

Illegal fishing

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ILLEGAL FISHING

Criminal Enforcement

v

Administrative Regime

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Introduction

- Not focusing on IUU (Illegal, unreported and unregulated fishing) - truly criminal
- Much of the offending and prosecutions is not IUU but breach of regulatory provisions
- Regulatory breaches are currently dealt with under criminal regime – is it time to reassess this approach?
- Is the administrative based regime applied in the United States and Canada more suitable
- Recent prosecutions highlight flaws in purely criminal model when prosecutions taken for regulatory offending
- Issues may be wider than fisheries and related to other regulatory offences in the Maritime context.



Current Compliance Regime – Criminal Law Model

- Historically New Zealand and other British Commonwealth countries used criminal model to enforce standards in regulatory environment
- Model sets out rules of acceptable and prohibited behaviour with criminal penalties as sanctions
- Theory – people who might otherwise disobey law will comply with the law to avoid stigma of criminal proceedings
- Criminal law system really designed to deal with more serious societal crimes



Fisheries Compliance

- Historically criminal model used
- In the Fisheries Act 1996 quite specific offences created with range of severe penalties
- Imprisonment possible
- Draconian seizure and forfeiture regimes
- Mechanistic approach – best use of limited compliance resources?
- Lack of meaningful measurement and analysis of success of criminal regime
- Includes offences of strict liability - no criminal intent required



Current Application of Criminal Regime

- Ministry of Fisheries treats minor regulatory offences which do not threaten the resource, as serious offences
- The Quota Management System is treated as a “house of cards” whereby even technical misreporting serious
- Deeming provisions used to prosecute imprisonable offences
 - see *Ministry of Fisheries v Antons Trawling Company Limited*, Auckland District Court, 11 June 2006
CRN 004500088-90
allegedly deliberate offending by Master of fishing vessel carefully concealed by him from the permit holder and Ministry.



Result of Current Legislation/Approach – Stand Off

- Main interaction with Ministry is formal interviews conducted using coercive powers
- Bill of Rights warnings
- Refusal to provide anything but the most general outline of allegations prior to interview
- Fishers very wary and defensive.
- No benefit, and considerable risk, in open discussions



Current Results

- Long, intensive and expensive investigations
- All or nothing approach – either criminal prosecution or warning
- Inappropriate prosecutions



Inappropriate Prosecutions

Antons Trawling Co Ltd – Master allegedly misreported exact area where catch taken.

- All catch reported within right QMA and correctly counted against quota.
- Misreporting of exact area affected research results.
- Master hid offending by manipulating ALC
- Permit holder charged with deliberate offending based on presumption
- Following several weeks of depositions charges withdrawn and less serious charges substituted
- Very expensive investigation for Ministry and impact on permit holder substantial



*Ministry of Fisheries v Tawera Fishing Co Ltd and Pelco NZ Ltd,
District Court Tauranga, CRN 04070501810-14*

- Initial publicity deliberate offending
- Vessel had several permits onboard but catch arguably recorded against the wrong permit – a mistake
- Registration of vessel not renewed – a mistake
- *“It is not a case of premeditated plundering of the fisheries resources for black market activities, or deliberate disguising or hiding of information, but more I think what could be categorised as a chapter of errors, omissions, a degree of sloppiness overall without attributing particular blame anywhere.”*
- Several weeks of hearing – then all but most minor charges withdrawn
- Fines in the region of \$1,000 - \$2,000 each offence
- Hawkes Bay Seafoods Ltd, Maruha



Alternative Compliance Model – Administrative

- Genuinely criminal involving intent and benefit from offending to be dealt with in a criminal arena
- Other regulatory offences, the US/Canadian administrative compliance model is put forward as an alternative.
- Has been tested overseas and works effectively
- Not a soft option



US Model

The main components of the US model are;

- Publication of preset levels of penalties within specified bands for specified violations
- Publication of compliance guidelines (which, if followed, protect the person from potential prosecution)
- Issuing of infringement notices for lower level violations
- For unpaid infringement notices and more serious violations, proceedings are commenced by way of a notice of violation action (NOVA) which is similar in concept to a statement of claim
- As the proceedings are civil in nature without prejudice discussions can take place and they may be compromised by way of settlement before hearing



US Model Cont.

- Agreements may also be reached that relate to future compliance with rules or restrictions of activities which have the force of any civil settlement
- Additional sanctions such as permit revocation or suspension, banning, forfeiture of property used in the commission of the violation can be sought, but are only imposed at the complete discretion of the Court
- If a matter goes to hearing it does so under civil procedural rules
- Hearsay evidence is applicable (evidence being evaluated in terms of its weights as opposed to strict rules of admissibility)



Benefits of Administrative Model

- US experience shows it takes considerable pressure off the limited resources of the Courts and the compliance agency
- Several thousand NOVA actions are commenced each year with less than a few hundred ever making it to Court
- Efficient – thousands of NOVA; hundreds of Court cases
- More open frank discussions between prosecution and fishers
- Increased ability to create arrangements with enhanced future compliance as well as acting as deterrents



Potential Settlements

Antons

- agree protocol with FCC for notifying of ALC anomalies
- agreeing to 100% observer coverage for period
- enhancing in-house monitoring
- fisher paying for adjustments to research
- could involve not fishing in an area for period

Pelco

- assisting in developing proper procedure for recording across multiple permits
- developing proper audits of performance



Elements of Administrative Regime Already in Place

- Formally fishing for quota species without quota was an offence. Now a civil/commercial regime is in place whereby you balance catch against ACE
- Administrative penalties for high seas fisheries offences (section 117z of the Fisheries Act 1996)
- The section 113z regime is not as flexible as the American model and the Ministry appears reluctant to apply it
 - See for example *Ministry of Fisheries v Vostochnia Fisheries Ltd*, District Court Tauranga, 10 October 2006, CRN 3070500146-0169



Seizure Issues - Fish

- Inability to distinguish between lawfully and unlawfully taken fish – see *Antons Trawling Ltd decision*
- Catch had been seized pursuant to section 207 of the Fisheries Act 1996.
- Only fish that could be seized was that taken in respect of which the offence was committed (in this case a non functioning ALC)
- It was impossible to differentiate between fish taken in respect of which the offence was committed and fish taken lawfully and therefore forfeiture was not lawful
- The proceeds from the sale of these fish were not forfeit to the Crown



Seizure and Admiralty Claims

- Seizure and Admiralty arrest co-exist in New Zealand
– see *Debis Financial Services (NZ) Ltd v Cray Fishing Vessel Stryker and Ops*, Wellington High Court, CIV 2003-485-002372
- Seizure has priority in Australia - s.108A Fisheries Management Act



What is Seized?

- Navigational and ship handling equipment, gear, lines, food, anchors and bunkers all seized

– see *Scandinavian Bunkering AS v The Bunkers on Board the Ship FV "Taruman"* [2006] FCAFC 75



Protecting Lawful Fishing

- If a Dutch owned and flagged vessel interferes with the lawful fishing operation of a New Zealand owned and flagged fishing vessel on the high seas what remedies does the New Zealand owner have (particularly what injunctive remedies) and which jurisdiction can grant those remedies?
- Assume that Dutch vessel does not interfere with the navigation or safe operation of the New Zealand vessel but simply attaches floats to fishing gear so that gear cannot be properly deployed. What if actual damage to the fishing gear caused by a Dutch vessel? Does it make any difference if the Dutch vessel has a New Zealand Master or Crew on board?