[55] In terms of the first submission, it is said that there is no particular entitlement to confidentiality and that the same view was taken by the Court of Appeal in *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517.

[56] In relation to the second submission, the following points are made:

- [a] There is no prohibition on disclosure in the 1996 Act.
- [b] The 1996 Act contains detailed savings and transitional provisions, none of those suggest there has been any intention to carry over the prohibition on disclosure in s 66(6). The clear intention is that the prohibition is not to continue.
- [c] There is no sense in preserving the prohibition because the information involved is stale.
- [d] There is no element of *quid pro quo*.
- [e] Reference is made to provisions in the 1996 Act which it is said will not operate effectively if the prohibition still has some ongoing effect.

[57] The alternative submission for Barine is that if a Court order is required it should be permissive, i.e., the information may be disclosed if the Inquiry wants the particular information. Relevance can then be determined by the Inquiry. Hence, any order should not fetter the Inquiry.

[58] On balance, I conclude this is a situation which is covered by s 17. The nature and scope of s 17 has been discussed recently by the Court of Appeal in *Claydon v Attorney-General* [2002] 1 ERNZ 81 as well as in the *Foodstuffs* case. In *Claydon*, the transitional provisions of the statute in question (the Employment Relations Act 2000) left no room for the operation of s 17(1)(b). Of that section, McGrath J observed that s 17 does not expand the common law as to what is a right (at para [85]). McGrath J also stated that,

“Where ... some further event had to take place before the right could be said to have crystallised the authorities tended to the view that the right had not been ‘acquired’ for the purposes of”

the equivalent to s 17 in the Acts Interpretation Act 1924 (at para [86]). (See also Burrows, “*Statute Law in New Zealand*” 3ed, at pp 421-424.)

[59] In terms of this case, it is relevant that the returns have been provided in an environment where the recipient of the returns is under an obligation not to disclose the information except in certain circumstances. The expectation of confidentiality is reinforced by the fact that, apart from the specified disclosures, only the High Court could authorise release. Further, there is evidence that some of the scampi fishers, other than Barine, consider the information although dated, retains commercial sensitivity particularly that information relating to sites and techniques used (affidavit of Mr Barratt refers). There is, then, reason for preserving the prohibition.

[60] In this context, the interest or right goes beyond a mere procedural device. At the least, it extends to, as Cooke J (as he then was) put it in *Wellington Diocesan Board of Trustees v Wairarapa Market Buildings Ltd* [1974] 2 NZLR 562 at 571, “an accrued right to have an application considered” by a Court. The fact that the fishers had to furnish the returns does not alter that.

[61] Accordingly, s 66(6) attracts the operation of s 17. The next issue is whether the context of the 1996 Act requires a different approach to that of s 17.

[62] There is force in Barine’s argument about the workability of the 1996 Act on this aspect. Section 51 of the Fisheries Act 1996 gives a right of appeal to the Catch History Review Committee (“the Committee”) against various decisions of the Chief Executive of the Ministry relating to provisional catch history.

[63] The functions and procedure of the Committee are then dealt with in ss 283-294 of the 1996 Act. The Committee will need to have access to returns filed in the years 1990-92 as those are base years for the allocation of provisional catch history.

[64] Further, s 293(2)(d)(i) provides that although decisions of the Committee will be made public, the Committee may delete information it considers commercially sensitive. Hence, Ms Jurgeleit for Barine submits that the 1996 Act contemplates the Committee exercising its own discretion on matters of disclosure. This does not sit well, it is submitted, with the maintenance of the requirement in s 66(6) for Court approval.

[65] In the end, I accept the Ministry's response to this argument is the correct approach. Mr Wilson points to s 284(3) of the Act which provides that the Committee shall not create or allocate provisional catch history unless it was actually taken and reported by a commercial fisher. Further, s 292(1) authorises the Committee to receive in evidence various types of information but the Committee can only receive records or returns required to be provided under the 1996 or 1983 Acts,

“that either have not been provided to the chief executive or were provided to the chief executive after the date by which they were required to be provided.”

[66] Essentially, the 1996 Act authorises the Committee to see and use the returns. That authorisation does not, however, require a different approach to be taken to the ongoing operation of s 66(6) in the present case.

[67] I add that I have considered whether there is material in the legislative history which casts a different light on the matter but have not found anything which affects my conclusion. The Bill which became the 1996 Act on introduction maintained the approach taken in s 66(6) including provision for Court ordered disclosure but allowed specifically for disclosure under the OIA or the Privacy Act 1993 (clause 189). On report back, the Bill carried over the reporting requirements but was silent (as now) on disclosure. The Select Committee's Commentary stated that the record keeping and reporting provisions in the Bill were “substantially the same” as those under the 1983 Act (p vi).

[68] I have also considered the Ombudsman's approach which is that the ongoing application of s 66(6) is inconsistent with the OIA's object of making official information more freely available. It is relevant to that argument that the 1987 OIA

Amendment removed the ability to disclose summarised information but not the other restrictions on disclosure. The constraints on disclosure such as the requirement for a Court order were maintained.

[69] It is possible to make the contrary argument as Barine does. However, the better view is that the context of confidentiality for the returns provided under the 1983 Act remains in the present case.

Should the Court authorise disclosure and of what returns?

[70] The second question is whether the orders sought should be made. The basis on which the Inquiry seeks access to Simunovich's returns is that this information does raise issues relevant to the Inquiry's Terms of Reference. The issues or matters before the Inquiry relating to returns are said to include:

- [a] Whether or not the records supplied by Simunovich correctly recorded scampi and by-catch caught by Simunovich.
- [b] Whether or not alterations were properly made to catch landing returns or other documents furnished by or on behalf of Simunovich.
- [c] Whether or not a comparison made between diaries kept on board vessels and records and information furnished show any material difference and if so what.
- [d] The significance or otherwise of particular entries in diaries and returns put by fisheries officers to Mr Patterson, a skipper for Simunovich, who has given evidence before the Inquiry.
- [e] What the returns show in relation to by-catch whilst fishing for scampi and, in particular, the relationship between returns of spotted stargazer (SPZ) and giant stargazer (SPA).

[71] The information is also said to be necessary to understand the brief of evidence of a Mr Hide given to the Inquiry and the basis of the evidence he seeks to give.

[72] For the inquiry, Mr Stevenson relies also on *Ruocco* (above). It is submitted that similar principles are involved here. In particular, there is a public interest in having the Inquiry fully and effectively carry out its functions and report. The present application is species specific and is limited to returns and information material to the Terms of Reference. There is a time restraint arising from the Terms of Reference being in general late 1980s to 1992, 1993, and 1998. The persons to whom disclosure may be made are constrained to the extent necessary to enable the Inquiry to discharge its function.

[73] As noted above, the Inquiry neither consents to nor opposes Simunovich's application that the returns of other scampi fishers should also be disclosed to the Inquiry.

[74] Simunovich's position is that the application is properly granted only if for all scampi fishers. Simunovich otherwise opposes the application on the basis that:

[a] It is not possible for the Inquiry fairly or properly to assess or judge the returns or properly inform themselves of the matters they seek to be informed of unless they see all scampi fishers' returns.

[b] The terms of disclosure as presently sought are too vague as to the returns sought, and as to the use to which the returns may be put by the Inquiry.

[75] The Ministry's approach is that there is real sense in Simunovich's application to provide a set of data for comparison. The Ministry refers in particular to the Inquiry's Term of Reference 2 which asks the Inquiry to consider whether the Ministry had a reasonable basis to suspect illegal fishing by "any" scampi fisher.

[76] Amaltal's submission is that it has made no allegations against any other fisher; it is not a party to any matter before either Inquiry; and so cannot see how its returns would be of any assistance.

[77] Apart from Amaltal, there is no real opposition to the proposition that the Court should authorise disclosure. If s 66(6) is in force, Barine supports the making of an order authorising disclosure.

[78] I agree with the Inquiry that there is, as in *Ruocco*, a public interest in the Inquiry having access to Simunovich's returns. I am also persuaded that it is appropriate to authorise disclosure of the other scampi fishers' returns to the Inquiry given the width of the Inquiry's Terms of Reference. The Inquiry can then determine which of the returns it considers are relevant.

[79] The information in issue is, as the Inquiry and Barine submit, capable of close definition. Further, the Inquiry has the powers of a commission of inquiry and so (apart from s 66(6)) would be able to compel disclosure of the information. Accordingly, the applications for disclosure by the Inquiry and Simunovich will be granted.

Does the Court have power to impose conditions?

[80] As the matter has been argued, the focus is really on whether the Court should impose conditions rather than whether there is power to do so. I make it clear that I consider there is power to impose conditions on disclosure. Section 66(6) is in broad terms. It must follow if it is possible to meet the intent of s 66(6) by imposing conditions, as in *Ruocco* (above), then the Court can do so.

What conditions, if any, should be imposed?

[81] The issue here is how far the Court should go in constraining the Inquiry's use of the information disclosed to it.

[82] Apart from Barine, there is general agreement amongst the other parties that disclosure should be subject to conditions. The scampi fishers, other than Barine, oppose Barine's access to their returns.

[83] Further, there is some support amongst the other scampi fishers for a requirement they be notified about disclosure of their returns and for restrictions on publication by the Inquiry of individual fisher's information. Amaltal acknowledges the practical difficulties of the latter condition. On that point, Mr Stevenson's submission is that the Inquiry would not like to exclude the possibility of referring to individual fishers.

[84] Barine's position is that it is for the Inquiry to consider and weigh any further decisions about access. Ms Jurgeleit relies on the observation in *Fay Richwhite*, above, that the "manner and circumstances" of the reception of information released to the Commission of Inquiry in that case are to be decided by the Commission in terms of its Terms of Reference and the Commissions of Inquiry Act.

[85] As I understand it, on Barine's approach the Court's order would authorise the Inquiry to use such returns or information "for the purposes of and incidental to the Inquiry". The other parties, broadly speaking, would favour the addition of the further conditions sought by the Inquiry and supplemented by those conditions proposed by the Ministry. (The Inquiry and the Ministry ultimately agreed on a set of conditions.) Those conditions would restrict disclosure by the Inquiry except for the purpose of showing the returns to a witness or to an expert retained by the Inquiry and preventing participation by other fishers (and others) whilst conducting any part of the Inquiry's hearing involving disclosure of the returns.

[86] There is merit in Barine's approach. The Inquiry is in a position where it can judge the relevance or otherwise of information *vis a vis* its Terms of Reference. The Inquiry will also have to deal with issues of natural justice. Further, it is undesirable, as Amaltal submit, for all of the parties to become embroiled in a lengthy process whereby matters have to be referred back to the Court before the Inquiry can progress.

[87] On the other hand, as Simunovich submits in reliance on *Ruocco* (above), the jurisdiction in s 66(6) is to be sparingly exercised. Proper safeguards are to be imposed. It is also relevant that the Inquiry seeks access to the information on a restricted basis. In other words, the Inquiry does not see conditions as unduly restricting its activities.

[88] On balance, the various interests are met by disclosure on a restricted basis. That is, with the conditions sought by the Inquiry and supplemented by the Ministry. I will, however, add additional conditions to allow the Inquiry to further disclose or use the returns as the Inquiry considers necessary for compliance with the principles of natural justice.

[89] I do not consider it is practicable to restrict publication by the Inquiry of individual fishers' returns. The Inquiry can use its best judgment on the matter. I have also included a requirement that the Inquiry notify fishers as to the returns it seeks and that the Ministry similarly notify fishers of returns it is disclosing.

Result

[90] Accordingly, the plaintiff and the first, second, fourth to ninth defendants are authorised to disclose to the third defendants and counsel for the third defendants, returns and other information furnished by the plaintiff and the fourth to ninth defendants to the second defendant pursuant to the Fisheries Act 1983 in respect of scampi and by-catch when targeting scampi, relevant to the Terms of Reference for the purposes of and incidental to the Inquiry.

[91] The third defendants are authorised to use such returns or information for the purposes of and incidental to the Inquiry but shall not further disclose or use the returns or information except:

- [a] For the purpose of showing the returns to a witness for the purpose of the examination or cross-examination of the witness;

- [b] Referring the returns or information to an expert retained by the Inquiry and subject to that witness giving a prior undertaking as to confidentiality;
- [c] Referring to material in the returns or information in the report of the Inquiry; and
- [d] As the Inquiry considers necessary to comply with the principles of natural justice.

[92] This disclosure is on the basis that, when conducting any part of the hearing that involves a disclosure of the returns or information, that part of the hearing shall be in the presence only of the party whose returns or information are being considered and that party's counsel, the first and second defendants and counsel, and counsel for the third defendants, any expert retained as above, any relevant witness, and the stenographers to the Inquiry unless the Inquiry considers the presence of additional persons is necessary to comply with the principles of natural justice. A separate transcript of such hearing shall be kept.

[93] The following additional conditions apply:

- [a] The third defendants will give notice to the plaintiff and the fourth to ninth defendants of the returns and information of those parties required by the third defendants to be disclosed by the Ministry;
- [b] The first and/or second defendants shall give notice to the plaintiff and to the fourth to ninth defendants of the returns and information of the plaintiff and of the fourth to ninth defendants which the first and/or second defendants propose to disclose to the third defendants being information subject to the Court order but otherwise than pursuant to a requirement of the third defendants;
- [c] Original returns and information shall be made available at the office of the first and second defendants in Wellington for inspection by the

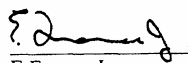
third defendants, counsel assisting the third defendants and any expert appointed by the third defendants;

- [d] Disclosure of returns and information may be by way of copies. Such copies must be securely kept and appropriately archived by the third defendants;
- [e] Any further copies made by the third defendants must be limited and numbered or otherwise marked (to maintain control); and
- [f] The third defendants are to retain an index of any further copies the Inquiry makes, require their return after the Inquiry has finished with them and destroy them in a secure manner.

[94] It follows from the above that it is appropriate to grant Simunovich's application for joinder of the other scampi fishers. Those fishers' returns can now be disclosed to the Inquiry and so they have an interest in these matters.

Costs

[95] I did not hear from the parties as to costs. Costs are accordingly reserved.


E France J

Delivered at 10:54 am / ~~pm~~ on 11th June 2003.

Annexure

Inquiry into fisheries management matters concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries

Terms of Reference

Introduction

The Ministry of Fisheries was established in 1995 following the restructuring of the Ministry of Agriculture and Fisheries. Prior to the establishment of the Ministry of Fisheries, the Ministry of Agriculture and Fisheries was responsible for fisheries management.

There have been allegations of corruption and impropriety on the part of the Ministry of Agriculture and Fisheries and the Ministry of Fisheries, in relation to the management of the scampi fishery.

Terms of Reference

The State Services Commissioner will undertake an inquiry into the allegations concerning the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries, which will assess the quality of the administration and management at the time referred to in the allegations, to determine whether there is a need to take further action to ensure that the quality of the Ministry of Fisheries' current management and systems meet public expectations.

The State Services Commissioner will, pursuant to the provisions of the State Sector Act 1988, inquire into the performance of the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries in the following matters:

- 1 Given the legislation and the Government policy framework within which the former Ministry of Agriculture and Fisheries was operating, did it act reasonably in administering the grant of permits and other necessary licences to fishers in relation to the scampi fishery from the late 1980s to 1992?
 - 1.1 Did the former Ministry of Agriculture and Fisheries have adequate, appropriate and consistent administrative systems and processes for the granting of such permits and licences at the time?
 - 1.2 If so, did the former Ministry of Agriculture and Fisheries comply with those systems?
- 2 Did Fisheries Officers in the former Ministry of Agriculture and Fisheries in 1993, and in the Ministry of Fisheries in 1998, have a reasonable basis to suspect illegal fishing by any fishing company involved in the scampi fishery?

- 2.1 If so, did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries respectively carry out adequate investigations into the allegations? If not, why not?
 - 2.2 Did the former Ministry of Agriculture and Fisheries and the Ministry of Fisheries have adequate and appropriate administrative systems and processes in place at the relevant times for the identification and investigation of alleged offences, and did the Ministries comply with those systems?
- 3 Did the former Ministry of Agriculture and Fisheries have adequate grounds for taking disciplinary action against Mr Nalder on each occasion? What were the circumstances surrounding the termination of his employment? Did his dismissal have any connection with his investigation of alleged offences relating to the scampi fishery?
- 4 Were the relationships between officials of the two Ministries and commercial scampi fishers at the relevant times professional and at arms' length?
- 5 Any other matter concerning the former Ministry of Agriculture and Fisheries or the Ministry of Fisheries that the reviewers consider relevant to the foregoing questions.

Exclusions

The investigation will not consider the appropriateness of fisheries legislation or Government fisheries policy. ...

Process

The inquiry will identify and access all relevant material in relation to this matter, and interview the relevant people.

Timeframe

This inquiry will be completed by 31 March [now 31 July] 2003 and the report and recommendations will be made public.

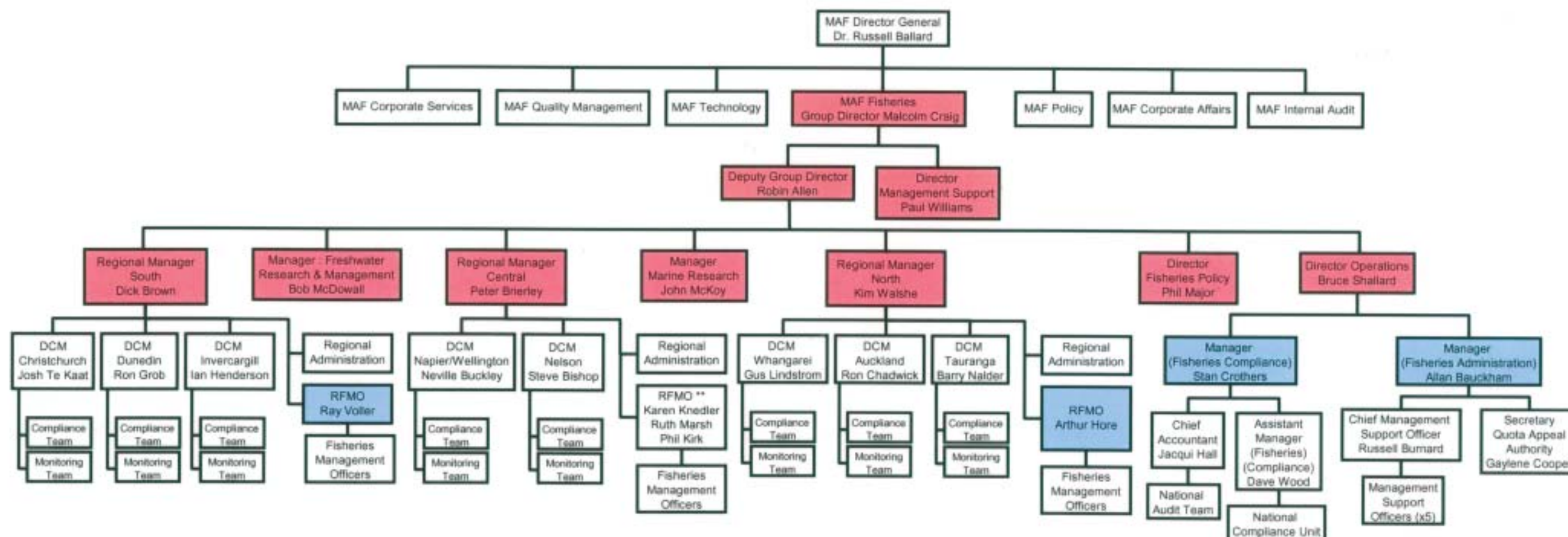
Michael Wintringham
State Services Commissioner

Date: 18/11/2002

16.0 APPENDIX 5 – ORGANISATIONAL STRUCTURE FOR 1990

MINISTRY OF AGRICULTURE AND FISHERIES

MAF FISHERIES ORGANISATION CHART 1990 *



Legend : DCM - District Compliance Manager
 RFMO - Regional Fisheries Management Officer
 ■ MAF Fisheries Board & MAF Fisheries Senior Fisheries Management Committee
 ■ MAF Fisheries Senior Fisheries Management Committee

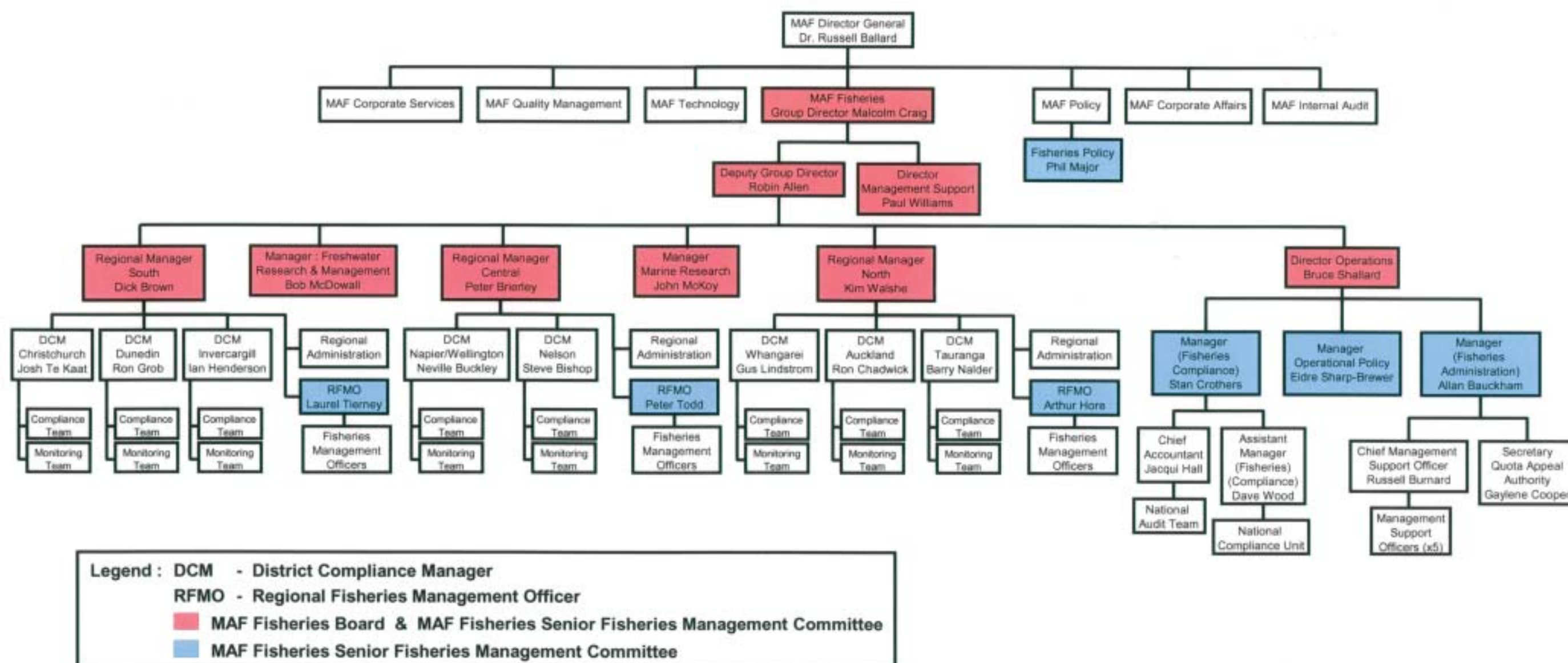
* Detail below Manager level incomplete.

** RFMO responsibilities shared. Permitting responsibilities; Karen Knedler.

17.0 APPENDIX 6 – ORGANISATIONAL STRUCTURE FOR 1992

MINISTRY OF AGRICULTURE AND FISHERIES

MAF FISHERIES ORGANISATION CHART 1992 *

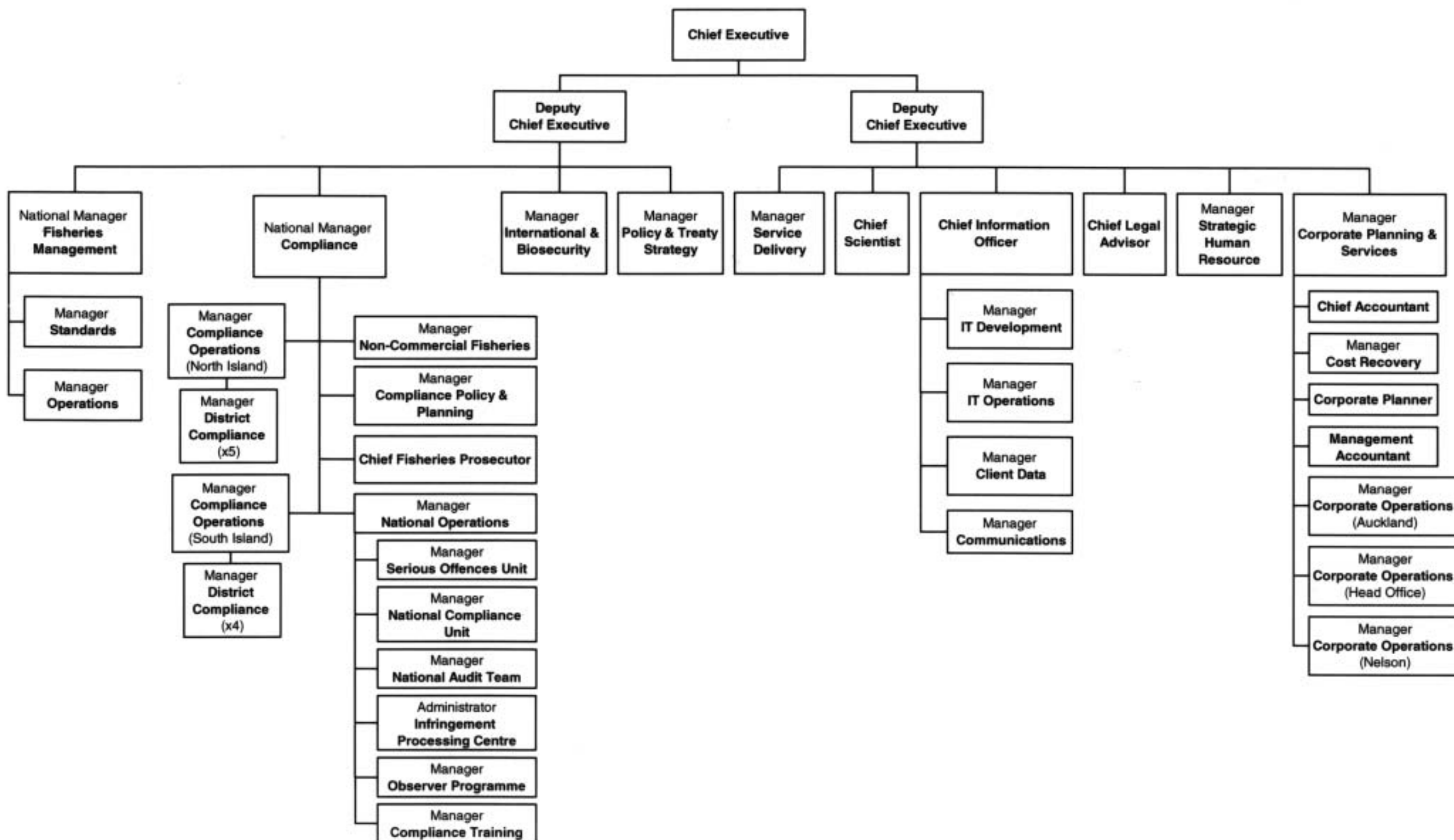


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18.0 APPENDIX 7 – ORGANISATION CHART 2003

MINISTRY OF FISHERIES

ORGANISATION CHART 2003



19.0 APPENDIX 8 – DELEGATIONS

The delegation documents referred to in the Inquiry hearings have to be read in the context of:

- The relevant Fisheries Act provisions and Regulations containing the powers and functions being delegated
- The divisional circulars and manuals which set out guidelines for fisheries management and permit administration
- The development of inconsistencies in the exercise of permitting administration in different regions and offices of MAF Fisheries
- The general quality of administration and the apparent limited quality control over the exercise of and compliance with delegations, at least in the period up to 1991.
- The developing pressures in the scampi and other fisheries at the relevant time.

The full set of delegations documents for the period up to 1993 were provided to the Inquiry.

19.1.1 Types of Delegations

Delegations are documents whereby a Minister or senior official authorises another person or persons (normally a more junior official within the same organisational hierarchy) to exercise a power given to the Minister or senior official. There needs to be legal authority for the delegation of the right to exercise that power to be made (see next section). When a power is delegated, the Minister or senior official to whom the power was given in the first place remains responsible for its proper exercise.

The types of delegation of powers and functions to which reference was made during the Inquiry, or which were implicit in the evidence presented, include:

- (a) [1] Powers under the Fisheries Acts (allocated to the Director-General or Chief Executive unless otherwise noted), some of which were or could be delegated:
 - the issue of commercial permits (S.63 of the 1983 Act)
 - reviews of decisions made on the issue of commercial permits (S.63)
 - the issue of special permits (S.64)
 - exemptions from fishing moratoriums (S.65) (this was a power given to the Minister)
 - registration of fishing vessel not owned by NZ resident (S.57(8))
 - setting catch limits

- waiving requirements for timely supply of catch records
 - initiating prosecutions and exercising other enforcement powers under the Fisheries Act, but not under the Crimes Act. Under the Fisheries Act these are direct powers of a Fisheries Officer so would not be “delegated” by the Director-General; the authority to issue warrants to Fisheries Officers i.e. to designate which officials held those powers, was however delegated to senior officials
 - altering data on QMR returns (the Nalder/Buster issue). The reference to delegation in the way the QMS Manual provisions are written again is implicit – the Inquiry did not see a reference to a formal delegation document relating to this power.
- (b) [2] Financial Delegations – powers to authorise the expenditure of public funds, under the Public Finance Act. In this Inquiry these financial delegations were relevant only to the issues relating to Mr Nalder, viz:
- that he was alleged to have exceeded his delegated authority to authorise the expenditure of public funds in relation to work by KPMG on Operation Buster;
 - that his delegated financial authority (if he had any as an acting senior fisheries investigating officer in Auckland) was suspended during the investigation into the KPMG/Buster issue.
- (c) [1] Human Resources delegations – essentially the rights to hire, fire, and take disciplinary action against staff. These would have been implicit in the issues surrounding Mr Nalder, but were not raised as an issue, or else decisions were taken by the Director-General himself as Mr Nalder’s employer.
- (d) [2] Release of information under Official Information Act. Again the Inquiry did not receive evidence about delegated authority to release information in response to requests under the OIA. This issue is related to the evidence about the ease or difficulty for various fishers in getting information from MAF/Fish, whether OIA requests can be made verbally, etc.

19.1.2 Legislative Authority to Delegate

The main legislative authorities relied on for the Director-General or Chief Executive to delegate any of the foregoing powers and functions appear to be:

- Sections 9 and 10 of the Ministry of Agriculture and Fisheries Act 1953. These sections were largely repealed in 1989.
- Section 41 of the State Sector Act 1988. This is the all purpose authority for all public service chief executives to delegate all their powers and functions (unless prevented from doing so by other legislation), including powers which have been delegated to

chief executives by Ministers. This provision was relied on by MAF/Fish from late 1988, rather than the provisions in the Ministry of Agriculture and Fisheries Act 1953, in part because it allowed sub-delegation more easily.

- Under the Public Finance Act 1989 the approach used for financial delegations in 1992-93, which is the time relevant to Mr Nalder, is Cabinet delegation of its authority to spend to Responsible Ministers and Chief Executives. The same approach applies today. Except for certain types of expenditure (probably not relevant here) these financial delegations are without dollar limit, provided expenditure remains consistent with and within the amount of the relevant appropriation. Chief executives may sub-delegate this authority, with the approval of their Minister, to officials in the department. Normally there are financial limits on the extent of authority given in these sub-delegations.
- Two specific provisions in the Fisheries Acts allow or at least contemplate the delegation of powers of the Minister of Chief Executive. These are:
 - S.63 (11) of the Fisheries Act 1983 (repeated in S.94 of the 1996 Act) indicates that the Chief Executive can delegate authority to issue commercial permits, and also delegate the power to review decisions made under that delegated authority.
 - S.65 (4) of the Fisheries Act 1983 gave the Minister power to delegate to the “Authority” the authority to approve (s 65(2) exemptions from moratoriums declared under S.65(1). However the approval of exemptions in 1990-91 was by the Director Operations with authority delegated under the S.41 State Sector Act provision.

19.1.3 Compliance with Delegations

Other than the issues relating to Mr Nalder, which were dealt with in Mr Williams’ report on the KPMG incident in 1993, there was very little evidence to suggest that formal compliance with delegations themselves was lacking. Mr Greeks commented (based on a 1990-91 audit) that there was no overall quality assurance system to ensure compliance with legislation and delegations in MAF/Fish, but the audit found little evidence of actual non-compliance. Mr Laking noted that the delegations documents he perused were clear and best practice for the time, but also was careful to distinguish the quality of the system on paper from the possible quality of its administration.

The real issue is compliance with the overall administrative system which comprised both the formal delegations and the other sources of direction or guidance on how the discretion to be exercised under delegated authority was to be used. Such delegation or guidance comes in notes annexed to the formal delegation documents in divisional circulars, in Manuals, in regional regulations – not used for scampi until 1991-92, in the decisions of the Fisheries Board (the senior management group in MAF/Fish) or of other technical committees, in the annual regional non-quota species management documents and sometimes in emails from head office staff.

The complexity, and sometimes doubts about the actual availability to the individual officials of this array of guidelines and directions were undoubtedly contributors to the administrative difficulties and mis-management which has been described in Court cases and this report. There were different and evolving pressures facing various fisheries and regions, and the staff in different regions made continuing efforts to deal better with those various pressures, sometimes by advocating changes to the directions and guidelines. The result was a complex and changing situation which contributed to the difficulty for people exercising delegations always to comply with the associated directions and guidance, or achieve reasonable decision-making timeframes.

Did the extent or nature of delegations themselves contribute to the regional inconsistencies and mis-management which were described to the Inquiry? When taken in conjunction with the complexity described above, they were at least an element which did not hinder those inconsistencies and mismanagement. The efforts first to add greater prescriptiveness to the exercise of delegations (eg Mr Burnard suggests the June 1989 delegations detailed significant constraints on the use of special permits, and he described these as designed to encourage the use of commercial permits for scampi)¹⁶², second to bring delegations back to only Head Office staff in 1990-92, and third to place scampi under a S.65 moratorium from October 1990 (later than several other non-QMS species) all reflect at least in part a recognition of the risk that widely-held delegated authority could aggravate and enable those inconsistencies and mis-management.

Even with the array of directions and guidelines there were areas where the processes were not clear. The apparently simple issues of where permit applications should be lodged, who should be consulted in deciding whether to issue them, and who should issue them, did not seem to be clearly specified. These issues were discussed fully in the Report in Term of Reference 1.

These latter points have moved away somewhat from the specific question of compliance with delegations. But they illustrate the complexity and also in some respects the lack of clear and comprehensive coverage in the overall system of delegations, directives and guidance. In that context, the exercise of widely delegated authority in a regionally-based administrative system contributed to uncertainty, delays and inconsistencies in the treatment of different fishers.

19.1.4 Specific Evidence on Delegations

There were a number of specific assertions about delegations made during the hearings which were not all clearly supported by the material on delegations.

- Mr Wilkinson indicated that s 64 1(c) is delegated down to Regional Fisheries Officers. The delegation of 13/10/86 signed by the Minister and Director-

¹⁶² However when the guidelines for special permits attached to the June 1989 delegations are examined, they are practically identical to Appendix B in the 29 August 1988 circular on permitting policy for 1988/89 i.e. the change occurred in 1988, as discussed under Term of Reference 1.

General shows a S.64 1(c) delegation only to senior head office Fisheries officials, which applied from that time until it was withdrawn at 20 June 1989.

- In Mr Wilkinson's view most permit delegations were withdrawn during 1990 (special permits from 2 February 1990, and commercial permits from 13 July 1990 (except delegations for commercial permits issued under s 63(2) to the holders of quota), and that they were reinstated from 26 September 1991. He appears to place reliance on delegation documents revoking all previous delegations. However, the clauses in the delegations relating to revocation of previous delegations typically say all previous delegations **relating to those provisions** are revoked, and only when delegations for all provisions are re-specified (as at 20 June 1989), does it simply say that all previous delegations are revoked.
- Mr Wilkinson also claimed all (permit) delegations were withdrawn in December (or November) 1991. In fact, special permit delegations were withdrawn between 25 October 1991 and 31 March 1992. These delegations were restored at the latter date to the Deputy Group Director only. Commercial permit delegations were left in place. However as from 25/10/91 the delegations relating to commercial permits for the first time specified the conditions to be included in permits by individual species. Scampi were not included in that list of species. Instead scampi had been included in regional regulations as from 16/9/91 with authority delegated to senior head office staff on 24/10/91 to approve (inter alia) scampi permits under those regulations and in line with the April 1991 criteria.

19.1.5 Conclusion

Delegations themselves were generally clear. However, widely delegated authority in combination with a regionally-based administrative system and complex directives and guidance, contributed to uncertainty, delays, and inconsistencies in the treatment of different fishers.

20.0 APPENDIX 9 – THE COURT DECISIONS IN THE SCAMPI FISHERY

Paris v. Director-General of Fisheries (Unreported: High Court: Wellington 1 December 1989, M968/89 McGechan J)

This was an application for review of the decision of the Director-General to attach conditions to the fishing permit held by Paris.

The Director-General of Fisheries gave notice under s 63 of the Fisheries Act 1983 stating conditions to be attached to fishing permits concerned for the relevant years. These conditions effectively closed substantial portions of the fishery. The fisher concerned challenged this decision by way of a judicial review. The grounds of challenge were alleged invalidity on the grounds that the conditions amounted to a prohibition rather than a control or management and secondly, because control and management should have been made under Part III and not by conditions on Part IV permits. Another ground of invalidity was that the notices were given by a registrar of fisheries to whom the Director-General had not made proper delegation of authority. The applicant also claimed a legitimate expectation that permit conditions would be reviewed from time to time enabling the applicant to have a reasonable opportunity to catch the quota. In refusing to open portions of the fishery it was also claimed that the Director-General had given weight to irrelevant considerations.

The Court did not uphold the grounds of invalidity, legitimate expectation or the irrelevant consideration claim and in respect of the incorrect delegation, found that notices had been issued by the wrong delegate. It did not regard as a serious irregularity, the person concerned being the correct official even if using the wrong title. As such it went to the exercise of his discretion against relief.

- In finding against the applicant, the Court observed that whatever the merits of the claim, the expectation was that a Ministry of this scale and importance should by now be able to get its formal paper work right.
- The failure to do so led to a situation that in contentious matters where it does not get the paper work right there will be challenge in the Court.
- His Honour mindful of this left open the possibility that despite dismissal of the proceedings, the applicant should have some award of costs.

Gunn v. Quota Appeal Authority (1993) NZAR 102

In 1981 Gunn held fishing permits for paua and wet fish. During mid-1981 he was convicted of possession of a cannabis cigarette and as a consequence lost the registration of the boat and permits related to it. During the next four years he applied annually to have his suspension lifted and this was lifted conditionally in 1984. This was on the basis that he was permitted to return to sea, on a supervised probationary basis. During 1986 he undertook a fulltime course to obtain a skipper's certificate which he obtained in 1987.

The appellant claimed that had it not been for his suspension he would have been the skipper of his own boat with a permit and catch history as at 18 September 1986 and would have been

allocated provisional quota. From 1981 until 1984 the plaintiff made regular applications for fishing permits. These were refused on the basis he was a suspended person. After his suspension was lifted, he applied for fishing permits in 1985 and 1986 but his applications were refused because of a set of instructions given by the defendant. As a result of the plaintiff's eligibility for such permits being rejected because he had not held a fishing permit in the previous year, MAF had determined that the plaintiff did not qualify as a commercial fisherman.

- The High Court held that the plaintiff's suspension was not a legitimate and sufficient reason in itself for refusing the fishing permit sought from 1981 to 1984.
- Secondly, after the suspension had been lifted, the plaintiff applied for fishing permits for a number of fishing methods appropriate to the boat he intended to use. Initially MAF purported to defer the application until after the fisherman had passed his Coastal Fishing Vessel Certificate but as the boat was exempt from those provisions, ultimately MAF advised the plaintiff that he did not qualify as a commercial fisherman. This was because he had not held a commercial fishing permit during the 1984-85 fishing year. MAF reached this conclusion in reliance placed on the FMD circular 1984-48.

It was submitted that the second defendant had no power to issue a determination as to the meaning of "commercial fisherman" contained in the circular as those words were defined in the statute itself. The meaning in the circular was repugnant to s 2 of the Fisheries Act 1983.

- His Honour upheld the argument of the plaintiff. He did not consider there was any ambiguity in the definition contained in the Act and even if there had been an ambiguity, MAF could not determine the true meaning of legislation by a departmental circular.
- His Honour also rejected a submission that s 64(2) of the 1983 Act imposed a complete discretion on the Director-General so that it was not a foregone conclusion that, despite the error, the plaintiff would have received the permit. His Honour considered that the discretion related to the period for which a permit may be issued and the conditions upon which it may be issued. Broader matters such as the management of the fishing resource were covered by s 65 rather than as part of the discretion under s 64.

In respect of the remedy and in reliance on *Montgomery v. Attorney-General* (High Court Auckland, CP1445/86, 28 March 1988, Henry J), His Honour held that MAF's decision to refuse fishing permits to the plaintiff was based on error and was unreasonable. The incorrect interpretation of the scope and definition of "*commercial fisherman*" in s 2 of the Fisheries Act resulted in the plaintiff failing to qualify as a commercial fisherman. There was no other valid reason suggested.

The plaintiff was granted a declaration that he was entitled to a fishing permit and it was deemed to be in force. The Quota Appeal Authority was directed to reconsider the plaintiff's appeal.

Petromont Holdings Ltd v. Chief Executive of Agriculture & Fisheries (Unreported: High Court, Auckland: M986/93: 7 September 1993: Anderson J)

The plaintiff sought judicial review of the decision made by the Director-General under s 63 of the Act to issue fishing permits for scampi in QMA 1-9 with varying catch limits in respect of QMA 1, 2, 4 and 6A. This had resulted in differences amongst permit holders' conditions. The second challenge concerned the revocation by the Director-General of the plaintiff's permit in respect of QMA 1, 2, 3, 5 7, 8 and 9.

Section 63(13) of the Act prohibited the issuing of a fishing permit for non-QMA fish except to a person who had a fishing permit on the 30th of September 1992 and caught fish during the period 1.10.90 to 30.9.92. The revocation of the applicant's permit was on the basis that the applicant had made no landings of non-ITQ fish stocks listed in his permit schedule.

The applicant challenged the decision on the grounds:

- That s 63(13)(c) was not concerned with landings of fish but with the taking of fish;
- The plaintiff did take scampi during the period specified;
- The plaintiff should have been granted an opportunity to be heard before it was determined that the plaintiff did not lawfully take scampi.

The Director-General acknowledged that the plaintiff took scampi in QMA 1, 2 4, and 6. At issue was the question whether or not the Director-General could revoke a permit where a permit holder has lawfully taken a relevant species during the period but has not taken such species in every area in which it could lawfully be taken by the permit holder.

His Honour found:

- That there was no ambiguity in the clause and that the purported revocation pursuant to s 63(13)(c) was invalid;
- The absence of landing was a not sufficient basis for revocation. The section was concerned with the taking of fish and not landing and as such it was an error of interpretation which rendered the purported revocation invalid;
- If the Director-General's decisions were otherwise lawful, the decisions would have been amenable to review because of the failure to accord as a matter of fairness the opportunity to be heard in connection with the fishery records or returns to be completed. The existence of discretionary powers and the administrative inconvenience of fairness did not relieve the obligation to be fair in deciding to revoke.
- The decision to revoke depended upon information from records or returns furnished before 15 October 1992. There was such scope for error, omission, oversight or misinterpretation of records to require the Director-General to provide an opportunity to be heard. The Director-General was not infallible and the significance of an incorrect decision was shown by the case.

In respect of catch limits, the Court held that s 63(9):

- Required the Director-General to be aware that conditions were not substantially the same;

- To be satisfied that the conditions were reasonable;
- To be satisfied that it is reasonable to apply conditions that are not substantially the same and to state the grounds for being so satisfied.

The Court concluded there was plainly an absence of substantial sameness because of the varied catch limits. The Director-General had not indicated any satisfaction that the conditions were reasonable. Also rejected was a submission that the statement could consist of internal departmental documentation. The conditions as to catch limits were invalid.

In respect of the argument that the Director-General's purpose was to impose a de facto quota management system, the Court said that imposing permit conditions to economically manage the industry may not be a valid purpose under s 63.

The Court dismissed any question of delay in the relief. Given the circumstances, the fisher was entitled to attempt to work within the system as it had done. Even if there had been delay, the public interest in ensuring that the Director-General's decisions were lawful would outweigh any disadvantage in not litigating issues at an early stage. The Court was referring to *Gunn* in this context. However, no concluded decision was necessary.

Vickerman Fisheries Limited v. Attorney-General (Unreported, High Court, Wellington CP1007/91; CP 655/87 26 August 1994 Neazor J)

This was a consolidated proceeding incorporating an application for review and actions for damage for refusal by MAF to issue a fishing permit for a vessel under s 64 of the Fisheries Act 1993 for fishing in the southern waters. The plaintiff also claimed damages for its lost opportunity of qualifying for allocation of quota.

It was not disputed that the decision to refuse to grant the permit was formally invalid because there had been no express delegation of authority to the decision maker by the Director-General. It was argued by the plaintiff that the Director-General had no power to refuse to grant a permit under s.64 as his power was simply to impose conditions on the permit issued. This was disputed by the Crown.

The High Court considered whether s 64 vested the Director-General with any general discretion to grant or refuse a permit. The plaintiff had submitted that under s 64 all that could be done was to issue a permit subject to conditions and then only within limits. The Crown submission was that s 64 conferred a discretion whether or not to issue a permit not simply to impose conditions.

The issue was whether the Act supplied a definitive statement of relevant factors in respect of dealing with licences, or whether policy issues that were not spelt out in the legislation could be brought into account and if so, in what circumstances.

The decision of Williamson J in ***Gunn v. QAA & Director-General of Agriculture & Fisheries*** (Unreported CP 118/89, 25.10.92 Dunedin) was considered. In *Gunn*, Williamson J held that s 64(2) did not contain a complete discretion for the Director-General but contained a discretion as to the period for which a fishing permit may be issued and the conditions upon which it may be issued. Management of the fishery was covered by s 65 rather than as part of a discretion under s 64.

The Crown argued s 64 gave power to regulate fishing which could extend to a power to prohibit. The High Court said the real issue was whether under s 64 the Director-General could apply a policy which has as its general purpose exclusion of any or any more vessels from the fishery or fisheries. In other words, does that purpose and the policy related to it go beyond the intended ambit of the section.

Neazor J was not prepared to go as far as Williamson J in **Gunn** and say that every applicant who is a commercial fisherman was entitled to a permit under s 64. However, in examining s 64 in the context of the whole Act it was apparent that Part III of the Act was designed for the purpose of controlling the number of vessels in an industry by the way of the grant or refusal of permits. Part III of the Fisheries Act provided for controlled fisheries to be declared and within that the Minister had the power to define the fishery species that could be taken and the persons that could be engaged in the fishery. If there was a fishery management plan the Minister could fix the maximum number of licences. Such a regime was not put in place and Neazor J considered that MAF attempted to exercise their control through the medium of s 64.

Part III and IV were not interrelated and a proper construction of s 64 required account to be taken of what was the subject of the express provision in Part III. Further, s 65 enabled the Minister to exclude all vessels from the fishery with the provision of allowing one or more if it was fair and reasonable to do so. The ambit of s 65 was inconsistent with the construction of s 64 that would allow one or more individual exclusions from any or all fisheries for reasons not associated with the operation of a particular vessel.

- On a true construction of the section s 64 provided for the issue of a permit whenever a reasonable authority could frame conditions relating to the matters referred to in s 64(2) which would enable a particular vessel to be used.
- It might be that in particular cases a permit could properly be refused having regard to the way or place in which the applicant wished to use the vessel.
- The implementation of a general policy of exclusion was beyond the legislative intention embodied in s 64. A decision to refuse a permit based on a consideration designed to keep out further vessels from the industry and not on whether the vessel could be allowed to fish under conditions which had proper regard to conservation and management of resource was based on a legally irrelevant consideration.
- Although the moratorium approach was based on an honest intent to pursue the resource, it had no adequate legislative basis.
- The Court was satisfied the moratorium and issues related to it were the basis of the decision to refuse a permit rendering the decision invalid.

The claims for breach of statutory duty, misfeasance and negligence were dismissed.

Jenssen v. Attorney-General (Unreported Court of Appeal CA 273/98 25 May 1999)

This was an appeal against the striking out of proceedings. The plaintiffs had asserted that they were wrongly refused fishing permits in the years 1982-84 as a result of which they did not receive the fishing quota established under the regime that took effect from 1 October 1986 and have sustained losses in excess of \$50 million.

The proceedings had been struck out by the Master in 1998 and Gendall J had declined to review the decision.

The assertion made for the purposes of the strike out was that as a result of a series of breaches of duty following the introduction of the QMS, they failed to secure prospective rights to permanent quota. Section 28H which came into effect from 1 October 1986, provided that a person to whom no provisional quota had been allocated might appeal to the Quota Appeal Authority against the failure or refusal to allocate provisional quota.

The plaintiffs had appealed to the QAA. The QAA responded that the plaintiffs did not appear to have held a fishing permit as at 18 September 1986. This date was crucial because the right to quota depended upon entitlement to a permit on the relevant date or over the relevant preceding 12 months. The appellants stated that they should have been recognised as possessing the necessary qualification to receive substantial quota and that their appeals to the Authority had never been determined.

The criteria for granting provisional quota was provided in s 28E. This enabled the Director-General to allocate a different provisional maximum ITQ where it would be unfair not to do so having regard to the commitment to and dependence on the fish in the QMA taken by the person and other provisional maximum ITQ allocated to that person.

The appellants maintained that to support a claim of substantial fishing history, that they had duly applied for permits under the provisions in force. They had filed a series of appeals to the QAA which had never been determined. Had that occurred, they should have received a major allocation of quota. It was implicit that the applications were wrongly decided and favourable decisions by the QAA were wrongly never made.

The plaintiffs had made application in 1982 for four boat fishing permits. The applications, it was claimed, were refused without reason and without justification. The appellants had tendered the prescribed fishing method fees and it was a duty of the Director-General to issue permits for the year to which the application related. Such permits would have acted as a springboard for receipt of permits for the following year. This in turn would have assisted the proof of history of fishing under s 28E.

In 1983 the appellants made application for fishing permits under s 64. The appellants provided the fees required by the Regulations for the registration of each fishing boat. The applications were returned because none of the fishing vessels were registered in the last year.

In 1984 the appellants made further applications. MAF by a memorandum advised the plaintiffs not to forward any money with the forms and this was challenged as an unlawful purported waiver of fees. The applications were either never dealt with or declined.

In the Court of Appeal, the Crown acknowledged that the plaintiffs had not conceded that there was any or any authorised withdrawal of appeals to the QAA or any other claim. There was no evidence of such withdrawal and therefore there was no sufficient basis for the factual premise upon which the judgments on the strike out by the Master and Gendall J were founded.

Turning to the s 329 ground, s 329 of the Fisheries Act 1996 validates decisions relating to permits under s 63 or special permit under s 64 of the Fisheries Act 1983 made before 1

October 1992. The Master had held that the statement of claim was not filed until 1998 and therefore was too late to challenge any decision or non-decisions made for the years 1982, 1983 and 1984.

The Court of Appeal traversed the context of s 329 referring to the decisions in **Gunn** (supra) and **Montgomery v. Attorney-General** (High Court, Auckland, CP1445/86, 28 March 1988, Henry J). These two decisions produced a combined result that entitlement to a fishing permit depended on a lower threshold than the QAA had employed and could be declared retrospectively. This led to the introduction of ss 28 I (4) and 28ZGA. The purpose of s 28ZGA was to prevent the judgments in **Jenssen** and **Gunn** from having further effect.

The Court of Appeal agreed with the Master that the claim could not succeed as far as it was founded upon entitlements to permits in relation to the 1983-4 year. The Court of Appeal did not agree with the Master's conclusion that the language in s 329 extended to the 1982 year and the 1967 legislation to which it made no reference. The Court therefore had to consider s 28ZGA.

The Court concluded that the section made unassailable the decisions of the Director-General made before 16 September 1992 which may have otherwise been invalidated on application of **Montgomery** and **Jenssen**. The plaintiffs' claim was therefore statutorily barred. Finally, the Court considered whether or not a cause of action would have existed in any event.

The Crown argued against a private law claim for damages for breach of a statutory duty. The Court of Appeal declined to take the point further but did state that there could be no need to develop the common law to recognise a cause of action in the present context. The plaintiffs had had full opportunity to claim under successive statutes any rights they may have wished to advance. There was no injustice which might lead the common law to recognise a cause of action premised upon failure of the statute law to provide a remedy. While not deciding the point, the Court of Appeal considered the cause of action to be at best dubious and most unlikely to succeed.

United Fisheries Ltd v. Chief Executive of the Ministry of Fisheries (Unreported, High Court, Wellington, CP194/95, 8 February 2000, Heron J)

These were strike out proceedings of applications pursuant to the Judicature Amendment Act 1972.

The applications for judicial review related to 1992 and 1993 applications for fishing permits to target scampi and a special permit to catch scampi and reviews in respect of those decisions.

It was further alleged that a policy in respect of the issuing special permits for scampi under s 64(1)(c) of the Fishery Act 1983 was not disclosed to the plaintiff. It was claimed that failure meant that it did not apply for the special permit. If the special permit had been issued, then the plaintiff would have been eligible to apply for a fishing permit pursuant to s 22A of the Fisheries Amendment Act 1994.

A further claim related to lawfulness of the Deputy Group Director's authorisation to decide applications for fishing permits.

The application for strike out was on the basis that s 329 of the Fisheries Act 1996 applied to the various decisions under review.

No request for review and no proceedings challenging the decisions to decline to grant the plaintiff a permit were issued before 1 October 1996, the cut off date for the application of s 329. The plaintiff attempted to argue that it did not come within the terms of s 329(1) or (2) because the reviews were never validly considered, were conducted by an officer not authorised to do so and that the actions of the Deputy Group Director were not validated by s 25(e) of the Acts Interpretation Act 1924.

The Court considered that the issues could be decided by reference to the use of the word “purported” in s 329 and whether that word extended to decision making by ostensibly unauthorised persons. The Court held that s 329 did so. The relevant letters setting out the decisions purported to make the decisions. The effect of the statute was to make them valid.

United Fisheries Ltd v. Ministry of Fisheries (CA76/00, 2 April 2001).

In the Court of Appeal, the appellant again set out that its rights to catch scampi had lapsed as it had been unable to have the relevant permits renewed. The appellant claimed that it took steps to re-establish those rights.

The Court of Appeal agreed with Heron J and held that the use of “purported” in the context of s 329 did not require the person making the purported decision to have actual power to decide. Further, it was unnecessary to decide whether a purported decision was confined to one which was made with the genuine belief there was authority. The second amended statement of claim did not plead that the Deputy Group Director acted other than genuinely in good faith. The appellant was seeking in the absence of a pleading of bad faith, the opportunity to test the genuineness of the Deputy Group Director’s decision. There was no basis for the pleading that the letters making the purported decision were other than a genuine attempt to exercise a power.

The second argument was that despite there being a purported decision it was still not one covered by s 329(2)(a) because the review decision was not one in respect of the issue, variation, refusal, revocation or cancellation of any fishing permit under s 63. As Heron J had noted in the High Court, the only outcome of a review would be the issue, variation, refusal, revocation or cancellation of any fishing permit and such a decision would come within the terms of s 329 as being a decision made in respect of such matters. The Court of Appeal agreed with this position that s 329(4) did not exclude from the validating provision in s 329(2) those review decisions which if successful would lead to the issue or variation of a permit under s 63. The review decisions were validated by s 329 and the appeal was accordingly dismissed.

Vautier Shelf Co No. 14 Ltd & ors v. Chief Executive of the Ministry of Fisheries and others (Unreported : High Court, Wellington CP 20/97 24 July 2000 Ellis J)

These were consolidated proceedings seeking judicial review in respect of decisions made allocating scampi catch amongst fishers. The plaintiffs’ claimed that they should have received more TAC and so the TAC should have been increased.

The Court traversed the history to 1 October 1992 and the history from 1 October 1992 to the **Petromont** decision in September 1993. Included in this history was the Court of Appeal's decision in **Jenssen** and its reversal by the enactment of s 28ZGA of the Fisheries Amendment Act (No 3) 1992 which prevented the QAA and Courts allocating quota to anyone not permitted to fish prior to the s 28B declaration. Section 329 of the Fisheries Act validated all permitting decisions made before 1 October 1992.

Ellis J agreed with the decision of Anderson J in **Petromont** that the decisions to issue permits for scampi in 1992-93 were invalid because of disparity of conditions. The point left open by Anderson J was whether or not the Director-General might impose permit conditions for the purpose of economic management rather than resource conservation under the exercise of discretionary powers of s 63(9).

Following the **Petromont Holdings** decision the Director-General wrote to all permit holders saying in terms of s 63(9) that he considered it reasonable to impose a condition giving different quota to each fisher. The Director-General advised that he had considered the various options in regard to management of the fishery and gave each fisher a full account of that consideration. This begged the question posed by Anderson J in **Petromont Holdings** but MAF had proceeded on the basis of a Crown Law opinion that what was proposed was legally permissible.

Ellis J held that s 63 could not be the empowering instrument for resource management of which TAC and quota were key matters. The Director-General's decision to allocate ICE by using s 63 alone for the management of the resource was illegal. In the Court's view, the appropriate method for a fishery not yet under the QMS was to regulate and not use the provisions of s 63.

The Court decided that in order to have a fishing permit issued under s 63, a fisher was not required to have a boat which could be inspected and registered under s 57 provided sufficient detail of the actual vessel proposed to be used can be provided so that the Director-General can compose a suitable condition to the permit. The Court also concluded that the Minister had wide powers under s 64 to issue special permits.

Having held that MAF must issue s 63 permits in an open fishery, the Court then considered whether s 63(9) applied to the issuing of permits in this case. The Court proceeded on the basis that the section did apply. The Court concluded that up until 1 October 1992 MAF was wrong to delay issuing permits to fishers who applied for the purposes of controlling fishing in an open fishery. The proper technique was to use regulations as was done in 1991 or a s 65 moratorium, as was done in 1990. When allocating ICE each fisher had to be treated fairly and reasonably. Failure to issue permits when requested and misleading conditions resulted in unfairness. MAF had failed to fairly develop the fishery at the critical time, 1989 to 1991.

The Court was sceptical of Simunovich's claim that they were not aware of the dynamics of building up catch history, although this decision did not apply to the smaller fishers who may have been misled to a degree. The Court did not find the refusal to allocate ICE in QMA3 and 6B unfair or unreasonable.

In respect of the impact of s 329 on the allocation of ICE it was argued that decisions made after 1 October 1992 can be challenged. Decisions which settle ICE for 1992-93 were made in September 1992. However, these decisions built on the errors and injustices over the

previous fishing years. Allocation for the next year was made on 21 December 1993 and rolled over the earlier ones which were declared by s 329 to have always been valid. The Court was aware that the ICE continued to be allocated by permit conditions which had already been held to be illegal as well as based on unfair procedures which disadvantaged some fishers. The Court noted that if allocations had been made by regulation in Gazette notice they would not be open to attack and it was surprising that MAF did not proceed in that way. The Director of Operations as early as May 1989 had alerted RFMOs to the necessity to manage the fisheries by way of regulations rather than conditions on permits.

At p.86 of the judgment, the Court noted that MAF ignored the warning given by Anderson J in the *Petromont* decision.

The Court was not prepared to accept that s 329(1) saved illegal procedures after 1 October 1992. Rather, it gave those who wished to challenge a limited time to do so. Applying that, the Court would have held that the ICE conditions on permits issued between 1 October 1992 and 1 October 1996 were reviewable in the legal sense as were the decisions made before the ICE allocations pursuant to the 1999 regulations. However, this was academic because the 1999-2000 allocation was made under valid regulation.

Fairness apart, MAF had eventually made the legally correct decision. Therefore, despite the Court holding that

- the allocations were made inconsistently with legislative rules through improper use of power to set conditions on permits; and
- unlawful allocations because of failure to consider individual circumstances and fairness,

the allocation of quota the 1999-2000 year under regulation was valid. As a consequence, such allocation may be conclusive of the fishery precedent of QMS under the 1996 Act.

Official Assignee v. Chief Executive of MAF [2002] 2 NZLR 722.

The case was then appealed to the Court of Appeal,

The Court of Appeal held that the Fisheries (Allocation of Individual Catch Entitlement) Regulations 1999¹⁶³ were invalid. Given that the Regulations were invalid, it followed that the allocations based on them were also invalid. Regulation 3 was therefore ultra vires the Act.

In the majority's view MFish's management could not usefully be analysed or commented on outside of that context. With that consideration in mind, they agreed with Thomas J that the Regulations were invalid.

¹⁶³ SR 1999/24

Thomas J on the other hand made extensive comment on the management by the Ministry. Thomas J noted that the Ministry had

- moved from one regime to another in a way that caused considerable confusion.
- Policies were announced but revoked or then changed without due consultation or notice.
- Other policies had been applied inconsistently as between competing fishers.
- Advice to fishers had not been given even-handedly and the treatment of fishers has been unequal.
- Assurances were given which were not kept and statements have been made which have been misleading.
- Different systems have operated in different regional offices. Needless mistakes had been made in processing and granting fishing permits.
- Delays, at times inordinate, and particular to a region or a fisher have occurred.

The Ministry appeared to have been too ready to build on errors and injustices committed in the preceding years and to rely on changing the legislation or adopting a new regime to overcome the problems caused by the earlier mismanagement.

Thomas J held that the common law duty to act legally, rationally and fairly applied.

His Honour noted that the Ministry's response to the *Petromont* decision was not to reconsider the legality or fairness of its prior decisions but to remake identical allocations of differing quota. However, these were justified on a different basis, namely management of the fishery.

Thomas J considered that administrators were under a duty to act fairly in carrying out their statutory powers and duties. Administrators did have a wide margin within which their substantive decisions will not be questioned by the Court. However, the Ministry was to be disabused of any attitude that may have reflected the Crown's submission that substantive fairness was not required and that suggested its officers were free to act other than even-handedly and fairly as between fishers.

Thomas J tempered his remarks by acknowledging the difficulties that the Ministry was under and the nature of the commercial interests at stake. Pressure brought by fishers individually and as a group, made the objective of the legislation to achieve optimum utilisation a formidable task. The requirement to attain even-handed treatment was not an expectation of infallibility.

Having determined that the 1999 Regulations were ultra vires, it was unnecessary for his Honour to continue and examine the validity of the Chief Executive's exercise of his discretion. However, he did consider that the Chief Executive had failed to exercise his discretion correctly.

Thomas J found that the Chief Executive failed to have regard to individual fisher's circumstances, resulting from the Ministry's actions leading up to the determination of that catch history which was then used to make the allocations.

The complaints of the fishers that the history did not fairly represent their entitlement could not be so easily set to one side.

Entitlements had been determined or influenced by acts or omissions of the Ministry. For example, the departure from policy on special permits which the Ministry had continuously represented to fishers, the impact of events which seriously affected the ability of fishers to establish a catch history and the delays on the part of the Ministry in processing certain applications.

Thomas J considered the Chief Executive was obliged to have regard to the fact that the catch history on which he based his allocation had been generated at a time when the appellants contend that they had been unfairly treated. The key point was that the Ministry had by its earlier acts and omissions pre-determined the appellants' catch history, which were then used to set future entitlements.

Thomas J dismissed reliance upon s 329 of the Act, saying it would not protect the Chief Executive's allocations under the Regulations from being challenged. Thomas J noted no fresh decisions by the Chief Executive as to the appropriate basis for the allocations were made. The individual catch limits were simply rolled over and ultimately became the allocations which the Chief Executive made under the 1999 Regulations. There was therefore no substantive exercise by the Chief Executive of the discretion which he was required to exercise to determine the proper basis of allocation under the Regulations. As a result, the catch history became entrenched with all the imperfections of the past.

Westhaven Shellfish Limited v. Chief Executive, Ministry of Fisheries (Unreported,: High Court Wellington CP322/98 5 October 2000, Ellis J)

This case concerns a cockle fisherman but follows on from the decision in ***Vautier Shelf Co*** (supra) referred to as the Scampi case. His Honour noted that his judgment was written on the understanding that the readers were familiar with the scampi case.

The plaintiff fished under Permit from 1983 to 1989 in the Pakawau Beach area. Since 1993 it had sought to extend its operations to other fisheries but has been refused permission by the Ministry. The plaintiff sought judicial review of these decisions. This was on the basis that the decisions were unlawful, not been made in accordance with the Act or regulations made under it. Cockle fishing is divided into nine fishing management areas and Golden Bay is in Area 7.

Westhaven applied to harvest cockles in Area 1, 2, 3, 4, 5, 7, 8 and 9 for 1992-93 and 1993-94. The application was declined on the basis of policy which stated that a permit for that species area method was needed as at 30 September 1992. Further the applicant had to have caught fish of that species in any area as authorised by a fishing permit between 1 October 1990 and 30 September 1993.

The initial decision was reviewed under s 63(11) on 26 October 1994. The review confirmed the earlier decision. The reviewer held that the decision to decline the application for areas

other than Area 7 had been incorrectly done pursuant to s 63(3). The power to decline in fact came from regional regulations which prohibit the taking of cockles commercially but empower the Director-General to authorise a commercial fisherman to do so as the Director-General sees fit. The reviewer contended that the decision had to be based on Fisheries management information available at the time of the decisions and the conclusion was that there was inadequate factual information to justify issuing a commercial permit to enable the discretion to be exercised under the regulations.

Westhaven asked for a further review pursuant to the new s 329 in 1997 following the enactment of the Fisheries Act 1996. This was undertaken by Ms Risk. Ms Risk recorded the policy guidelines for permit decisions under s 63(4) and for the exercise in the discretions under the Area Regulations.

She referred to guideline for Areas 3B and 3 and decided that while Westhaven qualified under s 63(13) because it held an appropriate permit and had fished in the stated years, it did not meet the criteria for permits under either guideline. The reviewer concluded that the refusal was a lawful exercise under the discretion given under s 63(4).

Westhaven then applied for a variation of its permit to enable it to take cockles from Areas 3 and 5 on 28 April 1997. This was declined as Westhaven did not meet the criteria established for the operation of the area regulations because Westhaven did not already have permits in those areas.

This decision was reviewed. The reviewer restated the policy for the exercise of the discretion under s 63(4) of the Regulations, referred to **Gunn**, **Vickerman** and **Petromont** said that the policies were within the purpose of the 1983-86 Acts, i.e. conservation and management of fisheries. The reviewer concluded that the criteria had been applied lawfully and confirmed the decision.

Southern Clams Limited with a permit to fish for cockles had applied for an increase in the permissible tonnage. They had consulted with Maori interest and presented an up to date NIWA assessment of the stocks. Their application made allowance for stake holders' interests. Southern Claims application was approved but the application by Westhaven to take cockles in Area 3 was declined.

The Court reviewed the decisions of **Gunn**, **Vickerman** and **Petromont** discussed in the scampi case. His Honour considered that the crucial question was whether the policies formulated at the Ministry were lawful under the 1986 Regulations as they applied to the six decisions taken. It was his view that the regulations under s 63 worked together with the Act giving power to make the regulations and the regulations giving power to issue the permit, which must be exercised in the terms of s 63 of the Act. His Honour then reviewed the decisions in **Fowley v. Bradley** (1984) 54 ALR 609 at 622; **British Oxygen Co. Ltd v. Minister of Technology** [1971] AC 610 at p.65 and **Sagnata Investments Ltd v. Norwich Corporation** [1971] 2 QB 614 at pp.626-627. The conclusion was that the guidelines or policies may be quite specific provided they confirm with the particular legislative policies but leave sufficient room for the proper exercise of the discretion. See **Practical Shooting Institute (New Zealand) Inc v. Commissioner of Police** [1992] 1 NZLR 709.

It was not suggested that the 1986 Regulations were ultra vires and His Honour was certain that before commercial fishing could be allowed the Ministry must have sufficient knowledge

of stocks and proper accounts has to be taken of those entitled to harvest it. This included the Maori Fisheries Commission, Maori Customary Rights, recreational fishers and any others.

It was proper therefore for the Ministry to require that an application should cover those matters provided the Ministry did not use those factors as a unreasonable restriction. This was the way the Ministry had approached the Southern Clams application and these factors applied to all fisheries.

It is also the Ministry's policy to restrict commercial fishers to FMA in which they held permits for fish for the 1990-91 and 1991-92 years. The Court accepted the moratorium imposed under s 63(13) was intended to be relatively short in duration to enable fisheries to be bought within the QMS. This had not happened and the moratorium has lasted since December 1992.

His Honour concluded that the policies promulgated for the application of the regulations were in accordance with the Fisheries Act but the Chief Executive must be prepared to entertain application by any fisher who qualifies under s 63(13) and to fish in any area not just the area for which permits were held in 1992. In his view the Ministry was entitled to require generic information as well as information specific to the fishery in question. The Ministry had approved extensions for permits for both Westhaven and Southern Claims in the existing areas.

The application by Westhaven for an area outside of its permit had not covered all the policy considerations in contrast to the Southern Clams application.

His Honour was satisfied that the Ministry did have power to make the decisions in question under the regulations and was entitled to apply the policies in the way that it was done. Although it was unnecessary to decide the matters of policy in issue it may not have been appropriate to make those decisions under s 63 alone.

The plaintiff's application failed.

Westhaven Shellfish Limited v. Chief Executive of Ministry of Fish & Ors [2002] 2 NZLR 158.

Westhaven had harvested cockles at Pukawa Beach in Golden Bay in accordance with permits issued under s 63 of the Fisheries Act 1983. Cockles are not within the QMS and are not subject to ITQs. Westhaven wished to extend its catch and sought permits for other fisheries. Those requests failed, as did applications for review made under s 62(11). Westhaven sought judicial review of the policy directions given by the Chief Executive of the Ministry of Fisheries, the Ministry's decisions declining permits and the Ministry's decision refusing applications for review. The applications were rejected by the High Court

The Court of Appeal said the policy directions were ultra vires and invalid. The Ministry had misinterpreted s 63 (13) as including a restriction on fishing in areas other than those fished under permit during the period 1 October 1990 to 30 September 1992.

This misinterpretation had been formulated as policy guidelines. The guidelines were held to be ultra vires as an unlawful fettering of the discretion to approve or decline permits.

The Court of Appeal stated that it was led to the conclusion that the possibility of exceptions to policy was closed off and the officials did not recognise such a possibility. The earlier misinterpretation was, in a sense, never removed.

The Court of Appeal then considered s 63(9). The High Court in the Vautier (scampi) case had held that s 63(9) applied to non-QMS areas. This was a requirement that conditions be substantially the same for all permits for any FMA or QMA. Cockles were not subject to the QMS and therefore there was no QMA. No FMA existed as no area had been declared. The Court rejected an interpretation that meant that all permit holders were to have substantially the same conditions for the same species - s 63(9) did not apply to non-QMS

The Court of Appeal held that Westhaven had established that the Ministry's policy had been developed and applied in an unlawful way because the policy unlawfully fettered the discretion conferred by the Act or Regulations or both. The decision on s 63(9) effectively overruled the decision in Petromont in respect of catch limits which differed. The Court of Appeal did rule that the Ministry had wrongly declined the plaintiff's application to fish in new areas and left the matter to be considered on an application for the current year.

Westhaven Fisheries Ltd v. Chief Executive Ministry of Fisheries (Unreported, High Court, Wellington CP115/02, 30 August 2002, Durie J).

By the time the further application was considered, the Fisheries Act 1996 had been brought into force with the result that the Ministry had then declined the plaintiff's application. Section 63(13) was re-enacted as s 93 of the Fisheries Act 1996. However s 93 referred to stock, not species. MAF considered that its interpretation of s 63(13) had now become law.

On this basis it refused Westhaven's application to vary its permit to allow harvest in other areas. MAF also refused the special permit application because it did not come within the "scope of administrator error". The High Court concluded that MAF had made an error of law in refusing the application. Whilst the decision is concerned with cockles, the Court made observations about the approach of MAF which are relevant. The Court noted that MAF failed to take an impartial view of the law as it was and preferred to see the law as it would wish it to be. The Court of Appeal's early decision was barely acknowledged and the Court was surprised that MAF did not obtain legal advice.

The case was appealed to the Court of Appeal and decision was given in February 2003. (***Southern Clams Ltd v. Westhaven Shellfish Ltd*** CA 184/02, CA 190/02, CA 194/02) The Court of Appeal began by stating that MAF, at first as a matter of law and later as a matter of policy, refused applications to amend permits to allow it to fish in new areas for the same species. The misinterpretation of s 63(13) and the disallowance of the policy guidelines were established in the early decision.

The question was whether the amendment in s 93 widened the scope of the 1992 moratorium and the Court concluded it did not. The Court disagreed with Durie J's general proposition that "stock" did not include a spatial element. It did agree that in the context of s 93 a different meaning was required for "stock" and agreed with Durie J's ultimate conclusion that MAF made an error of law.

Although it did not need to consider the refusal of the special permit they did so for completeness.

Special permits could be granted for the purpose of correction of administrative errors (s 97(1)(c)). MAF argued that its decisions were not administrative errors but intentional decisions and could not be described as administrative errors. There was no incorrect recording of an incorrect record of permit history of the nature contemplated by the special purpose.

The Court rejected this contention and could see no reason to confine administrative errors to clerical errors. It made no difference to Westhaven whether it was refused a special permit because its records for the years 1990-92 were mislaid or because MAF wrongly applied its area requirement. MAF had construed its power to issue special permits too narrowly. It would declare the refusal invalid on that basis alone.

The Court also commented that since the new moratorium MAF had understood its role too narrowly as s 93 did not stand in the way of a special permit. Further, MAF said that in order to grant the application MAF would need to accept that the decision to decline was wrong (not just set aside by the Courts).

The Court considered that this was again too narrow a view of the approved purpose. It was correct that the Court had not said that Westhaven was entitled to a permit. It had ruled that MAF had acted unlawfully in refusing to consider the merits of the application. While the error might not have resulted in “*loss of access to fishery*” [reference to approved purposes for special permits] in a direct sense there was “*disadvantage*” to Westhaven because if the merits had been considered the permit may well have been granted.

Westhaven v. CEO MFish (Unreported: High Court Wellington CP 102/00 21 July 2003 Goddard J)

Westhaven had applied to harvest geoducks and whelks. These were declined and that decision was confirmed on review.

Westhaven had received special permits from 1987 until 1990. A commercial permit was declined in 1989 and 1990.

In 1991 a further special permit for 100 tonnes was issued but due to bad weather only 30 tonnes were harvested.

Westhaven met with MAF in September 1992 and on the basis of that meeting applied for a commercial permit. A permit for 1992-93 was issued without geoducks. In late September MAF requested an application for a commercial permit and history. The Court noted that this was odd given that Westhaven’s involvement was well known and an application for a commercial permit had already been made.

The application was declined but not notified until 21 December 1992, three days after the s 63 (13) moratorium had come into force.

The decision went to Deputy Group Director of Fisheries, Wellington, Mr Shallard. On the recommendation of acting FMO Nelson and Greta Point, it was declined on 8 December 1992. Shallard did not have the Westhaven’s history. MAF contended it was not necessary.

The decision was forwarded to Nelson but not notified until 21 December 1992.

A file note obtained under the OIA showed two notes on the Shallard decisions which stated that the permit was not to be formally declined until after the moratorium was law and a further note not to omit the earlier note.

No explanation as to author or purpose was given by MAF. It was not on the decision when signed by Mr Shallard.

Westhaven applied for review under s 63(1). MAF responded stating that s 63(13) would prevent the issue of a permit even after a review. The effect of the letter led Westhaven to abandon the review.

Section 64(1)(c) provided discretionary power for the Minister to grant special permits if unfairness resulted. The Minister's approved purposes were subsequently enacted as s 2 of the Fisheries Amendment Act 1994. This enabled a commercial permit to replace a special permit held prior to 30 September 1994.

Westhaven approached the Minister who was briefed by MAF. Westhaven had no knowledge of the brief. The Minister advised s 63(13) prevented him from issuing a commercial permit. The Minister also said at the meeting that he did not know what would happen if the previous decision had been in error, despite his express approval to issue special permits for correction of administrative errors under s 64(1)(c).

Section 329 was enacted and in 1997 Westhaven sought a review. Eleven months later an interim review upheld the Mr Shallard's decision on whelks. The interim review invited comments. Westhaven had now come into possession of the Dr Allen memorandum of 1993 concerning approved purposes. Westhaven then pointed out that it came within the circumstances of the approved purpose.

The final decision on the whelk permit was made by the policy manager in the absence of Ms Risk, the Manager Operational Policy.

Goddard J stated that both officers failed to address the real issues before them, indulged in circular reasoning that reached no logical conclusion, and failed to interpret and apply s 329 and the rights of review granted by the section in any meaningful way.

The review decision in respect of geoducks was made eight months after the application. It mirrored the decision on whelks. However, Ms Risk expanded her reasons. Part of her reasoning had been expressly disapproved by the Court of Appeal in **Westhaven** (supra).

Westhaven took issue with a number of matters, including the status of the guidelines on which Mr Shallard's decisions were based and their date and the origin of the two handwritten notes.

In the final decision, Ms Risk acknowledged she had based her provisional decision on policy guidelines that were not in effect when Shallard made his decision. Her final decision made a number of attempts to correct that fundamental error. Ms Risk did not consider the error to have affected the outcome of her decisions.

Goddard J stated that Ms Risk's response to the handwritten notes was "*evasive and dismissive*". The final decision was again circular in nature and without logical conclusion.

The Court examined Mr Shallard's decisions and concluded that his decision was made in anticipation of the moratorium. It did not take into account individual circumstances. The decisions were illegal in the *Fitzgerald v. Muldoon* [1976] 2 NZLR 615 sense.

Furthermore, a close-minded approach developed and applications were declined on the basis of class alone. This was a fettering of discretion. MAF could not impose a pre-moratorium blanket policy.

The Court accepted that up until s 63(13) came into force, the s 63(4) discretionary power to impose conditions on permits remained relevant to deciding whether reasonable conditions could be framed to permit fishing of species prohibited unless specially authorised such as geoducks and whelks.

MAF had used the s 63 condition discretion as if it were already a moratorium in conflict with the principles in *Gunn and Vickerman* (supra).

The Court also found on the facts that it was incomprehensible that Mr Shallard did not consider issuing Westhaven with a specially conditioned s 63(4) permit. Westhaven had a legitimate expectation to at least be considered.

The Court then considered whether Westhaven's situation should have been considered under s 64(1)(c) after 18 December 1992. Goddard J considered the ministerial briefing paper prepared in June 1993 as showing that MAF acknowledged the possibility that Westhaven may have had an arguable case for a s 64(1)(c) permit on the basis of special purposes approved by the Minister. The Minister's silence about approved special purposes when asked at the meeting in June appeared curious. However the Minister adopted the Ministry's circular reasoning that there was a moratorium on new commercial permits and Westhaven did not have a commercial permit. Her Honour noted that this was a direct consequence of the unexplained three month delay in processing Westhaven's applications for such permits. The effect of the delay could not be under-estimated and the reasons for it could not be lightly dismissed. The failure to treat Westhaven's attempts to seek review or to have Mr Shallard's decisions revisited under s 64(1)(c) for approved purposes supported the inference that the Ministry had closed its mind to Westhaven's case. On the basis of the Court of Appeal's decisions in *Southern Clams* (supra) Her Honour was in no doubt that Westhaven should have been frankly appraised of the s 64(1)(c) special purposes at the time those were promulgated.

Her Honour then considered whether or not Westhaven would have been eligible for a special purpose permit, if it had known. Westhaven could have sought a special permit if there had been an administrative error and tangible commitment and subsequent hardship. MAF argued that administrative error equated to inadvertent clerical error relying on the decision of Durie J in *Westhaven* (supra). However, that aspect of Durie J's decision has been overruled. That being the case Goddard J accepted that MAF had once again construed its power to grant special permits too narrowly. Mr Shallard's decisions are properly to be characterised as administrative errors for the purposes of the section and not just for administrative law purposes. Goddard J also rejected the reasoning that Westhaven would not have qualified under the approved purposes. Westhaven had been disadvantaged by loss of time, effort and money; by losing the opportunity to be considered for a special permit that may have been eligible for conversion into a fishing permit after 30 September 1994. Westhaven was entitled to be frankly appraised of the approved purposes and have its case considered against those

purposes in an objective and open minded way. On this question of lost opportunity, Her Honour referred to the Court of Appeal in ***Southern Clams*** (supra).

MAF had attempted to argue that the moratorium would still have applied and have frustrated the issue or any permits after 18 December 1992, including a s 64(1)(c) special permit. As Her Honour noted, this reasoning had been rejected by the Court of Appeal in ***Southern Clams***.

Her Honour then had to consider whether s 329 cured the erroneous approach of Mr Shallard. Goddard J referred to the decision of Ms Risk and Ms Grindley as having proceeded on the wrong premise. This was that the policy guidelines formulated after s 63(13) as having provided the basis for Mr Shallard's decision. Her Honour noted that both reviewers were able to find that Mr Shallard had applied the wrong policy guidelines appropriately. Despite Ms Risk realising that her provisional decision had been reached by the wrong policy guidelines, she attempted to correct the material errors by inserting the correct policy guidelines into her final decision. The post-section 63 (13) guidelines erroneously identified were the same guidelines which the Court of Appeal had subsequently denounced as ultra vires and invalid. As the Court of Appeal also held in that case, Ms Risk's s 329 review decision, as well as the original decision she was reviewing in that case, demonstrated a lack of consideration of Westhaven's particular circumstances. It was impossible to tell whether any exception to the identified policy had been contemplated or how Westhaven's case had been assessed in light of that policy.

In the provisional decision, Ms Risk found that Mr Shallard had taken Westhaven's circumstances into account. That finding was not based on fact. In her final decision, Ms Risk adjusted her finding that Mr Shallard had reached the correct decision by substituting the correct policy guidelines in re-assessing his decision-making exercise. Goddard J noted that these attempts to rectify by amending a provisional decision in every material respect by reference to relevant policy did not cure the fundamental ill. Neither her final decision nor her provisional decisions on whelk or Ms Grindley's final whelk decision cured Mr Shallard's error; rather they compounded the erroneous approach he took.

The unexplained delay in timing and release of Mr Shallard's decision and the anonymous notes were considered by Ms Risk to have no effect on the validity of Mr Shallard's decisions. The Court noted there was a circularity of reasoning which did nothing to cure the unlawfulness of the decision making approach that was adopted by MAF through and nor had it cured the deleterious effect of the unexplained delays that occurred between September 1992 and 22 December 1992 when Westhaven was notified. The Court found the following:

- Mr Shallard failed to properly interpret and apply the scope of the discretion under s 63(4) and failed to comply with time frames that could reasonably be contemplated for determining commercial permitting decisions.
- Mr Shallard failed to appreciate that Westhaven had a legitimate expectation to be considered for a specially conditioned fishing permit.

Between September 1992 and December 1992, MAF operated a de facto moratorium and a closed minded approach was taken to non-ITQ applications during that period.

Mr Shallard's decisions were made on an erroneous basis, it was open to the Ministry to have reconsidered under s 63(11) or as a s 63(1)(c) reference. Her Honour was satisfied there was an obligation on MAF and the Minister to make those special purposes known to the Ministry. That obligation was not fulfilled. The Policy Directives formulated to dissuade fishers from pursuing s 63(11) and s 64(1)(c) review procedures were unlawful. Ms Hogg and Ms Grindley's approach to their s 329 review of responsibilities were erroneous. They merely recited rigid policies, had no logical conclusions and the policy recited was the wrong policy. Furthermore it was a policy that was disapproved of by the Court of Appeal.

The unexpected delay of almost three months in processing the application was significant. The delay could only be characterised as unreasonable, unfair and it irretrievably prejudiced Westhaven's chances of obtaining a suitably conditioned commercial permit and prejudiced the opportunity to test those decisions on review. The only reasonable inference to be drawn that the delay was deliberate and this was supported by the anonymous note appended to Shallard's decision memorandum.

There was still a discretion under the regulations to especially authorise exceptions to the prohibition on a considered basis. Shallard and his advisers failed to do so and Risk and Grindley failed to rectify.

The Reviewers simply proceeded as if geoducks and whelks were listed in the "*totally prohibited*" category rather than in the "*prohibited unless specially authorised*" category.

Trevor Phillip Goodship, Pranfield Holdings Limited v Ministry of Fisheries (Unreported: High Court, Wellington CP 185/97, 9 May 2002, Ellis J)

Mr Goodship was an experienced fisherman who in 1988 applied for a special permit and was told this was granted on 17 May 1988. This was conditional upon him providing details of a permitted fishing vessel. After various difficulties Mr Goodship negotiated a six month lease with an option to purchase a suitable vessel in 1990. Relying on the letter of 17 May 1988 he applied for the permits.

On 6 August 1990 he applied to MAF Nelson for a special permit to fish areas 2, 7 and 8. He had also previously applied to MAF Dunedin for a special permit to fish areas 3 and 4. On 3 September 1990 he applied to the Dunedin office for a special permit for areas 3, 4 and 5 and also for a commercial permit for the same areas.

It was accepted that all applications whether for a special permit or a commercial permit were treated as s63 applications.

On 24 September 1990 the Minister proposed a moratorium under s65 to commence for the fishing year of 1 October 1990. This resulted in all fishers having to seek an exception under s 65(2).

It was accepted that all those who had been granted permits prior to the moratorium were granted exemptions although some were subsequently revoked.

The plaintiffs were not granted any permit before the moratorium but now contend that they should have been granted an exemption or alternatively should have been granted exemption on merit. An exemption on merit was refused on 24 May 1991 and this was confirmed on review on 3 August 1991 and on 20 May 1993. Prior to the moratorium, Goodship had

obtained a routine permit for red cod bycatch and also registered the vessel *Westerner* on the basis of the lease and options.

The Ministry proceeded to establish the criteria for applications for exemption. The criteria went through various changes and were finally set on 19 April 1991. The previous draft criteria established in November 1990 were applied to Goodship's application and it was recommended that it be declined for Areas 2, 3, 4, 7 and 8. One of the essential criteria was the fishers' commitment to scampi fishing and this was to be crystallised on 30 September 1990. Mr Goodship's applications were refused and he was notified on 24 May 1991. He was told he did not meet the now five criteria. He was not told it was only the commitment criteria he did not meet.

Mr Goodship protested the decision and requested a review under s 63(11). Mr Goodship described the situation regarding the commitment to gear and the *Westerner*. Because of the delays Mr Goodship cancelled the registration of the vessel on 14 November 1990.

His Honour noted that Mr Goodship had made no attempt to advise the Ministry from the filing of the permits until the refusal in the following May of the agreement concerning the vessel and the danger he was in of losing it if he did not receive an exemption under s 65(2). His simple cancellation of the registration in November looked as if he had given up his efforts to fish for scampi.

Mr Goodship first submitted that he should have been granted a permit before the moratorium came into force in accordance with the letter of May 1988. His Honour, referring to his conclusions in the *Vautier* case that withholding of a permit to control a fishery was not a legitimate use of s 63 concluded that the Ministry should have issued a permit. However, because of the way the Ministry approached exemptions under s 65 it was uncertain whether, even if he had been granted a permit prior to 30 September 1990 he would have promptly received an exemption. His Honour thought it was more likely that his application for exemption would have been treated in the way it actually was.

The plaintiff then claimed that they fulfilled all criteria for the exemption including that relating to commitment. The plaintiff had applied to review the decision of 24 May 1991. The reviewer made a number of factual errors concerning Mr Goodship's commitment to the fishery. The reviewing officer had given credit for the value of the gear but had not assessed the level of commitment involved and Mr Goodship being prepared to enter into a lease, an option or to his efforts to obtain a boat.

After a complaint to the Ombudsman the Ministry conducted another review in 1993 the result being the same. With the Ministry insisting that commitment was to be measured by cash cost to Mr Goodship and rejecting a suggestion of a valuation of it. In His Honour's view this was narrow and unreasonable. The previous factual error concerning the date of the agreement was corrected but the commitment was assessed as no financial commitment. The reviewer also examined exemptions which already been granted and concluded that at least two other fishers had not met the criteria and suggested their permits be reviewed.

The significant words in s 65 for the granting of an exemption to the moratorium were whether it was fair and reasonable to authorise an exemption. The Court was not concerned with the criteria requiring commitment, but rather than the plaintiffs' claim was rejected on the basis of flawed assessments. First, by failing to take account of the significant value of

the gear, second, the agreement to lease and buy the vessel should have been assessed in light of Mr Goodship's efforts since 1988. The decisions showed no adequate evaluation of that aspect.

His Honour considered that the significant words for s 65(2) were the requirement that it was fair and reasonable to grant exceptions to the moratorium. His Honour considered that the three decisions rejecting the plaintiff's claim were flawed because of a failure to take into account the significance of the value of the gear, by narrowing the assessment to one of cash cost, the failure to assess the agreement entered by Mr Goodship as part of his efforts since 1988 to enter into the fisheries. His Honour concluded the decisions showed no adequate evaluation of this factor.

If the issue of permit was still alive His Honour would have referred the matter back to the Ministry for reconsideration under s 4(5) of the Judicatory Amendment Act 1972. However twelve years had elapsed since 30 September 1990 and the plaintiffs do not have a boat available. The Ministry could not check or assess the substance of the agreement to lease it by the *Westerner* and it may not be possible to value the gear. On the other hand the delay by the Ministry of eight months in dealing with the applications for permits and exemption was inexcusable and in its initial stage was just possibly highly detrimental to the plaintiffs. His Honour was unable to decide whether the exemption would have been granted even if dealt with properly.

His Honour held that the application was not properly assessed and this failure was part of the unsatisfactory situation analysed in the *Vautier* case. His Honour was also aware that the scampi fishery may soon become subject to QMA and it would be impossible for the plaintiffs to be considered for quota allocations.

Trevor Phillip Goodship, Pranfield Holdings Ltd v. Ministry of Fisheries (Unreported: CA 236/02, 2 October 2003)

The Court noted that in the second judgment the High Court declined to grant the appellants' relief by way of a declaration and dismissed the claim. The appellants appealed against the refusal of a declaration. There was no cross appeal by the third or third respondents nor by Simunovich Fisheries Limited. Simunovich was joined in the proceedings as fourth respondent.

The Court of Appeal accepted the argument for the appellant than on a proper reading of s 65 persons who held permits issued before 1 October 1990 were not covered by the moratorium. This was because s 65 applied only to permits issued or renewed during a period commencing on 1 October 1990. Since there was an unchallenged finding from Ellis J that the appellants should have been granted a permit before the moratorium was notified, no question could now arise about the need for an exemption or the likelihood that it might have been granted. The appellants would simply have gone fishing for scampi in the 1990-91 year on the assumption that it had a permit.

What the Court required the appellants to show was that a declaration concerning the position at the time would be a present utility, such as to outweigh any inconvenience caused to the respondent. Would the Ministry be able to respond to a declaration by issuing the appellants with a permit, given the changes in the statute? The Ministry could not simply grant a current year permit that should have been granted at an earlier time. In 1992, s 63(13) prohibited the

issue of any fishing permit for any species not within the QMS except to a person who not only held a fishing permit but caught fish during the period 1 October 1990 to September 1992. The appellants could not be deemed to have caught fish when no fishing actually took place. Secondly, the Fisheries Act 1996 repeated the prohibition of the 1983 Act and that remained as a barrier to the issue of the permit to the appellants. The appellants argued that s 329(5) of the Act enabled a special permit to be granted to rectify an administrative error. The appellants submitted that an unlawful refusal to issue a permit was an administrative error and the Court agreed. However, before a special permit could be issued, various consultations need to be undertaken under s 97 and a further decision would have to be made before a commercial fishing permit could be issued.

The appellants' objective was to obtain quota when the species was brought within the QMS system. The Minister had a choice of methodology in determining allocations of initial quota between catch histories or ICE. The appellants were not fishing in the years which constituted the catch histories. ICE for a commercial fisher cannot be set by special permit. It would be crucial for the appellants to have any special permit converted to a commercial permit.

Although the Court acknowledged the difficulties in the face of a formal declaration, it still considered that making of such a declaration would be of practical advantage to the appellants. It would not merely record the historical situation, it would assist them in their ongoing efforts to obtain the right to fish for scampi.

It would serve to emphasis to the Ministry that it has to acknowledge the factual findings made by the Judge and its previous misinterpretation of s65 and take these matters fully into account if an application for a special permit is now made.

The Court of Appeal considered that in the circumstances, to withhold a declaration might suggest that although the Ministry's errors were serious, they can now simply be put to one side. Withholding a declaration would create unnecessary difficulties and uncertainties.

The Court went on to add that it should not be counted against the appellants that since 1990 they had not had a fishing vessel available. The abandonment of the lease and purchasing arrangements were the result of the unlawful failure of the Ministry to issue a permit.

Further argument by the respondent against a formal declaration was that the appellants may use that in a further proceeding to challenge the basis upon which the Ministry may choose to bring the scampi fishery under the QMS system. The Court of Appeal doubted that a Court would be influenced to any great extent by the presence or absence of a declaration. If it was otherwise appropriate for there to be a declaration, it should not be withheld merely because it might give the appellant an advantage in future proceedings.

The Court were not impressed by any argument of disadvantage to Simunovich and other fishers. The argument was not supported by any specific actual prejudice. The respondents were in fact merely saying that any advantage over other fishers that they had gained from injustice done to the appellants should continue. The Court found that proposition unattractive.

The Court also rejected the refusal of relief on the grounds of wider public interest. As the other reason against granting relief were not strong and there was a reasonable explanation for

much of the delay, some of which had been caused or contributed by the Ministry. The Ministry submitted that it was now unfair in a new legislative environment to respond to a formal declaration. However, the Court noted that when Parliament validated decisions made before 1 October 1992 the validation did not apply to any challenge in Court proceedings commenced before the commencement of s 329, the present proceedings were so commenced within that period.

The Court was satisfied that there should be relief in the form of a declaration that the Ministry acted unlawfully in failing to grant permits for fishing scampi in accordance with their applications for 1990-91. A further declaration was granted that the appellants would have been entitled to fish for scampi in accordance with such permits during that fishing year. Although the declaration mentioned the possibility that they were granted save to the extent that the permits were lawfully called in or revoked by the Ministry because of the Ministry's view that had it in 1990 appreciated the true meaning of s 65, it may have notified an amendment or revocation of conditions of a permit to prevent its use for fishing for scampi. The Court was of the view that the Ministry might have encountered difficulties had it tried to take this course as an indirect means of widening the scope of the s 65 power to impose moratoria.

Kellian & Ors v. Ministry of Fisheries & Ors (Unreported: Wellington Registry, CP281/01, 22 July 2002, Durie J)

These were consolidated appeals for judicial review challenging the basis of declaring that the pilchard, anchovy, butterfish and paddle crab fisheries would be subject to the QMS from 1 October 2002.

The challenge was on the basis that the quota for the current permit holders would be assessed according to the catch records of the early 1990s provided for in s 30 of the Fisheries Act 1996. The plaintiffs argued that quota should be assessed on the basis of ICE as provided for in ss 31 and 40 of the Act. The fisheries with recent application of capital and labour from individual permit holders, meant that ICE should be assessed having regard to their years of effort rather than catch histories.

The first question was whether the Minister was wrongly informed when he was advised that it was not open to him to consider ICE for these fisheries.

In a decision paper of October 2001, the Ministry recommended to the Minister that 13 fisheries, including the present, be made subject to the QMS. The decision paper discounted the prospect of introducing ICE and assumed that the catch history model would apply.

The Minister did not sign off on the decision paper, but sought further advice on how to mitigate the impact that the catch history model would have on small scale fishers. This resulted in a paper on 16 October 2001, but the paper did not really address the concerns that the Minister had expressed or did not fully do so. MFish used the paper to strengthen its original proposition that ICE should not be allowed. The Minister accepted the recommendations. The central complaint was that in both papers MFish and therefore the Minister, rejected ICE option. The contention was that the Minister was wrongly advised and that MFish had a set mind.

The Court held that in analysing whether or not the Minister was wrongly advised, that the Minister was not properly advised when ICE should or should not be allowed. MFish had submitted that the intent of the Act was to allocate quota according to catch history. The Court considered that that merely begged the question. The Court then rejected MFish's arguments against the use of ICE. As expressed earlier, however, the Court's view would be irrelevant if the Minister was in fact unable to issue the ICE.

However, it was relevant to note that many of the arguments put forward by the Ministry were characterised by the Court as having no proper basis. There was no proper basis for the Ministry to extemporise on the matter, it was Parliament that governed, not MFish. Parliament had set the policy in the Act and the Ministry had merely to ensure that the Minister was advised on the correct interpretation and application. If Parliament had provided for ICE, it was not for MFish to prevent that from happening for policy reasons of its own. It could not put itself above Parliament, it had to reach conclusions on the scope and application of ICE on the basis of statutory interpretation.

The inevitable conclusion that the Court was drawn to was that it was not open to the Ministry to allocate ICE. There was no intention to maintain the fisheries as non-quota fisheries. The only question was whether they ought to have been set up under ICE after the 1996 Act was passed but the Court was not referred to any evidence that that should have been done. Rather the evidence was of an intention to shift all but certain species to QMS. These fisheries were not amongst those so named. The named species were kept under a non-quota regime for special reasons and no equivalent reasons were advanced for the instant fisheries. It appeared that permit holders in these fisheries must have been taken to have known that their quota entitlements would fall to be determined according to catch history in the specified years. The investment made in the interim was to be at their own risk.

The applications to review were declined and costs were reserved. However, His Honour indicated that on the material before him the Ministry may well have misled the plaintiffs as to the availability of ICE. If that is so it would not be a case where costs should follow the event.

Kellian v. MAF (Unreported: CA150/02 26 September 2002)

In the Court of Appeal the issues were:

- Did the Minister or more broadly the Government have any power to deal with the fisheries issue other than by way of the QMS;
- If they did, was the Minister advised that there was a choice and did he act on that basis;
- If the answer to both (a) and (b) was yes, were the reviewable errors of law in any of the factors or purposes to which the Minister referred or in his failure to consider relevant factors.

The Court found that in all other respects the advice was lawful. It did not give rise to reviewable errors. The Court therefore agreed with the High Court but for different reasons.

The Court of Appeal held that the Minister:

- Did not in fact make his decision on that confined basis; and
- That the law did not confine him in that way.

The Court of Appeal in respect of the first issue said that the ICE method appeared to be plainly available as a matter of law to the Government. It was plain that the Minister was advised that he did have a choice, and that he proceeded on that basis. The Court relied upon the main points of the papers put to the Minister and the Minister's affidavit. The papers did state a strong preference for QMS over ICE but the emphasis went to the question whether the choice of approach was flawed rather than whether there was an existence of the choice. The Minister's evidence was explicit that he was exercising a genuine choice.

The Court held it was open to the Minister and MAF to have a policy strongly supporting the introduction of stock and species into the QMS. Whilst MAF may have used the words that ICE should not be used to subvert the allocation mechanism, it was not objectionable in law as a clear indication of a policy.

In respect of the failure to consider the impact on individual fishers the Minister did have a summary of submissions before him, but not the specific circumstances of individual fishers. The Minister was required by s19(7) to consult persons or organisations having an interest in the matters set out, but the matters referred to were limited and did not include the circumstances of individual fishers.

The Court accordingly found no error of law under this head. The Court also rejected reference to economic efficiency as being an irrelevant consideration. Also rejected was a consideration of unfairness to potential new entrants as were all remaining grounds for review.

It follows that the comments made by His Honour in the High Court must be viewed with extreme caution.

21.0 APPENDIX 10 – ALLEGATIONS

This appendix addresses the main allegations that are not considered elsewhere in the Report.

21.1.1.1 Cape Kidnapper's Incident

In his affidavit Mr Patterson, who at the relevant time was the skipper of the *Enemelay*, referred to a telephone call from Mr Wilkinson asking him to hide fish. He described it in his affidavit:

“Throughout the whole 9 or so years that I worked for Simunovich I remember only one time when Fishery Officers visited my boat. We were called on the cellular phone by Vaughan when we were steaming into Napier to discharge fish, probably about 3 or 4 pm in the afternoon. We were going to refuel and discharge some bycatch as the hold was nearly full. We had about 15 tonnes of ling and giant stargazer bycatch to unload.

Vaughan asked me how much ling and stargazer we had on board then asked if we could hide it. I asked what he meant. He asked if we had much hoki on board and I said probably about 2 or 3 tonnes. He told me to re-stack the fish room and make sure we kept the freezer going. I asked why and he said it was because we were going to be boarded when we got to Napier and the fishery officers would be looking for our bycatch. I asked why this was and he said we could talk about it later. I started to think that there was something wrong and spoke to one of the crew, Miro Marinovic. Miro was concerned that we didn't have quota for the species that we had to hide.

We went and anchored at Cape Kidnappers and shifted 11 tonnes of fish. We brought it on the deck and restacked it. We put all the stargazer and ling at the back of the freezer then restacked the hoki in front of it as Vaughan had told us to do.

Later in the evening Ivan Simunovich rang and asked if Vaughan had spoken to me. I said yes and told him that we were restacking the fish. He said that if Vaughan had spoken to me then that was okay and hung up.

We arrived in port at about 1 or 2am in the morning and all the fans going so the freezers were minus 32 degrees as Vaughan had told us to do. After an hour or so the MAF guys turned up. They had just normal gear on with a woolly shirt on top. There wasn't enough space for them to look around and all they could see was frozen blocks of hoki and scampi. Then came up and signed out the logbook then went away. I think this would have been around 1992. I don't recall ever seeing another fishery officer on the boat after that.

The Briefing Notes re Scampi allege:

“Dave Patterson for example describes in some detail how Vaughan Wilkinson phoned him one day to advise him that his vessel would be boarded on arrival to Napier and to instruct him to “hide” certain fish at the back of the freezers, turn the freezers on as cold as possible and delay entry into port until very early in the morning.”

In evidence to the Inquiry Mr Patterson said that, by reference to a Ms Lang diary entry and his birthday, the date of the incident was the 23 February 1990.

The time of his telephone call from Mr Wilkinson was at 4 or 5 o'clock in the late afternoon when the Enemelay was about 3 or 4 hours short of Cape Kidnappers.

The Enemelay anchored at Cape Kidnappers for three hours. The crew on board were Ms Lang, mate, Miro Marinovic, Steve Stenbridge, Mr Carr and “Black Dave”. About four and half hours was taken to shift the cargo. Ms Lang assisted with the movement of cargo.

The Enemelay arrived at Napier at 21 hours on 23 February 1990 or a bit later. About 0100 hours on 24 February 1990 two fishing officers arrived and made an inspection and signed the log book (which was Mr Patterson’s terminology for the returns) and left. About 17.5 tonne of fish was unloaded on the afternoon of 24 February 1990. The Enemelay departed Napier at 08.30 hours on 27 February 1990.

Mr Wilkinson and Mr Simunovich deny having any communication with Mr Patterson to the effect alleged by Mr Patterson or in any other way participating in the restacking of fish for any improper purpose.

Ms Lang, who subsequently become a skipper, gave evidence that she was not involved and she did not see how it could be possible to restack the fish as alleged. She does not recollect anchoring at Cape Kidnappers and says, if the Enemelay had, she would have recorded it in her diary. She has never been involved in moving cartons pursuant to a request to put certain fish behind other fish. If she had been involved, she would have recorded it in her diary.

Mr Marinovic, who gave evidence by video from Frankfurt, said that he had an “*excellent working relationship with Mr Patterson*”. Mr Marinovic says that he did not receive a telephone call from Mr Patterson because there was no internal telephone on the Enemelay. Nor did he receive any other communication about restacking the fish room to hide bycatch. Mr Marinovic says that he had not recollection of restacking the freezer room to hide bycatch and he did not see how it could be done. Mr Marinovic was of the view that some of the allegations of Mr Patterson were “*fantastic*”.

The returns for the Cape Kidnappers trip, which Mr Patterson referred to as “*log books*”, were produced to the Inquiry. Mr Jones sighted the originals. These returns did not have any endorsement or signature on them of any enforcement officer.

There is no evidential foundation to establish that the Cape Kidnappers incident or any similar incident occurred.

21.1.1.2 Under Reporting Of Scampi

Mr Patterson made allegations of misreporting of scampi in a number of ways. He alleged that 5kg packs of scampi were packed to an average of 6.1kg and on some packs up to 6.7kg, the crew were paid on a 5kg rate and were therefore underpaid. In general terms the evidence before the Inquiry showed that whole scampi or tails were packed into boxes. Initially the weight of boxes was estimated with some test weighings. Following an introduction of Marbel scales, boxes were accurately weighed to their target weight or very slightly more. The crew was properly paid on the actual weight of the boxes. A scheme involving the under reporting of weight as alleged would necessarily involve the compliance and cooperation of the skipper and crew. Crew who gave evidence denied any under reporting. The probabilities are that it is highly unlikely that crew would comply or cooperate in a scheme of under reporting that resulted in their remuneration being adversely affected.

There is no evidential foundation to support the allegation that there was misreporting of scampi.

21.1.1.3 Port Landing Policy

Mr Patterson referred to a port landing policy:

“I very clearly remember the company policy that we would always be required to land vessels in port around midnight”;

“... from about 1990, the company ... required us to land at Tauranga. ... we did not land at the main Tauranga port wharf. Instead we were told to land at night at a very small wharf near a bridge near Tauranga. This was hard to find in the dark”;

“When we were fishing in Area 2 we were always instructed by Simunovich Fisheries Limited to discharge at night at Napier. They always asked us to land about midnight.;

“The truck would arrive around midnight”; and

“The whole process seemed very secretive.”

The tenor of the evidence was that the late night port arrival and unloading and the use of the small wharf was for an improper purpose.

Mr Wilkinson deposed as follows:

“There was never a company policy to land scampi vessels around midnight and none were. At that time the trucks had only chiller bodies, and no freezer units, so unloading in the evening was cooler for transporting back to Auckland. In those early days scampi was not the company’s main business”.

Mr Wilkinson and some of the skippers who appeared before the Inquiry gave evidence of the factors and procedures relating to berthing and unloading. There was evidence of routine and

regular unloadings at 7.00 am. They denied that there was any policy to berth late at night. In relation to landings at Tauranga, Mr Wilkinson said:

“Landings in Tauranga were made at the ordinary fishermen’s unloading wharf where the ice plant was, not at the main commercial wharves at Mount Maunganui where fishing boats were discouraged”.

Landing at the fisherman’s wharf was confirmed by some skippers.

There was no evidence to corroborate the allegation that there were instructions to use a small wharf at Tauranga or that it was in fact used.

21.1.1.4 Scampi Prices for Ling

Mr Patterson alleges that ling was returned as scampi. He says:

“I have also puzzled over exactly what then happened to the ling that was physically present on the boat but was not declared. I am sure that the quantities would have been far too much for Simunovich to sell locally through their small Onehunga fish shop. The only explanation for me is that the ling was somehow exported from New Zealand. The large number of tonnes being exported would not, however, make it easy to hide this fish.

On reflection, the only explanation I can think of is that the company must have been misreporting the ling as another species of fish. This presumably would have been a non-quota species, as any quota species would have resulted in a similar problem for Simunovich. Bearing in mind that we knew that we were fishing for maximum scampi catch history and that there was no catch limit for scampi at that time, I can see that there would have been a strong temptation to misreport the ling that we caught as scampi. This would avoid both the company’s ling bycatch problem and at the same time add to its scampi catch history.

I do not know, however, whether this in fact happened, as Vaughan Wilkinson took sole responsibility for filing the fishing returns that were required to be completed for the vessels that I fished on. I never saw any of the forms in their final form until the interview with Fishery Officers Prescott and Backhouse in 1998.

The other suggestion that some ling may have been misreported as scampi was when Ivan told me that he was paying other skippers scampi prices for ling that they misreported. When he told me this I shook my head and he never asked me to do it. However, soon after this I heard other Simunovich skippers, Gary Schroder and Wayne Crapper, talking on the radio about how they were being paid scampi prices for ling when I was steaming past Mayor Island one day. It surprised me both that they were prepared to talk about this on a channel that others could overhear and also that Simunovich were paying skippers more for ling than they had to, as even at that time scampi prices were much higher than ling prices.”

The first of the above allegations made by Mr Patterson is that ling was caught, not declared and exported. The non-declaration would require the compliance and co-operation of Mr Patterson and the crew.

Mr Wilkinson deposed that:

“There has never been any discussion with skippers regarding available ling bycatch, or any other quota bycatch, let alone with Mr Patterson. It is not their business. Skippers have always been told to land quota species. The matter of covering it with quota has been the company’s concern. With regard to ling, there was at that time no shortage of available ling bycatch. Trading bycatch is a routine concomitant of fishing. I reject Mr Patterson’s statements where he claims to have known Simunovich’s bycatch situation. I have never discussed that matter with him, and have never said anything about numbers of vessels and bycatch.”

The second allegation relates to Mr Ivan Simunovich saying that he paid other skippers scampi prices for ling and to Mr Patterson overhearing a radio conversation between Mr Schroder and Mr Crapper, who were Simunovich skippers. Mr Ivan Simunovich denies asking the skippers to report ling as scampi. Mr Schroder denied the allegation and said it would be impracticable to cut ling up to fit a scampi box. Mr Crapper also denies the conversation.

There is conflicting evidence in respect of these allegations and insufficient evidence, oral or documentary, to support them.

21.1.1.5 Landing Bycatch Only

Mr Patterson raised issues concerning the landing of bycatch as follows.

“On many occasions, including the time described above where the fishery officers were waiting for us, we were asked to come in to port only to discharge the bycatch. We were told to leave the scampi on board. I could never understand why Simunovich did not want us to discharge the scampi at the same time, as this would have added only a couple of hours to the discharge time. The company’s explanation was that they need to hold the scampi until there was a full container-load on board.

This did not ring true to me, as Simunovich Fisheries Limited had up to six or seven vessels fishing for scampi at the time, and all scampi and fish went through its factory in Auckland. I would have thought that a full container-load could easily have been put together from the combined catch. Sometimes we would make two trips to port to unload bycatch, and would be allowed to unload the scampi only on the third trip into port. This happened at Napier when we were fishing in Area 2, at Tauranga when we were fishing in Area 1, and at Napier or Wellington when we were fishing in Area 4 off the Chatham Rise.

The process of unloading only the bycatch seemed particularly strange to me when we were fishing on the Chatham Rise, as it is approximately 20 hours

steaming time from the fishing grounds to port, and a further 20 hours returning. The time to discharge the fish would be approximately six hours to discharge the bycatch, but would have been only eight hours or so, ie and extra two hours, to discharge the whole load of fish.

I have been unable to find any convincing lawful explanation to satisfy myself why we were required to discharge only the bycatch. I have always presumed that it is something to do with the shortage of ling quota that was available to Simunovich to cover bycatch.”

Mr Wilkinson gave evidence in reply as follows:

“Mr Patterson may not have understood the commercial convenience of storing caught scampi on board from time to time, but other skippers did. Vessels did not come into port together, so combining catches from vessels was not always efficient. At the time, our markets for scampi were not always robust, and it was helpful also to use the vessel for economic storage as well, as payment for the scampi did not arise till unloading.”

In the view of the Inquiry there was an adequate lawful explanation for the landing of bycatch only and there was no evidence of this being a part of or associated with any improper practice.

Mr Nalder made a number of allegations, mainly in his original affidavit.

21.1.1.6 Location of Operation Export File

Mr Younger was unable to locate the Operation Export/Simunovich file which was locked in the bottom drawer of Mr Nalder’s desk when he was suspended.

The evidence before the Inquiry shows that the procedures in the MAF/Fish Auckland Office for recording and custody of files of investigation were inadequate or non-existent. The Operation Export/Simunovich file (or a substantial part of it) was produced to the Inquiry.

Whilst the file could not be found by Mr Younger and it appears to have been lost for sometime, the Inquiry is of the view that this was attributable in all likelihood to inadequate procedures and was not attributable to any sinister or improper conduct.

21.1.1.7 Wilkinson/Shallard Pay Off

Mr Penwarden alleged that Mr Shallard benefited after he left the Ministry for his role in decisions which were to Simunovich’s advantage.

Counsel for the Ministry put to Mr Penwarden the notes made by Mr Stuart following the meeting at the Golden Wing lounge at which Mr Penwarden, Mr Stuart and Mr Prescott were present. The notes recorded a statement by Mr Penwarden that Mr Wilkinson had paid off Mr Shallard to get his scampi permit. Mr Penwarden denied making any such statement. Mr Penwarden said that it was possible that the role of Mr Shallard in decisions involving Simunovich was raised but not in terms of being paid off. The Inquiry heard no evidence of

any form of pay-off to Mr Shallard having been made before July 1998 when the Golden Wing Lounge meeting took place.

Mr Prescott met with Mr Penwarden and Ms Grey at the chambers of Mr Cooke on 15 November 2001. At the meeting Mr Penwarden told Mr Prescott that Mr Wilkinson, a former Ministry employee, used his contacts within the Ministry to obtain information beneficial to his company. Mr Penwarden also told Mr Prescott when it came to individual catch entitlements for certain areas, Mr Shallard was alleged to have issued permits to Simunovich that gave them a disproportionately high amount of catch entitlement.

The transcript reads:

“Q. ... did you allege to Mr Prescott at this meeting that in substance, ... Mr Shallard had benefited from Simunovich, after leaving the Ministry, for what he'd done for Simunovich while at the Ministry?”

A. I believe that Mr Wilkinson created opportunities for Mr Shallard, yes.

Q. So, the answer to my question is “yes”?

A. A qualified “yes”.

Q. On what basis did you make that allegation?”

Mr Penwarden suggested that Mr Shallard was appointed as an interim CEO of the Fishing Industry Association, and expressed concern that this was a possible example of the benefit received by Mr Shallard. Mr Penwarden also referred to Fish Serve where he said Mr Wilkinson and Mr Sharp were decision makers. Mr Penwarden said that questions were raised in relation to a contract for a data system for FishServe because there was to be a tender but no tender was taken and the group that Mr Shallard was working with ultimately received the contract. Mr Penwarden referred to industry concern and to it being subsequently revealed that *“the initial figure included a contingency figure of 30% which was subsequently eliminated.”*

Mr Penwarden said generally in respect of the above matters “I would be satisfied that proper investigation was made into decision-making.”

Mr Penwarden concluded answers to Mr Ivory on the above issues by saying:

“I just say it's extremely difficult for me to be giving evidence in this regard. But my understanding is the purpose of the inquiry is to expose these issues and I'm doing my best to answer as carefully as I can and expose the concerns that I have.”

The evidence given by Mr Penwarden was strongly rebutted by Messrs Shallard, and Barratt. These witnesses described the process for the letting of the data system contract and emphasised it was conducted professionally in an appropriate commercial way.

There was no basis for any suggestion of improper benefit for Mr Shallard.

21.1.2 Nalder Allegations

21.1.2.1 Allocation of Quota to Mr Wilkinson

Mr Nalder alleged that a substantial quantity of fishing quota had been allocated to a fishing company, which was owned by a second company, which in turn was owned by Mr Wilkinson. The quota was then transferred to Simunovich after Mr Wilkinson started working for them.

There was no evidence before the Inquiry of quota being allocated and transferred in the manner alleged or in any similar way.

21.1.2.2 Ghost Catch

There was “ghost catch” i.e. the fish had not been caught, and catch history existed only on paper and in the computer.

Mr Nalder acknowledged that he did not pursue the “ghost catch” history matter at all and he said it was Mr Younger’s task.

There was insufficient evidence before the Inquiry to support the allegation of a “ghost catch” or anything similar.

21.1.2.3 Accumulation of Wealth

There were concerns about the rapid accumulation by the Simunovich family of an inexplicably large amount of assets.

Whilst there were such concerns within the Ministry, the investigations carried out by Mr Nalder and Mr Younger were general or preliminary and were not sufficient to establish any inexplicably large accumulation of assets. Mr Ivan Simunovich and Mr Peter Simunovich denied any improper accumulation, and pointed out that no account had been taken of the liabilities, which were substantial.

21.1.2.4 Completion of Returns by Mr Wilkinson

Mr Wilkinson regularly completed figures in the returns furnished to the Ministry.

It is correct that Mr Wilkinson checked the completion of returns and completed returns signed by Mr Patterson and Mr Hikuwai. Simunovich, as the holder of the permit, had the responsibility to furnish the returns.

The evidence before the Inquiry particularly from the Inquiry’s expert, Mr Jones and the Fisheries Investigator, Mr Hide, was that the returns were completed to an acceptable standard.

21.1.2.5 Set up Involving Mr Crothers

There was a deliberate set-up to have Mr Nalder's employment terminated and Mr Crothers participated. Mr Nalder was convinced Mr Crothers wanted to get rid of him from the Ministry and Mr Nalder was suspicious that that was because his enquiries of Simunovich were too effective.

Mr Nalder said in respect of the “*set up*” allegation that he believed that Mr Crothers drove the KPMG situation and the QMR situation. In respect of the KPMG incident this was because Mr Crothers could not remember a discussion which Mr Nalder said took place, at a CTC meeting. In respect of the QMR incident it was because “*the first word of fraud being mentioned*” was in Mr Crothers letter dated 23 September 1993. Mr Nalder also said that there was an element of “*pay back*” because Ms Hall was not used for forensic accounting for Operation Buster.

In closing submissions the Ministry submitted that “*The evidence shows that Mr Crothers peripheral role in the two investigations into Mr Nalder's conduct was appropriate and cannot be construed in a sinister light*”.

These allegations are not supported. Dr Allen initiated the inquiry and made the decision in the KPMG incident for reasons other than setting up Mr Nalder¹⁶⁴. In respect of the QMR incident the inquiry was initiated and Dr Ballard's decision was made for reason other than setting up Mr Nalder¹⁶⁵. The Inquiry considers this allegation cannot be upheld.

¹⁶⁴ See Term of Reference 3 and section “*Did Mr Nalder's Dismissal have any connection with his investigation of alleged offences relating to the Scampi fishery?*”

¹⁶⁵ Ibid