

Independent Review of MPI/MFish Prosecution Decisions Operations Achilles, Hippocamp and Overdue

MHQC

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1 OVERVIEW

On 16 May 2016 the University of Auckland Business School announced the findings of the research led by Dr Glenn Simmons into the New Zealand fishery catch (**Simmons report**). The findings suggested that fish without economic value have been routinely dumped at sea and not reported.

The Simmons report suggested the total catch since the Quota Management System was introduced in 1986 is much greater than officially reported. The vast majority of the discrepancy is said to be unreported commercial catch and discards. The abstract for the report concludes *“The future sustainability and certification of fisheries will depend on how the government addresses the under reporting problems, which have long been a cause of concern.”*

The findings in the Simmons report, in particular quantification of unreported catch, have been controversial. There are concerns with the report's methodology and conclusions and in particular the response is made that estimation of the total catch is not a valid measurement of the health of the fish stocks.¹

On 18 May 2016 Newshub reported obtaining information that New Zealand fishing boats have been illegally dumping quota fish. The source was MPI reports into two MPI operations named Achilles and Hippocamp conducted in 2012 and 2013 – each of which was earlier referred to in the Simmons report.

As a result, there was criticism of MPI's decisions not to prosecute in these two operations.

On 19 May 2016 the MPI Director-General commissioned a review into the decisions made by MPI in respect to the two operations (Hippocamp and Achilles) and a third called Overdue. The review was into the circumstances around each Operation, the appropriateness of any decision not to prosecute and the adequacy of MFish and MPI's response.

The terms of reference for the review were finalised and sent to me on 24 May 2016 (**Appendix 1**). I commenced reviewing the relevant documentation and interviewing relevant parties in June 2016. The interviews were conducted in confidence and without transcripts. I interviewed approximately 25 people including a range of current and former Ministry staff and representatives of commercial and recreational fishing. I reviewed the available documents and correspondence in relation to each file and a range of other related documents. An edited chronology is contained at **Appendix 2**.

MPI sought and obtained the agreement of the Attorney-General to waive legal privilege in respect of the investigation reports from Operations Overdue and Achilles so that I might refer to the contents of those documents in my report. Waiver of privilege was not sought for other privileged material, including legal advice, that I have reviewed.

A draft report was provided to relevant parties in August 2016 and comments received and considered. I would like to thank all those I interviewed for their time and cooperation, and in particular the MPI officials who assisted with the arrangement of interviews and provision of relevant material.

¹ MPI's response to the Simmons report can be found at <https://www.mpi.govt.nz/law-and-policy/legal-overviews/fisheries/the-health-of-new-zealands-fisheries/>

2 SUMMARY OF FINDINGS

2.1 OVERDUE

- 2.1.1 MFish conducted an operation in respect to four commercial fishing vessels in early 2003. Product from two vessels was able to be inspected and the investigation suggested that the catch landing record had understated the weight of fish. The investigation and legal process followed and a decision was made not to prosecute.
- 2.1.2 The decision was understandable in the circumstances. The response taken appeared to be adequate and produced a change of behaviour by the fishing company concerned.
- 2.1.3 Despite initial errors, the subsequent investigation and documentation was thorough and professional. The legal review documentation could have been improved although some documentation was unavailable to me due to the age of the investigation.
- 2.1.4 MFish worked with industry following the operation to clarify the methods for calculating the weight of landed fish. Whilst no uniform method seems to have been established it appears that since this operation, deep water fishing companies have more sophisticated and thorough methods.
- 2.1.5 No other prosecution or compliance action need have been taken.
- 2.1.6 Any applicable limitation period for Fisheries Act offences has expired and that is appropriate. No other matter arises.

2.2 HIPPOCAMP

- 2.2.1 The aim of Hippocamp was to gather information to determine the extent of dumping and high-grading in the South-eastern trawl and set net fishery. To a certain extent this was successful but the results were limited.
- 2.2.2 There was no referral to prosecution or recommendation to prosecute arising from Operation Hippocamp. This was reasonable and understandable given the limitations of the findings.
- 2.2.3 Accordingly, there was no decision not to prosecute as the question did not arise.
- 2.2.4 A follow up operation using MFish vessels was recommended and did not occur. Operation Achilles provided an effective alternative.
- 2.2.5 No other prosecution or compliance action should have been taken.
- 2.2.6 The results of Hippocamp were used for education purposes and provided some input into Operation Achilles.

2.3 ACHILLES

- 2.3.1 In November 2012 MPI installed monitoring cameras on set net commercial fishing vessels. This was a pilot programme designed to monitor and study the capture of Hector's dolphins through the summer. Six vessels participated and when footage was reviewed, it revealed discarding of quota fish by five of them. A thorough investigation and legal process followed. Each skipper and crew member cooperated fully with the process. A decision was made not to prosecute and the skippers received a warning.
- 2.3.2 The decision not to take prosecution action and in particular the process leading to it was flawed. The decision however was understandable and available in the circumstances. It was a complex matter, approached professionally and in good faith by all involved.
- 2.3.3 The prosecution decision was affected by considerations which were not relevant under the Guidelines. In particular, potential embarrassment to MPI or officials was an irrelevant consideration.
- 2.3.4 Earlier conduct of MFish and MPI created hurdles to the prosecution which should not have been present. That conduct was inappropriate or at least unhelpful.
- 2.3.5 The decision process was confused, not well documented and not well communicated.
- 2.3.6 The follow-up actions do not seem to have been thoroughly completed. The decision to warn was meant to be combined with "drawing a clear line in the sand". That does not seem to have been achieved. Some steps have been taken but the situation as to discards remains confused.
- 2.3.7 The limitation period for prosecution has passed (late 2014/early 2015) and that is appropriate. Prosecution decisions like this once made should only rarely be changed.
- 2.3.8 The limitation periods may warrant review in light of the changes in the Criminal Procedure Act 2011.
- 2.3.9 Relevant guidelines could provide more helpful guidance in complex regulatory prosecutions such as these. It would be useful and timely for MPI to work with Crown Law to review and revise guidance.

2.4 GENERAL COMMENTS

- 2.4.1 Any criticisms made in this report need to be seen in context. MPI prosecutes hundreds of cases each year, including many fisheries cases. Its processes are generally robust and its people experienced and professional.
- 2.4.2 The issue of discards was again highlighted by Operations Hippocamp and more clearly by Operation Achilles. It is a problem that has been recognised since the beginning of the QMS. MFish and MPI have not grappled effectively with aspects of the problem and either enforced the law or acted to change it. The non-enforcement of the law in a case such as Achilles is unsatisfactory but primarily due to conduct outside of the Compliance directorate.

- 2.4.3 MPI may wish to consider a review of the relationship between Fisheries Management and Compliance in terms of the planning of Fisheries Management operations (such as observers or cameras) and the interrelationship with potential Compliance operations. In turn, review is required of follow-up from Compliance operations back to Fisheries Management efforts.
- 2.4.4 The issues raised in the Simmons report have long been recognised by MFish/MPI and industry. A coherent rationale to the rules around discards is not obvious. The fisheries management system is under review at present and provides an opportunity examine this. In the meantime, it is incumbent on commercial fishing to improve their performance and comply with the current law. At least one of the vessels the subject of Operation Achilles was able to do so.

3 SUMMARY OF REGULATORY FRAMEWORK

3.1 THE FISHERIES ACT 1996 (THE ACT)

- 3.1.1 The Act has the purpose of providing for the utilisation of fisheries resources while ensuring sustainability.² No person shall take any fish by any method unless the person does so under a current fishing permit.³ This rule is subject to a number of exceptions including non-commercial amateur fishing and Maori customary non-commercial fishing. Fishing permits are issued by the chief executive of MPI.⁴
- 3.1.2 New Zealand's quota management system (QMS) requires the Minister to set a total allowable catch (TAC) for each fish stock included in the QMS (currently more than 600 across 100 species) with a view to enabling the production of the maximum sustainable yield from each stock.⁵ Allowances are made for Maori customary fishing, recreational fishing and other sources of fish mortality, leaving a total allowable commercial catch (TACC) again set by the Minister.⁶ In effect, recreational fishers and commercial fishers compete for a share of the TAC, with the take of recreational fishers generally regulated by bag and size limits and the take of the commercial fishers regulated by quota and annual catch entitlement (ACE).
- 3.1.3 Quota is the right to take fish from a stock, in turn represented as shares that can be traded (<http://fs.fish.govt.nz/>) or "an entitlement to fish for a share of the species concerned"⁷. Quota in turn generates an ACE at the start of each fishing year (generally 1 October) which is the annual catching right which also can be traded⁸. Commercial fishers purchase an ACE to match the fish they aim to catch. MPI maintains an ACE register through FishServe (www.fishserve.co.nz) which

² Fisheries Act 1996, s 8. Section 8 was the subject of consideration by the Supreme Court in *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 at [38]–[40].

³ Section 89.

⁴ Section 91.

⁵ "Quota management system", "total allowable catch" and "total allowable commercial catch" are defined terms under s 2 of the Act. For background to the adoption of the QMS, see M Sullivan and J Inns *Brookers Fisheries Law* (online ed, Westlaw NZ, 2006) at [Intro.03](5).

⁶ The TAC and TACC allotment provisions were considered in detail by the Supreme Court in *New Zealand Recreational Fishing Council Inc*, above n 1, at [41]–[49].

⁷ *New Zealand Recreational Fishing Council*, above n 1 at [35].

⁸ Sections 66 and 67

is searchable by the public for a fee. The register also contains records relating to species, stock, quota, vessels and TAC/TACC. If quota fish are caught and landed without ACE then the commercial fisher has the fishing year to acquire the matching quota otherwise they are required to pay a deemed value for the fish.

- 3.1.4 Deemed values are the price payable by a commercial fisher per kilogram of quota fish where they do not have an ACE for that catch. For the first 11 months of the year, interim deemed values are charged. Once the year is completed, the deemed value becomes final and an amount is due. If that amount exceeds \$1,000 the fishing permit of that fisher is suspended until payment is made.
- 3.1.5 Commercial fishers are required to submit returns of their catch as specified in the Fisheries (Reporting) Regulations 2001 which in turn are compared with the ACE held. These returns enable the calculation of catch against ACE. When combined with other data (such as scientific research) they form the basis for the calculation of the TAC and the consequential recreational and commercial catch. Licensed fish receivers (LFRs) are also required by the Regulations to submit returns of fish received, which are used to check the accuracy of the fishers returns. Hence the importance of accuracy in such returns.
- 3.1.6 In the case of quota species, the fundamental rule is set by section 72(1) which states:

72 *Dumping of fish prohibited*

(1) No commercial fisher shall return to or abandon in the sea or any other waters any fish, aquatic life, or seaweed of legal size, or for which no legal size is set, that is subject to the quota management system.

- 3.1.7 The fundamental rule is therefore that quota fish must be landed and recorded.
- 3.1.8 The requirement to land and record all catch is not comprehensive. The first exception is contained in the section and reinforced in s 72(3) which requires any commercial fisher to immediately return a quota fish which is not of a legal size to the water (whether alive or dead).
- 3.1.9 This includes such “popular” fish as snapper and blue cod which have a minimum legal size for commercial fishers of 25cm and 33cm respectively. So the commercial fisher who catches a 20cm gurnard and a 20cm snapper is obliged to treat those two differently. The gurnard must be landed and recorded, the snapper must be immediately returned and (arguably⁹) need not be recorded (although I understand there is now recording of snapper returns in SNA1).
- 3.1.10 Minimum legal sizes for fish (and for net mesh) are established in the Fisheries (Commercial Fishing) Regulations 2001. These are set out below to illustrate. Commercial fishers must not take or possess finfish that are smaller than the length specified in the following table for each species:

⁹ The issue of whether a record of lawful discards of quota fish (those below the minimum size) is required is a complex one. The MFish policy appears to have been not to require such reporting (and that appears to continue under MPI). The Fisheries (Reporting) Regulations seem to require such reporting (by virtue of destination code A) unless the Chief Executive notifies otherwise.

| Species of fish | Minimum net mesh size (mm) | Minimum fish length (cm) |
|-----------------------------------|----------------------------|--------------------------|
| Blue cod | - | 33 |
| Blue moki | 115 | 40 |
| Butterfish | 108 | 35 |
| Elephant fish | 150 | - |
| Flatfishes (except sand flounder) | 100 | 25 |
| Garfish (piper) | 25 | - |
| Kahawai | 85 | - |
| Kingfish | 100 | 65 |
| Mullet | 85 | - |
| Pilchard | 25 | - |
| Red cod | 100 | 25 |
| Red moki | 115 | 40 |
| Rig | 150 | - |
| Sand flounder | 100 | 23 |
| Snapper | 100 | 25 |
| Tarakihi | 100 | 25 |
| Trevally | 100 | 25 |
| Yellow-eyed mullet | 25 | - |
| All others | 100 | - |

3.1.11 For emphasis, the effect of section 72 and the Regulations requires commercial fishers to “discard” or return certain fish to the water dead or alive. Other fish (those without a minimum legal size) must be landed and recorded (save if excepted under Schedule 6 as described below).

3.1.12 If the stock is listed in Schedule 6 of the Act and the commercial fisher complies with the requirements set out in that schedule, the fish can be returned to the water. Examples are kingfish or rig. In general terms kingfish or rig are allowed to be returned live if they are likely to survive on return to the water and the return takes place as soon as practicable. Some fish are required to be reported in the catch effort landing returns (kingfish), some not (rig). Some of the Schedule 6 stocks can be returned live or dead (for example blue shark or spiny dogfish).

3.1.13 A further defence is provided in section 72 where the return of the quota fish to the water was authorised by an observer present and the amount of fish was included in the reported catch. In addition, there is a defence to the offence of “dumping” under section 72 where the return was of parts of fish lawfully processed on a vessel.

3.1.14 In the case of the fish primarily the subject of Operation Achilles, gurnard and elephant, there was no minimum legal size or Schedule 6 exception.

- 3.1.15 The return of such quota fish is an offence¹⁰ and subject to a maximum fine of \$250,000¹¹. Filing false or misleading catch returns (failing to return the catch of quota species) is an offence¹² and subject to the same maximum fine¹³.
- 3.1.16 Each of the offences (dumping and making false or misleading returns) has a limitation period of two years from the date of the offence¹⁴. The equivalent limitation period under the Criminal Procedure Act 2011 is 5 years¹⁵.
- 3.1.17 Irrespective of the logic of a two-year limitation period, the applicable limitation periods for Achilles, Hippocamp and Overdue have well and truly passed. None of the cases involved a problem in investigating or reaching a decision within the limitation period which applied. The two-year limitation period in the Fisheries Act 1996 was an extension of the usual six-month period under the old Summary Proceedings Act 1957. The Criminal Procedure Act 2011 has shifted the benchmark and in due course if the Fisheries Act is reviewed that is an issue which could be considered. I am advised that the two-year limitation can pose challenges in complex cases.

4 PROSECUTION PROCESS AND POLICY

- 4.1.1 The Ministry process for investigation and prosecution decision making is an orthodox one. Complaints are referred to the Compliance directorate or an investigation is otherwise commenced. A lead investigator is responsible for directing the investigation. Legal advice is obtained along the way, ordinarily from a specialist Ministry prosecutor (lawyer) and on occasions from a Crown Solicitor.
- 4.1.2 When the investigator reaches a point that the usual investigation process is complete, he or she refers the investigation report to a prosecutor for review. This legal review accompanies the report to the manager in the Compliance directorate authorised to make the prosecution decision (as discussed below). In situations of complexity or significance, the investigation report may be referred to the relevant Crown Solicitor's office for advice on the decision to prosecute. That advice then also forms part of the material available to the manager/decision maker.
- 4.1.3 The relevant prosecution policy at the time of Achilles and Hippocamp was the MPI Organisational Policy Prosecutions and Appeals effective from 31 July 2012 (the **Policy**). It provided for the decision maker for a non-international prosecution to be as follows:

Where a breach is detected of an Act, regulation or other legal instrument for which MPI is responsible, the decision on what further action to take, apart from a decision to issue a warning

¹⁰ Section 72(4)

¹¹ Section 252(3)

¹² Section 230(1)

¹³ Section 252(3)(m)

¹⁴ Section 236(2)(b)

¹⁵ Section 25(3) Criminal Procedure Act

or an infringement notice, must be taken by one of the following managers in the branch of MPI that has investigated the breach:

- the relevant DDG;
- a Director;
- a Tier 4 Manager;
- a Tier 5 Manager authorised in accordance with the Guidelines and Standards: Prosecutions and Appeals.

4.1.4 In the case of Achilles, although not well documented, the decision maker was the Director of Compliance which accords with the Policy.

4.1.5 The Policy states that it harmonises the MAF policy of February 2011 and the MFish policies of March 2006. It also cross refers to the MPI Organisational Guidelines and Standards: Prosecutions and Appeals (the **MPI Guidelines and Standards**), the version of which has been provided to me is dated August 2011. I am advised that this is the correct version of those MPI Guidelines and Standards (it is a MAF document, produced after the merger but before the name change to MPI).

4.1.6 Both the Policy and the MPI Guidelines and Standards refer to the two stage test for prosecution and the need for (i) evidential sufficiency; and (ii) a prosecution to be in the public interest.¹⁶ Each document allows for escalation in the case of disagreement, sensitive or high profile cases. The MPI Guidelines and Standards contain more detail as to the standards to be met and the documentary requirements.

4.1.7 The MPI Guidelines and Standards require the decision maker to “consider whether prosecution is, in the circumstances, the most appropriate course of action to influence future compliance with New Zealand law”. This is not a phrase which appears in the Solicitor-General’s Prosecution Guidelines (**SG Guidelines**) and may provide distraction from the proper test. Other than this statement the Policy and the MPI Guidelines and Standards appear consistent with the SG Guidelines.

4.1.8 The SG Guidelines contain the following in respect to independence of the prosecution decision-maker.

The universally central tenet of a prosecution system under the rule of law in a democratic society is the independence of the prosecutor from persons or agencies that are not properly part of the prosecution decision-making process. In practice in New Zealand, the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise. All government agencies should ensure the necessary processes are in place to protect the independence of the initial prosecution decision. (section 4)

4.1.9 The importance of independence in prosecutorial decision making should be emphasised. There is a real risk that those who have to make such decisions will get pressure to include

¹⁶ As set out in the SG Guidelines (current version July 2013). Earlier versions of the Guidelines date back to at least 1990 and contain the same test for prosecution.

considerations which are not relevant to the decision. This is particularly apparent for in-house prosecution teams. MPI and other prosecution agencies must work to ensure that independence is preserved. The option of seeking the advice of the relevant Crown Solicitor's office provides a valuable safeguard which I understand is utilised where appropriate.

- 4.1.10 The MPI Guidelines and Standards require the decision maker to record and place on the case file the reasons for the decision to prosecute or not, and address each and every element of the section of the Guidelines and Standards including the specific Crown Law guidelines (which is reference to the SG Guidelines). In the case of Achilles, this was not done.
- 4.1.11 The issue did not arise in Operation Hippocamp. In Operation Overdue there was sufficient in the prosecutor's opinion combined with the investigators final memorandum to meet an equivalent requirement at that time.
- 4.1.12 My interviews and review of information suggested the MPI prosecution process is generally robust, thorough, professional and independent. The people involved are high quality, experienced and professional public servants who are making complex and difficult decisions in good faith. Any shortcomings highlighted in this review must be viewed in context.
- 4.1.13 MPI and the Public Prosecutions Unit in Crown Law has supplied data to me relating to MPI prosecutions. MPI undertakes about 300 fishing related prosecutions per year with (ordinarily) over 80% or more resulting in convictions. There has been discussion in the media about a low rate of prosecution for discarding under section 72. I have not investigated that issue. There may be many factors contributing to that including the difficulty of proving of the offence, other offences prosecuted (for example, related to reporting) and the circumstances discussed in this report.
- 4.1.14 MPI Compliance and Prosecution sections are staffed and managed by highly experienced personnel who in my view are both principled and professional (that view was also expressed to me by those in the industry). There are many examples of difficult and complex prosecutions (both in fisheries and other areas) which the Ministry successfully prosecutes.
- 4.1.15 In 2011 the only formal performance measures that MFish had for prosecutions were:
- No adverse judicial comment;
 - No prosecutions dismissed as having no case to answer.

I am advised these measures were satisfied.

- 4.1.16 There was reference by a number interviewed to the existence of a requirement for a 90% "success rate" for MFish prosecutions at the time of Operation Overdue. As discussed further below this appears to have been a requirement imposed by MFish management (through the Statement of Intent). I doubt that such a requirement was ever formally imposed upon MFish by Crown Law and is likely to have been an historical misunderstanding.

5 SUMMARY OF OPERATIONS AND DISCUSSION

5.1 OVERDUE

- 5.1.1 The Ministry of Fisheries conducted an operation in respect to four vessels with fish landed in January, February and March 2003. Product from two vessels was able to be inspected. Initial investigations suggested that the catch landing record had understated the weight of fish. Approximately 3,900 cartons of Hake, Hoki, Ling and Black Oreo Dory were seized. Further evidential weighing occurred and in the course of that it transpired that MPI had used incorrect conversion factors and other inputs in the initial calculation of the weight of the fish to be seized. This in turn raised doubt as to the validity of the seizures.
- 5.1.2 Further sampling was undertaken of the fish seized from April through to August 2003. From August through to November 2003 interviews were arranged and undertaken with various company staff, including vessel managers, factory managers and other personnel. In December 2003 an investigation report was finalised and forwarded to an MFish prosecutor (lawyer) for review. That report was detailed, very thorough and of a high professional standard (comprising 30 pages, with many appendices, summarising months of investigation).
- 5.1.3 The report summarised that in 2003 and for some years earlier, the fishing company had a system whereby a weight tolerance was applied to the weight of cartons of fish report as landed on the catch landing record. The reason for the calculation is that under the Fisheries (Reporting) Regulations 2001 weights of fish must be recorded in greenweight kilograms.¹⁷ Greenweight means the weight of a fish prior to any processing or removal of any part of the fish.¹⁸
- 5.1.4 Where the fish is processed at sea the greenweight will of necessity be an estimate. The Act and Regulations require the weight to be recorded in greenweight kilograms using conversion factors given by notice under the Act. In simple terms the fisher and the licensed fish receiver calculate the greenweight of the fish by multiplying the weight of the processed fish by the notified conversion factor. The correct conversion factor also depends on the principal landed state (the state which best describes the state of the fish after processing) with different factors applicable to different states.
- 5.1.5 The concern highlighted in Operation Overdue was with a method of applying a percentage weight tolerance to the weight of cartons resulting (it was alleged) in a reduced greenweight of around 1.5%.
- 5.1.6 The December 2003 report contained statistical analysis of the data including weights obtained during the evidential and destructive sampling phases, data obtained from the recording system on each vessel and from sampling on-board and on shore. The weights obtained varied but the data showed underreporting in the catch landing return of between 0.6% to 1.93% depending on the species and the vessel.

¹⁷ Section 187 Fisheries Act and Regulation 36(4).

¹⁸ <http://www.fish.govt.nz/NR/rdonlyres/655C7E58-2F1C-47D7-BD76-2B2CAAF7A5E1/0/Complianceinfosheet04.pdf>

- 5.1.7 The investigator noted that this amount may seem “quite small” but if it extended across all vessels it would amount to hundreds of tonnes per annum unreported for Hoki alone. The investigator noted that the issue had been around for a considerable period of time and the issue with this company dated back to 1996.
- 5.1.8 The investigator considered that offences under sections 231 and 232 of the Fisheries Act were relevant. Those offences cover making false statements in a required return under the Act (s 231) and buying or selling fish where the landing of the fish has not been reported in accordance with the Act (s 232).
- 5.1.9 The report said that there have been a number of attempts to resolve the issue over the many years MFish and fishing companies have been aware of it. The company had advocated since about 1999 for an industry/MFish working group to resolve the carton weight reporting issue. MFish was slow to get the working group underway although has made it clear that the fishing companies were still required to meet their legal obligations to accurately record and report catch.
- 5.1.10 The investigator wrote that there are a number of different methods of establishing the weight of processed fish before the application of a conversion factor. The MFish method was “just another method” although likely to be more accurate in his view. The legislation did not stipulate a method by which the accurate processed weight of fish is determined in the course of establishing greenweight.
- 5.1.11 The investigator was of the view that there were offences disclosed against sections 231 and 232 and the reporting regulations. The incorrect conversion factors in the initial seizure process was noted but he was not of the opinion that it would affect the success of the prosecution.
- 5.1.12 In the report, it was noted that the relevant compliance managers resolved that the only way to satisfactorily deal with the systemic under reporting of carton weights was to test the matter in Court.
- 5.1.13 MFish and the company engaged in correspondence over the issue in early 2004. In January 2004 a senior fisheries prosecutor completed an initial review of investigation report. That review has not been located.
- 5.1.14 I spoke to the prosecutor concerned. He was able to give considerable context to the issue. The first aspect was that during his time as a prosecutor, he understood that MFish had an expectation of a success ratio of 90% in their prosecutions under the Fisheries Act. He understood this was set by Crown Law as part of the terms on which MFish was allowed to conduct its own prosecutions. MFish Annual Reports and Statements of Intent from the time reflect such ratios. It is not something I have heard of before this review and nor is it consistent with the prosecution guidelines which existed at the time.
- 5.1.15 I have made enquiries about the setting of such a ratio by Crown Law. That confirms my own view that it is unlikely to have been a formal requirement from Crown Law and is more likely to have been something of interpreted by MFish management. No doubt it was a proxy for excellence in preparation of prosecution files, however, which is something to be commended.

- 5.1.16 Crown Law have conducted a review of their files and have been unable to find any support for the proposition that such a ratio was set by them. Irrespective, such ratios as targets can be an unhelpful distraction from the prosecution test in the Guidelines.
- 5.1.17 Between January and May 2004, the prosecutor recalled having a number of meetings and discussions over this matter, in particular to discuss the issues raised in the investigation report and his preliminary report. His recollection is that MFish had difficulty proving complex prosecutions during that period. An example is given below.
- 5.1.18 My review showed there were evidential and sampling issues which arose and were discussed in the lead up to the final legal report.
- 5.1.19 That final report, representing the prosecutor's recommendation on the issue of prosecution, was prepared in May 2004. Privilege is maintained in the report.
- 5.1.20 The final prosecution report (for such a significant MFish investigation) was scant, conclusory and (without more) lacking the usual rigour one would expect if this was a standalone document. It was, however, bolstered by the initial legal review and lengthy discussions with the relevant investigators and compliance personnel.
- 5.1.21 The May 2004 prosecution report was considered by the District Compliance Manager (the prosecution decision maker) and a decision not to prosecute was made.
- 5.1.22 There were three primary reasons for the decision. First, calculation errors were made on product lines seized and this cast doubt on whether reasonable grounds existed for the seizures. Incorrect conversion factors were used. That in turn led to a conclusion that some of the evidence would not be admissible. There were concerns as to the reliability of MFish calculations in other areas and whether they were forensically robust (for example questions as to whether the scales were properly certified as accurate).
- 5.1.23 Second, the remaining admissible evidence in respect to the carton weights suffered from insufficient sample size which in turn cast doubt on the ability to accurately calculate the weight of the fish. Given this was a criminal prosecution and the essence of the case, this was a legitimate concern.
- 5.1.24 Third, there was a concern that MFish had not been suitably clear with the fishing company concerned that this method of variance allowance (and the calculations which followed) was impermissible and there was a possibility that the fishing company thought MFish had approved of the method.
- 5.1.25 Instead of prosecution, the company was given a warning. A warning letter was delivered in person on 24 May 2004. The investigator in another very thorough report of 1 June 2004 recorded the reasons for the non-prosecution (summarised above).
- 5.1.26 Ultimately the decision was understandable in light of the uncertainties in the calculations, the challenges likely to be brought to the MFish process and the errors made by MFish along the way.

Further the margin of under declaration was relatively small and upon exploration of the uncertainties mentioned would likely have become smaller.

- 5.1.27 In addition, one can understand a reluctance to proceed with a case of such complexity where such a win/loss ratio was considered to apply.¹⁹
- 5.1.28 Both the prosecutor and investigator (in the June 2004 report) confirmed that the practice of the fishing company had been discontinued as a result of the warning letter. I was able to confirm that with a representative of the fishing company who was involved at the time. I was told that the fishing company after that time utilised the method used by MFish despite that it worked against the company on occasions. I was told that other companies use different methods and it seems that there is no uniformly accepted method or practice still today.
- 5.1.29 There was informal discussion and reflection on the errors made in the investigation process but no formal debriefing process. I understand there was further efforts undertaken by MFish and industry on a potential methodology to deal with the issue. A working group was established and progress was made. I am also advised that industry practice has moved on since the operation and the deep water fishing companies run more sophisticated processes to ensure the accuracy of weights declared.

5.2 HIPPOCAMP

- 5.2.1 In May 2011 MFish planned Operation Hippocamp to investigate commercial inshore finfish dumping in the eastern and southern finfish fishery. The investigation and planning report records that:

“Operation Hippocamp is a project focusing on high grading and dumping of fish in the eastern and southern Inshore finfish fishery. It is an inspection based project that aims to gather substantive information on catch mix and fish size at time of fish catching, landing and receiving of fish by LFRs.

It is intended that freshly caught fish will be examined for catch mix and length frequency at sea by Fishery Officers. This will be compared with similar examination of fish upon landing and at LFRs. Mfish Observer coverage will be used to gather further information on catch mix and fish size after the initial execution of the at sea boardings of commercial vessels.”

- 5.2.2 The report noted that the project relied heavily on the availability of staff and Naval resources to achieve its aim and the immediate priority was to secure those resources.
- 5.2.3 The terms of reference for Hippocamp also dated May 2011 recorded the project was focused on inshore domestic fishing vessels in the inshore waters of FMA3 (South-East South Island) and FMA5 (Southland). The fish species concentrated upon were:

Priority

ELE - Elephant Fish, GUR – Gurnard, TAR – Tarakihi, RCO - Red Cod, SPE - Sea Perch

¹⁹ A later MFish prosecution with similar complex calculations in respect to the weight of quota fish was unsuccessful and is a useful reminder of the difficulty in proving these types of prosecutions (refer *MFish v Maruha (NZ) Corporation Limited and others*, CRN30000511913, District Court, Christchurch, 1 December 2004, Holderness DCJ)

LEA - Leather Jackets, SPD - Spiny Dogfish, GSH - Ghost Shark

Secondary

SCH - School Shark, SPO – Rig, STA – Stargazer, SKA - Skate

- 5.2.4 The aim of the operation was to increase compliance knowledge of illegal dumping (within the relevant areas) and to create a strong deterrence against illegal dumping of finfish throughout the different sectors of the commercial fishing industry. More specifically, the aim was to gather information on catch mix and fish size to determine the extent of dumping and high-grading in the South-eastern trawl and set net fishery.
- 5.2.5 The first phase of the operation was to gather intelligence regarding the fisheries and fishers in question. The second phase of the operation was to utilise the Naval resources to target the vessels linked to two LFR's in the area, with an aim to cover approximately 50 days of fishing across 10 vessels. This was to occur during February and March 2012.
- 5.2.6 The results were to be considered and responded to using MFish's VADE model which segments the regulated sector according to the different compliance behaviours exhibited and details the appropriate interventions. VADE is an acronym for those segments which are
- 5.2.6.1 *Voluntary (comply voluntarily and are informed);*
 - 5.2.6.2 *Assisted (attempting to comply and uninformed);*
 - 5.2.6.3 *Directed (a propensity to offend, opportunistically); and*
 - 5.2.6.4 *Enforced (intending to offend and engage in illegal activity).*
- 5.2.7 The briefing paper associated with Operation Hippocamp recorded that since the inception of the QMS MFish had received information about the at-sea dumping and high-grading of quota species. It noted that these issues are difficult to detect. A Hippocamp was a water-horse from Greek mythology with the forequarters of a horse and the tail of a sea creature. The aim was to "ride the horse out to sea to achieve our otherwise difficult objective".
- 5.2.8 The reason that evidence of discarding is difficult to detect and prosecute relates primarily to the requirement to prove beyond reasonable doubt that the defendant in question was responsible for returning the particular quota fish of the particular size. The evidence is likely to be obtained by eye-witnesses (observers for example) and on smaller vessels these are unlikely to be present. If obtained by cameras, identification of the fish in question is not straightforward, both in terms of identification of the species and if one has to prove the fish is above the minimum legal size. Where fish is found having been discarded, the identity of the fisher is also difficult to prove (but can be and has been in some instances).
- 5.2.9 In Hippocamp, the briefing paper records the investigator's summary of the current state of MFish's knowledge of the issue as:

“Observer information shows that when a MAF observer is on-board a commercial vessel it tends to report much more small fish and by-catch as taken in its returns. Observed vessels also tend to report much higher levels of non-fish by-catch than vessels without observers on-board. Direct evidence from crew on-board vessels suggests that when observers are on duty, unwanted and low value by-catch is retained and reported. They say this type of catch is often routinely dumped and not reported when there is no observer on-board. There has been limited observer coverage in the inshore fishery but when there has been it has confirmed dumping as an issue in this fishery.”

“Dumping and high-grading of quota species generally occurs when there are economic incentives to dispose of fish species with a low value compared with other catch. The value of a species can be affected by quality, size, market or association with overfishing penalty. If a fisher has limited ACE for a species, then small or damaged fish that fetches a low price may be dumped in favour of higher value fish of that species. If ACE has been exhausted and an over fishing penalty will be incurred, then a species may be dumped in favour of another species.”

5.2.10 This commentary is consistent with the comments contained in the Simmons report. In particular LFRs pay less for smaller fish of a species than for larger fish (Elephant and Gurnard being examples noted below). That creates a commercial incentive on fishers to discard lower value fish.

5.2.11 The execution of Operation Hippocamp was intended to have three aspects:

5.2.11.1 At-sea data collection of catch mix and fish size information.

5.2.11.2 Wharf-side and LFR inspections of focusing on catch mix and fish size. Supporting information on size specific payment systems will also be gathered.

5.2.11.3 Data analysis and follow-up inquiries where necessary.

5.2.12 In February and March 2012, only three trips covering a total of seven vessels were able to be completed at sea to give the information desired above. The low number was due to weather, timing and bad luck. As a result, the onshore response and inspect and resulting data was also limited. This in turn significantly reduced the potential strength of the findings.

5.2.13 The Operation Hippocamp final report noted despite this:

“There appears to be a significant difference between the total at-sea sample and the onshore samples. Although the onshore samples generally fit the profile for medium and larger length GUR there appears to be a large portion of fish missing at the smaller end of the profile. The difference between the total at-sea sample and the individual onshore samples indicates vessel specific differences in the landing of small GUR.”

5.2.14 The report goes on to note the relevance of the price difference offered by the relevant fishing companies, with a much lower price offered for GUR under 32cm, and noting the strong commercial incentive to land only GUR over 32cm.

5.2.15 In relation to ELE the final report notes:

“Although the total at-sea sample is limited for use as a comparison it is interesting to note that the onshore samples show that few ELE less than 50 cm were landed.”

5.2.16 The final report noted again the significant price differential for ELE over 50cm (\$2.65 per kg) as against \$1.70 per kg for ELE under 50cm.

5.2.17 The conclusion of the report was that the exercise provided useful information. It stated that:

“The results of the Operation Hippocamp data analysis suggest there is a significant GUR discarding and high-grading problem in the East Coast inshore fishery. The analysis suggests between one third and two thirds of GUR may be dumped by inshore trawlers.”

5.2.18 I note here that concern is raised with me as to the sufficiency of data to reach the conclusions set out. The data set is noted as being small and any conclusions must be read with that in mind.

5.2.19 The primary constraint identified in Hippocamp was the need to use Naval vessels, which needed to be scheduled months in advance with little flexibility to change if the circumstances (weather for example) changed.

5.2.20 The investigator recommended using Ministry vessels to gather the same type of information over late spring 2012 to late summer 2013. He commented:

“I think that Operation Hippocamp was an attempt to scope an issue that we have known about for a long time but has generally been considered in the too hard area. ... Operation Hippocamp shows that this approach is likely to work but failed to gather enough information this time round. ... size and species high-grading in the inshore fishery is a problem we must confront and address, so I am keen to give it another go in the future.”

5.2.21 Accordingly, there was no reference to obtain legal advice or referral to prosecution. Nor was there any recommendation to prosecute. That was appropriate given the limitations of the operation.

5.2.22 The terms of reference for this review could be read as suggesting that all three operations contained referrals to prosecution and decisions not to. In the case of Operation Hippocamp that was not the case. No suggestion of prosecution was raised following the execution of the operation as far as I can see.

5.2.23 The information gathered was helpful it seems. It was used both as educative material for fishers and to inform further compliance efforts (discussed below).

5.3 OPERATION ACHILLES

5.3.1 In November 2012 MPI with the assistance of Archipelago Marine Research (AMR), a Canadian based electronics company, installed monitoring cameras on set netting commercial fishing vessels operating out of Timaru and Oamaru. This was a pilot programme designed to monitor and study interaction with protected species such as Hector's dolphins (HDO) through the summer set net season. This particular fishery was identified as a potential risk to the HDO population.

5.3.2 The project came under the responsibility of the Fisheries Management directorate of MPI and was endorsed by the fishing companies involved. Six skippers agreed to take part and the camera installations were completed with their consent. The fishing companies involved were active in

obtaining that consent. A question was raised with me as to whether there was “informed consent” to the cameras, in particular as to how the footage could be used.

- 5.3.3 My interviews with MPI personnel and representatives of the fishing companies revealed a difference in view as to the briefings which formed part of the camera project. In summary MPI was of the view that fishers were told that the focus of the cameras was on Hector's dolphins and that there was no impact on their legal obligations (effectively that they should continue to operate as usual – with the expectation that this would be lawfully).
- 5.3.4 The fishers gained the impression that the focus of the cameras was on HDO and that otherwise they could continue to operate as they normally did without consequences. This was reflected in some of the interviews and in other communications from them. I confirmed that also in discussion with lawyers involved. The literal message given was open to different interpretations. I conclude from my interviews that the issue of discards of quota fish was primarily left unsaid and unresolved. It was raised at one early meeting with the fishers and again it seems that the recollection of the parties differs.
- 5.3.5 In addition, there was no formal written agreement with the skippers as to the use of the footage or authority under the Fisheries Act or other legislation (the Search and Surveillance Act 2012 for example) to obtain or use the footage. That in turn was bound to raise evidential and legal challenges at a later date. The Fisheries Act does not provide for the ability to compulsorily obtain such footage in these circumstances.
- 5.3.6 In conjunction with the observer program, a former fishery observer was employed under contract to AMR to facilitate in the installation of the camera equipment and technical support. The contractor had considerable expertise as an observer and technical skills relevant to the camera operations.
- 5.3.7 Two colour cameras were placed on-board each vessel. One camera overlooked the aft deck area, while the second a higher quality digital camera was placed looking over the stern to record the catch as it came on-board the vessel. Both cameras captured footage at four frames per second which was then recorded to a hard disk on-board the vessel which was changed on a monthly schedule.
- 5.3.8 Two weeks into the project an HDO capture was reported. On 04 December 2012 one of the skippers contacted the MPI project manager to advise that he had captured an HDO.
- 5.3.9 The footage from this haul was subsequently examined by the expert contractor. It was during this examination that footage potentially showing a further HDO capture was observed (during the same haul).

Investigation and Prosecution Process

- 5.3.10 As a result of these observations, the matter came to the attention of an investigator in the compliance fishery investigative team who commenced an investigation. The skipper was interviewed in respect to the HDO catch.

- 5.3.11 As a result of this interview a further examination was undertaken of that skipper's fishing trips. During the examination of these trips, numerous quota species were observed being discarded contrary to the Act and Regulations. A more extensive examination of the set net hauls between November 2012 and February 2013 was undertaken. There appeared to be consistent and deliberate discard of quota fish, in particular ELE, GUR and RSK. The precise quantities that were discarded are the subject of some debate and uncertainty. They are described by some as significant but others suggest it was of modest value. It is difficult to ascertain from a sample of the footage.
- 5.3.12 Following these results, the investigator commissioned examination of the footage from the other five vessels. This was carried out between May to September 2013 and the observer examining the footage reported that the same issues were identified on four out of five of the vessels.

Camera Footage Summary

- 5.3.13 A summary of video footage from the cameras placed on the six boats was compiled by the observer and able to be viewed by me. It is a summary compilation with the on screen title "Operation Achilles, Timaru Set Net Fishery Summer 2012-2013". It is extracted from the many hundreds of hours of footage from the camera project described above. In summary:
- The footage from the first vessel shows examples of quota species discards including Elephant fish (ELE), Rough Skate (RSK), Red Gurnard (GUR) and School Shark (SCH). The footage comes from a range of hauls from 26 November 2012 to 15 January 2013 and shows regular discarding of the quota species (including a large kingfish on 15 January 2013).
 - The footage from the second vessel shows examples of quota species discards such as ELE, Rig (SPO) and Spiny Dogfish (SPD). Each fish was identified from the stern camera and then the discards were visible on the deck camera. The footage comes from a haul on 13 January 2013.
 - The footage from the third vessel shows quota species discards such as ELE, GUR and SPO. Each fish was identified from the stern camera and then the discards were visible on the deck camera. The footage comes from a haul on 24 January 2013.
 - The footage from the fourth vessel shows quota species discards such as ELE and GUR. The footage comes from a haul on 29 January 2013.
 - The footage from the fifth vessel shows some non-quota discards but unlike the other vessels showed retention of all quota species including retention of damaged ELE. Each fish was identified from the stern camera and then the treatment of the fish was visible on the deck camera. CAR is identified as the only species discarded. The footage comes from a haul on 15 December 2012.
 - The footage from the sixth vessel shows discards of ELE and RSK. Other catch of quota species were not reported as required (GUR, FLA and a large Salmon). The footage comes from hauls on 14 November 2012, 4 December 2012 and 11 January 2013.

- 5.3.14 In July 2013 the investigator compiled a preliminary investigation report, a version of which later found its way into the public domain (it is not known how this occurred). The report stated five of the six vessels openly discarded substantial quantities of quota fish and failed to record fish as required under the Act.
- 5.3.15 The preliminary report cited the findings of Operation Hippocamp and stated that they compared similarly with the findings of this operation (now named Achilles).
- 5.3.16 The report contains elements of advocacy and emotional language which is uncharacteristic and inappropriate for this type of report (although it was preliminary and not intended for external review). The investigator explained that this was because of a sense that a prosecution of this conduct would be resisted. The report states:
- "It is more than sustainability. It is more than the fact that we are relying on misleading and incorrect data to sustain our fisheries. The most pressing reason for urgent action is that we have compelling visual evidence of serious offending recorded on a media that could become available (for whatever reason) to outside persons and organisations. Some of these people and organisations could have strong vested interests in this information and make this material quickly available to the public via internet related media."*
- 5.3.17 The preliminary report was circulated in MPI and there followed considerable discussion internally across various directorates as to the appropriate response. As noted above, the analysis of the detail of the footage continued by the expert contractor.
- 5.3.18 The investigator produced a further investigation report in January 2014, which included more detail of the investigation and in particular contained summaries of the interviews with the skippers and crew of the vessels concerned. In broad summary each of the skippers accepted they discarded quota species and (to varying degrees) were aware this was illegal.
- 5.3.19 In the course of the interviews, the skippers raised the issues which were anticipated and noted above. Primarily, the response was that this conduct was what had always occurred and the motivations were both commercial (the fishing company prices) and (to some extent) an attempt to save smaller fish or pregnant females. Some of the skippers expressed concern at the use of the camera footage for this purpose when they understood it would not be.
- 5.3.20 The further report was forwarded to an experienced MPI lawyer/prosecutor to review and advise. In April 2014 the lawyer responded with privileged legal advice. Privilege is not waived in that advice.
- 5.3.21 In May 2014 MPI then referred the matter to the Crown Solicitor's office in Christchurch (Raymond Donnelly) for review of the file and advice on the decision to prosecute pursuant to the SG Guidelines. It is standard and sensible policy for a department to engage the relevant Crown Solicitor to advise on sensitive, significant or complex prosecutions.
- 5.3.22 In June 2014 the Crown Solicitor's office provided advice on Operation Achilles. The advice is privileged and privilege is not waived.

- 5.3.23 The matter was then referred to the Director of Compliance for consideration and discussion with the Director of Fisheries Management (ultimately responsible for the camera project). The Director of Compliance at that stage raised for discussion the possibility of warning the skippers combined with a voluntary forfeiture of the annual catch entitlement equivalent to the estimated discarding.
- 5.3.24 Another feature arose for consideration related to a current MPI project which was designed to explore the issue around a minimum economic size (MES) for QMS species. As described above, only some quota fish have a minimum legal size, the remainder must be landed, retained and recorded at any size, save for the limited scope of returns to the sea under Schedule 6 or under the watch of an observer.
- 5.3.25 In June and July 2014 members of the Compliance directorate including the investigator debated the issue of the appropriate prosecution response to the report. Further advice was sought from the Crown Solicitor on the issue of the impact of earlier Ministry responses to the discard issue on a successful prosecution. Again that advice is privileged.
- 5.3.26 The investigator undertook further inquiries in August and early September, and provided a further report dated 8 September 2014.
- 5.3.27 That report is privileged because it was prepared for the purpose of obtaining legal advice from the Crown Solicitor. Privilege is not waived.
- 5.3.28 My inquiries confirmed that there was a direction from senior management in 2009 to ignore discarding and misreporting of quota fish detected on one of the vessels involved in the summer dolphin observer programme.
- 5.3.29 The direction was given by the then National Manager Fisheries Compliance and it resulted in no action being taken on any of the other 42 vessels involved in the programme despite discarding allegedly being witnessed in about half of them.
- 5.3.30 This in turn had a flow on effect that resulted in offending that was detected by observers involved in inshore dolphin programmes not being followed up or actioned.
- 5.3.31 The direction given was confirmed to me by a number of people involved although it was explained by the then National Manager Fisheries Compliance that it was intended to be limited to direct compliance action on the particular issue rather than broader impact. A subsequent email from him was intended to clarify the matter. It did not seem to and the information I was given suggested the impact was broader.
- 5.3.32 Notwithstanding the direction, an investigator was assigned the 2009 observer report of discarding and commenced an investigation of it. That investigation was later halted upon confirmation of the direction by the same person.
- 5.3.33 Whatever the intention behind the direction, it created the impression in Compliance at least that they ought not investigate or prosecute in circumstances where observers were on-board vessels for the purpose of observing marine mammal interaction.

- 5.3.34 This was at the same time as MPI was aware that gathering evidence in relation to discarding was difficult in the inshore fishery because of the limited observer coverage. MPI was also aware that there was a need to resolve the problem of discarding.
- 5.3.35 The direction and resulting impact was no doubt in good faith and designed to honour the statements of MPI that the observers would only be there for the purposes of Hector's dolphin interactions. It was, however, unfortunate and inappropriate in my view.
- 5.3.36 The longer term influence of it was likely to have been more extensive than expected. Its impact continued through to the decision making in Achilles as discussed below. It hampered the ability of Compliance to make the prosecution decision and complicated the considerations involved.
- 5.3.37 The 8 September 2014 report was provided to the Crown Solicitor for further advice. At this time the start of the limitation period of 2 years was approaching (November 2014). The Crown Solicitor gave further advice on 19 September 2014. Privilege is not waived in that advice.
- 5.3.38 Ordinarily, the advice of a Crown Solicitor to a department on a departmental prosecution matter is considered highly persuasive. Whilst the prosecution decision remains with the Department concerned, the Crown Solicitor's advice on whether or not the test for prosecution is met is normally followed.
- 5.3.39 Between 19 September 2014 and 29 September MPI considered and discussed the advice of the Crown Solicitor and the options available. The relevant compliance officers including the Regional Compliance Manager recommended a prosecution should be taken. The Director of Compliance was again involved and in turn consulted with the MPI chief legal advisor and the Deputy Director-General (Regulation and Assurance), who is responsible for Fisheries Management. I note this is not the "relevant DDG" for the purposes of the Policy – i.e. the DDG to whom the Director of Compliance reported to.
- 5.3.40 This was another complicating and confusing factor. That DDG was not the relevant DDG for the purposes of the Policy and was responsible for Fisheries Management (and the camera project). It would have been preferable for the Policy to be followed in this respect.
- 5.3.41 The various alternatives were considered and debated. The options of imposing deemed values or otherwise deducting amounts from annual catch entitlement were considered and internal advice (or comment) was given that these options were not available. This does not appear to have been given detailed consideration although again there was likely to be real uncertainty about the quantity of quota fish involved.
- 5.3.42 On 29 September 2014, the DDG (R&A) responded saying:
- "In sum, my view is we need to hold people to account when they transgress. If we have concluded prosecution is the best available tool, then we should use it."*
- 5.3.43 This was referred to as the "green light" for prosecutions to be commenced. The investigator, Compliance manager and Crown Solicitor was advised of this on the same day and following. It is

apparent from the wording of the email this was not intended to be a formal prosecution decision. This was a misunderstanding of the email.

- 5.3.44 On 30 September, the Director of Compliance called for a video-conference to be held on Friday 3 October to “finalise the MPI position”. From the emails I have seen it appears the Director of Compliance did not agree with the view reached earlier and had reached a different view. Other communications between the Director of Compliance and the Director of Fisheries Management suggested they had a different view of the prosecution decision.
- 5.3.45 On 2 October the Director of Fisheries Management emailed the Director of Compliance with his input into the decision-making. He was not complimentary of the 8 September 2014 report of the investigator. He stated in relation to the issue of discarding:

As you are aware discarding is a systemic failure of the current system and something we have not been able to get on top of from day 1 of the QMS. FM [Fisheries Management] can't quantify the tonnages involved but we suspect they are significant to the point that they are impacting on stocks. We estimate that if we found the golden bullet to stop discarding, we would probably put over half of the inshore fleet out of business overnight through lack of ACE availability to cover by-catch. Industry themselves are very keen on getting a better handle on this problem as they recognize the sustainability issues and the fact they could have higher TACCs if accurate reporting occurred. This was why they brought into the Better Information Better Value trial that was proposed, but which I have stopped as it was not a good approach.

- 5.3.46 The Director of Fisheries Management continued in the email to outline the considerations against deciding to prosecute including (i) delay, (ii) punishing those who volunteered to have cameras on board (as against those who refused), (iii) risk of a discharge without conviction after a very costly prosecution, and (iv) other embarrassment at trial, such as the leaked investigation report.

- 5.3.47 The Director stated:

As you are aware I have spent the last 5 months considering discards and see this as the single biggest issue we face in our wild stock fisheries. Because of that I have been positioning industry in regards to EM [Electronic Monitoring]. They are now fully on board and want it to happen soonest.

- 5.3.48 The email continues to describe why the Integrated Electronic Monitoring and Reporting System (known as IEMRS) will deal with the discards issue and give better fisheries management outcomes through better information availability. The Director stated his concern was that prosecuting the fishers where there seems to have been an “implied immunity” could potentially “scuttle” the important IEMRS project. Instead, the Director said, a warning could be combined with driving the introduction of IEMRS project.
- 5.3.49 The Director of Fisheries Management made it clear in the email that the prosecution decision was with the Director of Compliance and that he would support the decision either way. This email was copied to the same DDG (Regulation and Assurance).

- 5.3.50 On 3 October the scheduled meeting was held either by AV or teleconference (recollections differ). No formal record was kept of the meeting or decision. A record was derived from the emails which followed and handwritten notes of one of the participants.
- 5.3.51 The notes record that the Directors of Compliance and Fisheries Management and the Regional Compliance Manager convened by video to discuss. Despite this the Director of Fisheries Management states he did not attend the discussion.
- 5.3.52 The notes record that the Director of Compliance had considered all the reports and discussed with the Director of Fisheries Management and the Senior Leadership Team (SLT). I am advised this latter discussion did not occur and that it should refer to members of the SLT. I am advised that prosecution decisions are not discussed at SLT meetings although members of SLT will be consulted on occasions (as here).
- 5.3.53 The notes record the decision was to warn and not to prosecute. This was to be by way of a formal warning letter together with a message that “a clear line in the sand” be drawn to remove “all indemnity for offending for any future trials”. A meeting with industry representatives was proposed and observers/better electronic monitoring were suggested to deal with future issues. The notes do not state the reasons for the decision but state “the reasons for this are advised, but based on associated risks as highlighted”. The notes record that “we need to have a high degree of certainty in any prosecution decision and in this case there are many risks associated”.
- 5.3.54 The emails which followed the decision and my interviews suggest the reasons included the issues raised and discussed in this review and included that the non-prosecution option would be “less damaging to MPI and more constructive in changing fishers behaviours”.
- 5.3.55 The less damaging to MPI reference appears to be to the IEMRS project but also likely included the issues relating to (a) previous MPI conduct regarding discards; and (b) questions around the ability to use the camera footage and what was said to the skippers in gaining their consent.
- 5.3.56 I will comment further below on the decision reached but in my view the lack of timely and accurate documentation of the prosecution decision was regrettable. It meant that it was difficult to clearly ascertain the reasons for the decision and created uncertainty (for me and others).
- 5.3.57 As directed, warning letters were drafted and sent to the skippers concerned. An example is attached as **Appendix 3**.
- 5.3.58 The investigator and Compliance personnel were correct to determine that there was sufficient evidence to prosecute. They were ultimately right to focus upon whether prosecution was in the public interest.

Public Interest Factors

- 5.3.59 The factors listed in the SG Guidelines are not exhaustive and in this case there were many competing factors. The starting point is the public interest requires a prosecution where there has been a contravention of the criminal law (but it is not the rule that all such offences must be prosecuted).

- 5.3.60 In particular, it would be correct to consider the offence under section 72 was punishable by a fine only – a less serious offence than others in the Act. It is implicit that this was considered.
- 5.3.61 It was relevant and considered that a consequence of conviction under section 72 and section 252(3) was forfeiture to the Crown of the vessels involved (unless the Court for special reasons ordered otherwise). There were five vessels and potentially five trials involving considerable cost and expense for all involved. The impact upon the fishers in particular would have been considerable. All these considerations were relevant and were considered.
- 5.3.62 The relatively small financial penalty likely to be imposed and the possibility of a discharge without conviction was also relevant and considered.
- 5.3.63 The SG Guidelines state: “In regulatory prosecutions, for instance, relevant considerations will include an agency’s statutory objectives and enforcement priorities”. It is difficult to know now how this would have impacted on the decision, particularly without documentation as to the reasons. The requirement to ensure sustainability should have featured prominently as that is at the heart of the Act.
- 5.3.64 Under section 254 of the Act, the Court is obliged on sentence to take into account the purpose of the Act and to have regard to the difficulties inherent in detecting such offences and the need to maintain adequate deterrents. The same considerations would be relevant in determining the public interest and appear to have been considered.
- 5.3.65 The factors are not exhaustive but potential embarrassment or damage to the reputation of MPI or officials arising from earlier conduct was irrelevant. The damage to the future of the IEMRS project might have been relevant in terms of the statutory objectives and enforcement priorities.
- 5.3.66 I spoke to the Crown Solicitor involved regarding his reaction to the decision and I have taken that into account in reaching my views.
- 5.3.67 In my view the decision and in particular the decision process was flawed primarily because it was influenced by factors which were not relevant. In particular, the previous conduct of MFish outlined above created a distraction and a hurdle which should not have been there. The efforts of Fisheries Management in establishing Achilles did not deal adequately with the consequences for Compliance activity and the ability to use the camera footage, which in turn created distraction and uncertainty in the prosecution decision making.
- 5.3.68 The process was confused and involved individuals outside those named in the Policy. In addition, not enough weight was given to the view of the Crown Solicitor on some of the issues which were relevant to the decision.
- 5.3.69 The decision was carefully considered, however, and made in good faith. Even without the irrelevant or distracting factors, the decision may have been the same (given the relevant factors outlined above). It was one which was understandable and available in the circumstances.
- 5.3.70 The SG Guidelines do not provide particularly helpful guidance in complex regulatory prosecutions such as these. It would be useful and timely for MPI to work with Crown Law to review and revise

its own policy and guidance to provide more assistance in this area. Crown Law may wish to expand the guidance it provides.

Outcome and Consequences

- 5.3.71 The outcome of the Operation caused confusion amongst MPI compliance officers. For example, it was discussed at a management meeting in October 2014 and compliance officers voiced concern at the contradictory stance. The issue was raised in an email from the Regional Compliance Manager to both Directors (Compliance and Fisheries Management).
- 5.3.72 The assertion was that Compliance were hindered in enforcing the law because Fisheries Management had not properly addressed with fishers what would occur if evidence of offending was obtained (through observers or cameras). I agree.
- 5.3.73 The Manager summarised the issue well by saying that *“this is a very grey area as it appears ever since this time with Observers and e-surveillance used, there has always been an elephant in the room, never properly addressed by Fisheries Management to lay a foundation about what would happen when/if offending was detected”*.
- 5.3.74 There remained disquiet amongst some of those I spoke to about the lack of resolution on the issue, the decision itself and the lack of transparency. Others were comfortable with the decision and understood that it was a difficult and complex call to make. I also note for completeness that the decision in Operation Achilles came at a time when a number of very complex and high profile prosecutions were in train.
- 5.3.75 There does not appear to have been a clear conclusion on the reporting of the suspected capture of the Hector's dolphin. I understand that no prosecution action was taken and I have not seen an express decision on that matter. Because it is not central to my review I have not investigated the matter in detail.
- 5.3.76 On the other hand, some action was taken by the Compliance directorate in particular the Inspectorate to educate fishers as a result of Operation Achilles. I am told that fisher forums were held across the South Island supported by Fisheries Management. Permitted fishers were invited and a range of issues were covered including section 72 (the discarding offence), reporting and return requirements.
- 5.3.77 It appears that more steps could have been taken to educate industry of the findings of Achilles and the issues in the inshore fisheries. MPI as a whole, however, was involved with efforts to deal with the issue – as discussed below.

5.3.78 There is evidence to me of a lack of coordination and understanding between the Fisheries Management and the Compliance directorates. I am advised that efforts are being made to address this, and that for the current trial of cameras in the SNA1 fishery, it has been made clear to all parties that the footage can be used for compliance purposes. Other initiatives are in train.

5.4 MINISTRY AND INDUSTRY EFFORTS REGARDING DISCARDS

- 5.4.1 It is often referred to in MPI documents that the Ministry has been aware of the issue of discarding of quota fish since the commencement of the QMS. That appears correct to me. Support for that comes from numerous sources within and outside MPI. One only needs to refer to the Simmons report and the Ministry's Plenary Report (and equivalents) for each year for evidence that the discarding issue features prominently in the Ministry's thinking.²⁰
- 5.4.2 MFish and MPI have attempted to grapple with the issue but unsuccessfully. For this report it is only necessary to consider attempts in the last decade but there are undoubtedly more and what follows is just by way of example.
- 5.4.3 The Discard at Sea project was initiated in 2008 in response to a request received from commercial fishing industry members to initiate a review of discards recordkeeping and reporting. This was in response to growing concern within industry that longstanding dumping and discarding practices are contrary to current reporting requirements. The collaborative MFish and industry Discard's Working Group (the **Working Group**) was formed to head the project.
- 5.4.4 The purpose of the project was to improve the management and the reporting of discards of commercial catches in the New Zealand EEZ. The Working Group was asked to develop a set of recommendations on how to better manage and report discards in New Zealand's commercial fisheries.²¹
- 5.4.5 By early 2012 the progress of the Working Group had stalled due to lack of mandate and expertise to progress the practical implementation of options for resolution.
- 5.4.6 Further attempts were developed to address the issue, including a project named Better Information Better Value (BIBV) which derived from the Working Group. Included in this was the possibility of granting special permits to discard quota fish where it was done for the purposes of research (under section 97 of the Act). The Ministry ultimately did not proceed with BIBV despite the support of industry, because it would have effectively legitimised illegal behaviour and potentially created more confusion. The minimum economic size project appears to have been part of or similar to BIBV and ultimately did not proceed either.
- 5.4.7 These projects were no doubt stopped for good reason. I note the most recent Director of Fisheries Management has led a significant MPI effort into the IEMRS project in order to deal with this issue and that is positive. Others do not see the IEMRS project as the complete answer. In my view it must advance the position significantly from where it is at present.

²⁰ <http://fs.fish.govt.nz/Page.aspx?pk=61&tk=212>

²¹ Extracted from Discards At Sea Project Update Report and Recommendations February 2012.

5.4.8 For many years (and at least since 2007) MFish and MPI and industry were actively considering a solution to the discard problem. In addition, MFish and MPI were taking prosecutions against commercial fishers for large scale dumping. Examples are given in the Simmons report and in particular I have reviewed documents related to the prosecution of those involved with the fishing vessels Oyang 75 and Oyang 77 for mass dumping of quota species in 2011 (amounting to hundreds of tonnes of quota fish).

5.4.9 In a recent submission document Fisheries Inshore New Zealand commented:²²

“Much work has been conducted over the past five or more years to obtain better information on total fisheries mortality and to ensure that information is used in monitoring and management. Much of this work has been conducted in collaboration with MPI.

The absence of more comprehensive catch reporting is both a symptom and a cause of much undesirable activity. For example, discarding fish can be a symptom of incorrect TACCs and DVs [deemed values] and may be unnecessary waste and a loss of economic value when fish is marketable. As a result of discarding, estimates of fishing mortality are inaccurate which results in incorrect CPUE and uncertain stock status information. If TACCs and DVs are not adjusted to reflect increasing abundance, TACCs remain incorrect and the cycle continues unabated.

There are numerous reasons why catch information may not be reflected accurately in MPI figures and subsequently considered in scientific processes. For example, catch that is less than the minimum legal size is required by law to be returned to the sea, yet in most cases there is no requirement to report this catch. Recent work in the SNA1 fishery has been undertaken to record that catch and ensure it is used in science processes.”

5.4.10 I note that the position of Fisheries Inshore New Zealand is not, however, fully accepted by MPI.

5.4.11 One of the outcomes of the Working Group was a suggestion that the ambit of minimum legal sizes be broadened so as to include many more quota species and allow for the return of undersized fish. Both industry and MPI have repeatedly acknowledged the problem but have not been able to develop and implement a solution. The IEMRS project and the Fisheries Operational Review are advanced and will eventually improve the position.

5.4.12 For now, however, the law remains and appears to be regularly disobeyed. One of the vessels involved in Operation Achilles (the fifth vessel) was seen to have landed and retained all quota species. It is possible to obey the law and it is incumbent on fishers to do so. One would expect the LFR's and quota holders to assist with that (access to quota and the differential price paid by the LFR's is noted as a problem).

5.4.13 This context was in the minds of those responsible for the prosecution decision in Operation Achilles. In particular, the possibility that a trial of minimum legal sizes for a greater number of quota species, with permission to do so under legislation, was being considered. This and other factors discussed above seemed to unnecessarily complicate the decision.

²² “Fisheries Inshore New Zealand’s Response to the Operational Review of the New Zealand Fisheries Management Framework” (December 2015) at p 18.

6 APPENDICES

- 6.1.1 Terms of Reference
- 6.1.2 Edited chronology
- 6.1.3 Example warning letter – Operation Achilles

Appendix 1 – Terms of Reference

Ministry for Primary Industries
Manatū Ahu Matua



24 May 2016

Michael Heron QC
Barrister

Dear Mr Heron

Prosecution decisions in Operations Achilles, Hippocamp and Overdue

This letter sets out the terms of reference for the above review.

Background

Between November 2012 and February 2013, MPI used surveillance cameras on several fishing boats operating out of Timaru and Oamaru ports for the purpose of observing the effects of commercial trawling on Hector's dolphins. In the course of reviewing the footage from these cameras, some suspected breaches of the Fisheries Act 1996 were observed. Ministry staff consequently undertook a more extensive review (Operation Achilles), which led to the drafting of the *Operation Achilles Preliminary Investigation Report July 2013*.

In February/March 2012, MPI also undertook another operation (Operation Hippocamp) to gather information to help determine information on catch mix and fish size. A report, *Operation Hippocamp Investigation Report March 2013*, was produced.

In 2003/04, a Ministry of Fisheries investigation, Operation Overdue, identified that some boats were processing and reporting fish in a way that resulted in understatement of catch weights. A report was prepared for this investigation.

All three of these reports identified suspected breaches of Fisheries law and, after legal input, decisions were made not to prosecute.

In May 2016, copies of the reports into Operations Achilles, Hippocamp and Overdue found their way into the public domain, resulting in criticism of the Ministry's decisions not to prosecute. I place a high priority on the Ministry having strong credibility with the public when it comes to our role as the regulator of fisheries in New Zealand and our role in holding people to account when illegal activity takes place.

As a consequence, I am tasking you with reviewing the circumstances around Operations Achilles, Hippocamp and Overdue, including the decisions not to prosecute.

Terms of reference

Please review the following matters:

1. the appropriateness of the decision of the Ministry not to take prosecution action in relation to Operations Achilles, Hippocamp and Overdue;
2. the adequacy and appropriateness of the Ministry's response to alleged offending identified in Operations Achilles, Hippocamp and Overdue;
3. whether any other prosecution or compliance action should have been taken in respect of Operations Achilles, Hippocamp and Overdue;
4. whether the Ministry is restricted from taking action on your findings, and the appropriateness of any legislative restrictions;

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5. any matters that I may refer to you related to other decisions about whether to prosecute suspected fisheries offending; and
6. any related matter that I may refer to you.

You should make any recommendations you consider appropriate.

In carrying out your review, I expect you to take into account:

1. the matters set out in the Solicitor-General's Prosecution Guidelines;
2. the prosecution files prepared by MPI Compliance Branch officers;
3. legal advice provided in relation to the prosecution files;
4. the range of alternative compliance tools relevant to any alleged offending; and
5. any other information or matters relevant to a decision whether to prosecute in Operations Achilles, Hippocamp and Overdue.

I will make my staff available to you, along with any documents or information you require to conduct the review.

Reporting

I intend to publish your review after it is finalised. Any publication would include such redactions as may be necessary to protect the privacy of individuals, future compliance action or any prosecution action, whether related to the matters under review or otherwise.

I look forward to receiving your report.

Yours sincerely



Martyn Dunne CNZM
Director-General

Appendix 2 – Edited Chronology

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| March 2003 | Overdue: Inquiry phase of Operation Overdue commenced. This inquiry looked into packaging weights, net weights and conversion factors applied in respect of fish landed and processed. |
| April to November 2003 | Overdue: Inquiries continue, including interviews with staff, inspection of documents and computer records, and sampling of packaged fish. |
| December 2003 | Overdue: Investigation report prepared. |
| January 2004 | Overdue: Concerns raised about the accuracy of the statistical analysis and admissibility of the evidence. |
| February to May 2004 | Overdue: Ongoing discussions among MFish staff about whether or not to prosecute. Legal advice is provided by an MFish prosecutor. |
| May 2004 | Overdue: A decision is made by MFish staff not to prosecute. |
| June 2004 | Overdue: Close-out report notes that the fishing company has changed its practice to conform with regulatory requirements. |
| January 2009 | Summer observer programme: MFish writes to fishers in the inshore fleet advising them that up to 50 observers will be placed on vessels to monitor interactions with Hector's and Maui dolphins, and that the observers have not been trained in '[fish] species identification or catch quantification. We are relying on the vessels' normal returns to provide the fishing information required of each operator.' |
| May 2011 | Hippocamp: Planning commences for an inspection of the southern inshore finfish fishery, aiming to gather substantive information on catch mix and fish size at time of fish catching, landing and receiving of fish by licensed fish receivers. |
| February to March 2012 | Hippocamp: At-sea inspection and surveillance of fishing boats (using naval vessels and airforce patrols) is hampered by poor weather and other circumstances. On-shore inspections are also undertaken. |
| May 2012 | Hippocamp: The final report notes that limited data was gathered, but identifies a problem with discarding and high-grading of gurnard, and notes that small elephant fish are not being landed. It recommends a further exercise in the following summer to gather more information. |
| October 2012 | Electronic monitoring trial: Agreement is signed between MPI and Archipelago Marine Services Ltd to install cameras on fishing boats from the Timaru inshore fleet, and process the footage in order to trial whether cameras were effective at monitoring interactions between fishing boats and non-fish by-catch (including dolphins). |
| November 2012 to March 2013 | Electronic monitoring trial: Six inshore fishing vessels carry cameras recording fishing trips in the southern inshore fishery. |
| December 2012 | Electronic monitoring trial: One vessel reports the capture of a Hector's dolphin. Review of the footage identifies what appears to be a second dolphin entangled in a net, that is not landed. |
| May 2013 | Achilles: The Fisher who reported the capture of one dolphin is interviewed by an MPI investigator about the failure to report the suspected second dolphin. |

| | |
|--------------------------|--|
| June 2013 | Achilles: Review of footage from the vessel that captured the dolphin identifies discarding of fish species. Footage from all six vessels is examined and identifies discarding of quota fish on five of the six vessels. |
| July 2013 | Achilles: A confidential 'preliminary investigation report' is prepared by MPI investigator for internal discussion only. |
| October to November 2013 | Achilles: Ten fishers and deckhands from five vessels involved in the electronic monitoring trial are interviewed about discarding of quota fish. |
| November 2013 | Achilles: A lawyer for the fishers indicates that he has obtained a copy of the confidential preliminary investigation report. |
| January 2014 | Achilles: A final investigation report prepared by MPI investigator for legal review recommends prosecution of skippers and permit holders of five vessels and warnings for some of the deckhands. |
| January to April 2014 | Achilles: An MPI prosecutor considers the investigation report. |
| April 2014 | Achilles: The Crown Solicitor in Christchurch is instructed. |
| June 2014 | Achilles: The Crown Solicitor provides advice. |
| July 2014 | Achilles: Discussion between MPI staff and the Crown Solicitor. |
| August 2014 | Achilles: The Crown Solicitor provides advice. |
| September 2014 | Achilles: A report is provided to the Crown Solicitor. |
| September 2014 | Achilles: The Crown Solicitor provides advice. |
| October 2014 | Achilles: A decision is made by MPI staff not to prosecute, but to issue warning letters. Warning letters are sent by MPI staff to 10 persons. |

Appendix 3 - Example warning letter – Operation Achilles

30 October 2014

Ministry for Primary Industries
Manatū Ahu Matua



s 9(2)(a)

RE: DISCARDING AND NON-REPORTING OF QUOTA SPECIES s 9(2)(b)(ii)

The Ministry for Primary Industries (MPI) has concluded an investigation into breaches you have committed against the Fisheries Act 1996 (the Act).

In order to remedy and mitigate the effects of set netting on Hector's Dolphins the Ministry implemented a set net prohibition within certain areas of the South Island and in order to assess the effectiveness of this action installed surveillance cameras onboard certain fishing vessels.

As a result of that initiative it has become apparent that significant discarding of quota species fish and non reporting of catches has been occurring from the above fishing vessel.

This conduct is in contravention of the Act.

Section 72 of the Act provides that the dumping of fish is prohibited: *no commercial fisher shall return to or abandon in the sea or any other waters any fish, aquatic life, or seaweed of legal size, or for which no legal size is set, that is subject to the quota management system.*

Section 230 of the Act provides the offence of neglect or refusal to supply particulars, and improper divulging of information.

Both offences carry a maximum penalty of a fine of \$250,000 provided for at section 252 of the Act, and there is a strong likelihood of forfeiture of items used in the offending being sought by the Ministry should the Ministry prosecute in these matters.

MPI has decided in this instance to conclude the matter by way of official warning.

This warning should not be regarded as a precedent and you are advised that any further occurrence may result in immediate prosecution or other action. For the avoidance of doubt, MPI does not anticipate issuing further warnings before enforcement or other action is taken in relation to on-going or future conduct that is in contravention of the Fisheries Act.

Please do not hesitate to contact me should you have any queries regarding this matter.

Yours sincerely

s 9(2)(a)

s 9(2)(a)

Investigations Manager
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