IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-120
[2019] NZHC 1204

IN THE MATTER OF	an application for judicial review under the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER OF	the Fisheries Act 1996
BETWEEN	COMMERCIAL FISHERS WHANAU INC Applicant
AND	ATTORNEY-GENERAL First Respondent
	DIRECTOR-GENERAL OF THE MINISTRY FOR PRIMARY INDUSTRIES Second Respondent

Hearing: 13 May 2019

Counsel: B J Marten and M R K Redding for applicant
N C Anderson and D J Watson for respondents

Judgment: 30 May 2019

RESERVED JUDGMENT OF DOBSON J

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Introduction

[1] This application for judicial review is brought by Commercial Fishers Whanau Inc (CFW), a society representing the interests of smaller operators within New Zealand's inshore fishing industry. Its members comprise approximately 65 fishers who own their own boats, all of which are less than 28 metres long. Their boats are mostly crewed by just one or two people, and the businesses are often family operations. Some fishers own fishing quota, but a greater number lease quota from others.[1]

[2] CFW's concern relates to a series of regulations promulgated in 2017 under the Fisheries Act 1996 (the Act). These regulations update reporting requirements for commercial fishing activities to require geospatial position reporting and to facilitate electronic monitoring of fishing activities. CFW claims that these regulations impinge on the property and privacy rights of fishers in a manner that the Act does not permit. The challenge extends to certain circulars issued in relation to the regulations. CFW seeks:

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[1] Their fishing quotas comprise Annual Catch Entitlements administered under the Fisheries Act 1996, entitling them to fish for specified quantities of individual species of fish.

(a) a declaration that these regulations and circulars, or such substantive aspects of them as relate to asserted property rights of the fishers, are ultra vires the Act;

(b) a declaration that these regulations and circulars, or such substantive aspects of them as relate to privacy rights asserted by the fishers, are ultra vires the Act and other legislation governing privacy and surveillance;

(c) a declaration that the regulations dealing with electronic monitoring of fishing activities are void on the grounds of uncertainty; and

(d) costs.

[3] The application names the Attorney-General as first respondent on the basis that the regulations are made by the Governor-General and it is their lawfulness that is at issue. The Director-General of the Ministry for Primary Industries (MPI) is authorised under the Act to promulgate circulars intended to provide the detail for steps required to comply with the relevant regulations. The Director-General is named as second respondent in relation to discharge of that function.

[4] The respondents (the Crown/MPI) oppose the application on the grounds that there is no cogent basis upon which to find the regulations or their associated circulars invalid. The regulations at issue are said to be authorised by the Act, fall squarely within the scope of the relevant empowering provisions as properly interpreted and, along with the associated circulars, are wholly consistent with the Act's purpose. They are intended to improve the quality of the information available to fisheries managers within MPI and the fisheries industry, supporting and giving effect to the aim of providing for the utilisation of fisheries resources while ensuring sustainability.

The legislative context

[5] In New Zealand, fishing and fisheries' resources are managed under the Act. Section 8 provides:

> **8 Purpose**
>
> (1) The purpose of this Act is to provide for the utilisation of fisheries resources while ensuring sustainability.
>
> (2) In this Act,—
>
> **ensuring sustainability** means—
>
> (a) maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment
>
> **utilisation** means conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being.

[6] The Act is designed to enable the use of fisheries resources, now and in the future, and allowing people (including fishers) to provide for their social, economic and cultural well-being is at the heart of the Act's purpose. The Supreme Court observed that objective can only be achieved if sustainability is ensured:[2]

> [39] Section 8(1) appears in Part 2 of the Act headed "Purposes and principles". It expresses a single statutory purpose by reference to the two competing social policies reflected in the Act. Those competing policies are "utilisation of fisheries" and "ensuring sustainability". The meaning of each term in the Act is defined in s 8(2). The statutory purpose is that both policies are to be accommodated as far as is practicable in the administration of fisheries under the quota management system. But recognising the inherent unlikelihood of those making key regulatory decisions under the Act being able to accommodate both policies in full, s 8(1) requires that in the attribution of due weight to each policy that given to utilisation must not be such as to jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.
>
> [40] This ultimate priority is recognised in the two definitions. The first consideration in the definition of "utilisation" is the *conserving* of fisheries resources. Their use, enhancement and development, to enable fishers to provide for their social, economic and cultural wellbeing, are considerations which follow. The definition of "ensuring sustainability", on the other hand, reflects the policy of meeting foreseeable needs of future generations which is concerned with future utilisation. These complementary definitions apply whenever those terms are used in the Act.

[7] Up until 2015, information on the total removals of target and non-target species from fisheries and associated catch rates were collected from a variety of

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2 *New Zealand Recreational Fishing Council Inc v Sanford Ltd* [2009] NZSC 54, [2009] 3 NZLR 438 (citation omitted).

sources, including commercial fishers' catch-effort reporting,[3] MPI observers on fishing vessels,[4] and geospatial vessel position reporting on those vessels carrying vessel monitoring systems.[5]

[8] In August 2015, the then Minister for Primary Industries announced a high-level review of the information-gathering system, focusing on potential opportunities to improve the quality of information available to support fisheries management decisions, including opportunities created by the emergence of new technologies.

[9] The "Future of our Fisheries" programme that ensued identified that:

(a) existing reporting systems were no longer fit for purpose and a change to mandatory electronic reporting would improve the ease of data collection and the quality of data collected;

(b) finer scale geographic information on commercial fishing activity would assist MPI in fisheries management (particularly at a localised level); and

(c) installation of cameras on commercial fishing vessels (electronic monitoring) would assist with expanding MPI's capacity for monitoring and verification of catch effort, discarding and protected species by-catch.

[10] In response to these identified opportunities, the then Minister for Primary Industries obtained approval to develop the Digital Monitoring Programme (DMP), which dealt with three separate elements:[6]

(a) electronic catch reporting;

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3 As required under the Fisheries (Reporting) Regulations 2001.
4 As part of the observer programme under Part 12 of the Fisheries Act.
5 As required under the Fisheries (Satellite Vessel Monitoring) Regulations 1993.
6 Arising out of the "Future of our Fisheries" consultation in late 2016, the Digital Monitoring Programme and was the subject of a Cabinet Paper released on 24 April 2017: Office of the Minister for Primary Industries *Improving fisheries management through an Integrated Electronic Monitoring and Reporting System (IEMRS) and Enabling Innovative Trawl Technologies (EITT)*.

(b) electronic vessel position reporting; and

(c) electronic camera monitoring of vessels.

[11] The key aim of the programme, as set out in a Cabinet Paper, was to provide better information on commercial fishing to help resolve key fisheries management issues, including:[7]

(a) reducing waste in fisheries by monitoring disposal activities of fishers, particularly for inshore fisheries;

(b) managing the environmental impacts of fishing, including protected species bycatch;

(c) supporting fish stock management, including setting catch limits;

(d) strengthening public confidence in fisheries management through verifiable information;

(e) supporting requirements of third party sustainability assessments; and

(f) supporting market access requirements that require "boat to plate" tracking.

The Regulations and Circulars

[12] On 10 July 2017, two months after MPI issued a regulatory impact statement for the DMP, the Governor-General promulgated the following regulations (collectively, the Regulations):[8]

(a) The Fisheries (Reporting) Regulations 2017 (the Reporting Regulations), which set out the reporting obligations of permit holders, licensed fish receivers, auditors and other parties regulated under the

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7 At [34].

8 Ministry for Primary Industries *Integrated Electronic Monitoring and Reporting System: Regulatory Impact Statement* (May 2017).

Act. This includes reporting information such as the amount and species of fish caught.

(b) The Fisheries (Geospatial Position Reporting) Regulations 2017 (the GPR Regulations), which require a geospatial position reporting device to be carried and operated on commercial fishing vessels, enabling monitoring of that vessel's position by MPI.

(c) The Fisheries (Electronic Monitoring on Vessels) Regulations 2017 (the EM Regulations), which require permit holders to ensure that vessels are equipped with video cameras to enable monitoring of onboard activities by MPI.

[13] Each of the Regulations provided for one or more circulars to be issued by the chief executive of MPI (the Director-General) under s 304 of the Act. These circulars would augment the Regulations by addressing technical matters and practical details such as:

(a) the manner and form in which reports of catches or vessel positions must be provided by fishers to MPI;

(b) the technical requirements for such reports, for example approved software and devices; and

(c) the location and number of video cameras required aboard vessels.

[14] On 14 December 2018, the Director-General issued the following circulars (collectively, the Circulars):

(a) *Fisheries (E-logbook Users Instructions and Codes) Circular (No 2) 2018* (made under the Reporting Regulations) (the E-logbook Users Circular);

(b) *Fisheries (E-logbook Technical Specifications) Circular (No 2) 2018* (made under the Reporting Regulations) (the E-logbook Technical Circular); and

(c) *Fisheries (Geospatial Position Reporting Devices) Circular (No 2) 2018* (made under the GPR Regulations) (the GPR Circular).

Judicial review of regulations

[15] The law in relation to challenging the validity of regulations is well settled.[9] The first step involves construction of the Act under which the regulation purports to be made. This requires analysis of the scope of the authority conferred by Parliament in light of the purposes for which those powers were conferred.[10] Where Parliament has given the Executive a broad power to regulate, it is a power to carry out the purposes of the empowering legislation and the Executive's discretion is constrained by those purposes.[11]

[16] The second step is to determine the meaning of the regulations, and the third step is to decide whether the regulations comply with the empowering Act.

[17] The focus is on the legal limits of the power, not the merits of its use; unless regulations are irrational, review is not an opportunity to assess the reasonableness of the policy being promoted.[12]

[18] As recently confirmed by the Court of Appeal in *New Health New Zealand Inc v South Taranaki District Council*, in respect of delegated legislation "matters are presumed to have been done regularly and lawfully and the courts will only interfere in a clear case".[13] The onus is therefore on the challenger to establish invalidity.

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9 *Harness Racing New Zealand v Kotzikas* [2005] NZAR 268 (CA) at [58]–[59], citing *Carroll v Attorney-General* [1933] NZLR 1461 (CA).

10 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50].

11 *Edwards v Onehunga High School Board* [1974] 2 NZLR 238 (CA) at 242, citing *McEldowney v Forde* [1971] AC 632, [1969] 2 All ER 1039 at 1063.

12 *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 at [22], citing *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 (CA) at 388. See also *Unison Networks Ltd v Commerce Commission*, above n 10, at [54].

13 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [194]; affirmed by *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 60, [2018] 1 NZLR 1041.

The empowering provisions

[19] Section 297 of the Act is an empowering provision, containing a lengthy list of subject matters for which regulations may be made. The more relevant include:

> **297 General regulations**
>
> (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
>
> (a) regulating or controlling fishing and the possession, processing, and disposal of fish, aquatic life, or seaweed including any of the following:
>
> …
>
> (viii): regulating or prohibiting the possession or use of any kind of gear, equipment, or device used for, or related to, fishing:
>
> …
>
> (ca) prescribing requirements or matters relating to the installation and maintenance of equipment (including electronic equipment) to observe fishing or transportation, and to the payment of any associated prescribed fees and charges:
>
> …
>
> (e) defining the vessels or classes or types of vessels to which any regulations are to apply:
>
> …
>
> (h) prescribing the accounts, records, returns, and information that any person or class of persons may be required to keep or provide under Part 10 or any other provision of this Act, and providing for–
>
> (i) the manner and form in which such accounts, records, returns, and information are to be kept or provided:
>
> (ii) the time for or within which such accounts, records, returns, and information are to be kept or provided:
>
> (iii) the person by or to whom such accounts, records, returns, and information are to be kept or provided:
>
> (iv) the places where such accounts, records, returns, and information are to be kept or provided:
>
> …

(y) providing for such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

[20] Section 297(2) then provides for a further layer of requirements and exemptions:

> Without limiting anything in subsection (1), any such regulations may-
>
> (a) authorise the Minister or the chief executive to issue or impose, as the case may be, any authority, approval, requirement, prohibition, restriction, condition, direction, instruction, order, permit, notice, or circular:
>
> (b) exempt from compliance with or the application of any provisions of the regulations any person or species or vessel, or authorise the Minister or the chief executive to grant such exemptions as the regulations may specify.

[21] A further power to promulgate circulars is also found in s 304(1) of the Act:

> Regulations under this Act may provide for the promulgation from time to time by the chief executive of circulars specifying general criteria for the drawing up, accomplishment, demonstration, carrying on, or provision for any act, plan, proposal, matter, system, process, or thing.

The scheme of the Act and nature of the regulation-making power

[22] For CFW, Mr Marten contended that this case is about whether the substance of the Regulations falls within the scope of the empowering legislation. He argued that the Regulations and their accompanying Circulars have gone too far and that, by analogy with other authorities, they are unlawful. Mr Marten submitted that, while the detailed set of regulation-making powers in the Act is appropriate for a complex industry, the large breadth of those powers means the Executive's use of them should be carefully scrutinised by the courts. There are so many paragraphs on offer, and so many words open to expansive meanings, that the Executive could seize on several to regulate an aspect of fishing in a way that Parliament never intended to approve. Mr Marten adopted the view of the United Kingdom Supreme Court, as cited by Mr Anderson, in *R (on the application of the Public Law Project) v Lord Chancellor*:[14]

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[14] *R (on the application of the Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2017] 2 All ER 423 at [26] per Lord Neuberger P, quoting Daniel Greenberg (ed) *Craies on Legislation* (10th ed, Sweet & Maxwell, London, 2012) at [1.3.113].

> [A]s with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating ... [T]he more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.

[23] For the Crown, Mr Anderson responded that the way in which the Act deals specifically and in detail with the matters to be covered by the Regulations does not unduly confine the scope of the regulation-making powers in the Act, as interpreted on their plain meaning and in light of the purpose of the Act.[15] There was a broad range of matters requiring regulations, and Parliament had not left it to the Executive on a carte blanche basis.

[24] In promulgating regulations, the Executive is guided by both the Act's purpose and the empowering provisions but, as the Crown argued, this is not to unduly confine the scope of their powers; the intention is that the Executive will have those powers needed to regulate the fisheries effectively.

Challenge to GPR and Reporting Regulations: Erosion of property rights

[25] Under the GPR Regulations, all fishing vessels are required to carry GPR devices which must operate continuously during fishing or transportation of fish, tracking the fishers wherever they travel so that MPI knows where they are fishing.[16] This information is to be transmitted to MPI in accordance with the Circulars.[17] The GPR Circular includes the following specifications:

(a) that the information be transmitted to MPI every three minutes;[18]

(b) that latitude and longitude be given to an accuracy of four decimal places (accurate to within about 11 metres);[19] and

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15 *Brader v Ministry of Transport* [1981] 1 NZLR 73 (CA) at 81.
16 GPR Regulations, reg 5.
17 Regulations 6 and 8.
18 GPR Circular at [10(5)].
19 At [7(1)].

(c) that the data be securely transmitted to maintain confidentiality and prevent third party interception.[20]

[26] The Reporting Regulations require industry participants to provide a range of reports such as trip reports, fish catch reports and monthly harvest returns.[21] These reports are to be done electronically if required,[22] in a form set out in the Circulars.[23] The E-logbook Users Circular includes requirements that:

(a) weights recorded in reports must be greenweight;[24]

(b) latitude and longitude references be to an accuracy of four decimal places;[25] and

(c) the material provided must match that set out for different reports and fishing methods in Schedule 1 to the circular.[26]

[27] The E-logbook Technical Circular specifies the technology to be used to get those reports to MPI. An e-logbook is required, which transmits data to the service delivery agency (MPI currently contracts out this function[27]) that provides operational support to the industry, and the reports must be encrypted and not capable of being changed by third parties.[28]

Fishers' proprietorial interests

[28] Mr Marten submitted that the combined effect of the GPR information tracking a vessel's whereabouts and the reported information matching the location data with the type and weight of fish caught in the reported locations would provide MPI with far more accurate (and qualitatively different) information than ever before on where fish are caught. This would arguably have the effect of converting fishers' key

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20 At [13(1)].
21 Reporting Regulations, reg 6.
22 Regulation 41.
23 Regulation 37.
24 E-logbook Users Circular at [7(1)].
25 At [9(3)].
26 At [6].
27 See [36] and [40] below on the identity of FishServe, the current service provider.
28 E-logbook Technical Circular at [6], [12] and [13].

commercial knowledge – their intellectual property – into MPI's property. The combined effect of the GPR and Reporting Regulations arguably puts CFW's members' property in jeopardy, in a way that Parliament can never have intended the Executive to be able to do.

[29] It was submitted that inshore fishers' secret spots (as identified by their idiosyncratic "marks") are their most valuable assets which, when combined with their skills of boat-handling and expertise in actually catching fish, enables them to successfully bring home a catch, with minimal wasted time and effort. Once those closely guarded secrets have to be revealed to MPI, there is no meaningful guarantee that they will not be revealed to other fishers, including larger competitors, thereby destroying or substantially reducing the value of that intellectual property.

[30] In *Edminstin v Sanford Ltd*, a Bluff oyster fisherman successfully argued, in the context of an employment dispute, that he owned his marks, that is, the knowledge, whether committed to memory, paper or digital technology, about the location of fish and other sea features.[29] That case provides a clear sense of the commercial importance fishers place on their marks:

> [57] As did Mr Edminstin himself until when he ceased work as skipper on *Toiler*, vessels' masters carried written records of their marks onto and off their vessels before and after each voyage. In Mr Edminstin's case, these were kept and conveyed by him in a mature and non-descript plastic shopping bag. The records consisted of a variety of notebooks, scraps of paper and oyster bin tags, some of these (or the information on them) passed down from father to son. As well as being available onboard to assist with setting a course or courses, these records were taken home by skippers for updating or augmentation and were guarded jealously by them. There was no suggestion that the owners of the vessels of those skippers in the oyster fishery had a proprietorial interest in these records or in the information contained in them.
>
> [58] I conclude that had a reasonable and objective observer of skippers' practices asked skippers, crew, vessel owners and others involved in the industry who owned the information in these handwritten mark records, the unhesitating responses would have been that these were a skipper's, and exclusively so. This would have been reinforced, in my conclusion, by the equally unanimous, immediate and sure response to a related inquiry about who decided the course or courses to be followed by an oyster vessel in the harvesting season. These were the decisions of the skippers alone, and a non-skipper owner of a vessel would not have directed its skipper where to harvest oysters in the fishery. These are longstanding and well-established practices in the oyster fishery known to, and followed by, all involved. …

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29 *Edminstin v Sanford Ltd* [2017] NZEmpC 70 at [56].

…

> [81] Without necessarily accepting the dollar figure ranges of value put on Mr Edminstin's marks for both him and Sanford, I accept that an oyster skipper's marks, and Mr Edminstin's in particular, are a monetarily valuable, albeit intangible, asset of a skipper. … I accept that there are elements of the current fishery which may have reduced the former value of marks, but that is not to the point in this case. Any proprietorial interest that either party has in Mr Edminstin's marks is a real interest with actual or potential economic value.

[31] The Crown did not dispute that this recognition of the proprietorial status of marks applied similarly in respect of inshore fisheries for species other than Bluff oysters.

[32] CFW has filed affidavits from seven of its members, a number of whom attest to the value placed on a fisher's marks. Jayce Fisher, who has been fishing commercially for the past ten years, and whose family has been fishing in Southland since "pre-European history", said:

> [8] My marks were given to me by my father, who was given them by his father, and so on. The fishing marks are a taonga, passed down. I have had to do virtually no exploration myself, as this knowledge has been built up over so many generations. The marks are stored in my plotter, but I also know them based on landmarks on shore, such as prominent trees, hills, rocks and islands. This was how they were originally described, in the pre-computer era.
>
> [9] A cray fisherman's secrets are hard to maintain. Other boats can see if you are fishing somewhere, and if they know you are good, they will follow you. It does not take long for them to start competing. However, the area we fish is dangerous, windy, and filled with tidal currents. It is not easy work, and can be dangerous. As a result, we face little competition: there are easier fishing grounds in the region. So we are largely left alone, to make the most of our knowledge and expertise of that area.

[33] Similarly, Teone Taiaroa's family has fished the waters of the Otago Peninsula region since "pre-European times", doing so on a commercial basis for four generations. He says that the only thing he owns of value is his knowledge, which includes not just his skill at fishing but, more importantly, his marks:

> [18] … the more special advantage I have is the thousands of marks built up over 40 years, some of which I inherited from my father, and some from my grandfather. They are a taonga passed down to me. They represent early indigenous knowledge. My marks are stored both on paper and on my boat's electronic plotter …

> [19] These marks tell a fisherman spots where fish are likely to be – down to within a few feet. They also show me where obstacles are: as a trawler I need to know where rocks are to avoid them. If I were blue cod potting I would want to find rocks where the fish lived. Because I have these marks, I am able to fish in more dangerous inshore waters with many obstacles than another fisherman without my local knowledge would be able to. It is my one real competitive advantage. I will even lie to my own brother about these things when I am fishing – even though we will tell each other all our personal secrets once we are back on land.

[34] CFW members have not been overly concerned at providing data under the previous reporting requirements because they do not provide MPI with sufficiently detailed information on catch locations to be vulnerable to expropriation. Further, the use of paper forms does not result in large amounts of digitised data being transmitted with correspondingly larger risks of disclosure to third parties. However, if and when the GPR and Reporting Regulations begin to apply to CFW members, all this will change as onboard GPR devices will transmit information to MPI at a level of accuracy much greater than that previously required.

[35] Ms Rebecca Blowes, the current director of Fisheries Science and Information at Fisheries New Zealand within MPI, completed an affidavit explaining MPI's approach to the new reporting requirements. She acknowledged that "a commercial operator's fishing knowledge is a valuable commodity", and that:

> … this information may directly influence success or failure as an operator. Making this information available to others may mean operators risk losing any advantage created from their skill and experience and could prejudice the commercial position of the provider of the information.

[36] Ms Blowes stated that Fisheries New Zealand has a policy of protecting the information that it receives to the greatest extent possible, while meeting the requirements of the Official Information Act 1982 (the OIA) and balancing the public interest. She deposed that FishServe, the data collection agency used by MPI, was directed to develop a system to give effect to this policy, which supposedly ensures that fishers' data will be kept safe. Ms Blowes described the system as follows:

> The system FishServe developed restricts the visibility of the fine scale location information through a two-step process. When the master of a vessel is listed by a permit holder as a person authorised to provide catch event data, the master must select whether they wish to "Share" or "Restrict" the location data for each fish catch event provided by them. "Shared" means that the permit holder can see the location data to 4 decimal places, while "Restricted"

> means that the permit holder can see the location data to 1 decimal place (i.e., equivalent to the previous requirements). This ensures that fishers operating under contract are able to safeguard the details of particular fishing marks from the permit holders they have been engaged by.

[37] In response, CFW notes that, while this process might provide some comfort for fishers in that specific position, this is not a legal measure and is not reflected in the Regulations or Circulars. A fisher's formal obligations do not change as a result of this and MPI could simply reverse the operational change if it so chooses. Nor does the possible retention of detailed location data from permit holders leasing quota to fishers affect the reporting obligation to MPI. MPI wants fishers to trust that their data will be secure, but there is no protection in the Regulations or Circulars of any kind for fishers if their information is compromised. There is no right to compensation for a data breach, nor is there a mechanism through which MPI would undertake to investigate the matter.

[38] A reply affidavit from Ms Hayley Nelson, one of CFW's members, deposed that on the same day as Ms Blowes had affirmed her affidavit, she and her partner were emailed a document by an official at MPI. This document included aerial photographs of a number of fishing boats in the Southland region (including their vessel), the GPS position of those boats, a comment on what they were doing at the time, and maps summarising this information. Ms Nelson understood that a number of other vessel owners, competitors whose vessels were also photographed, were sent the same document. While she says this was not a malicious data breach, it arguably demonstrated "cavalier treatment of our information by MPI", because the position at which they were photographed fishing that day forms part of their secret knowledge. In submissions, Mr Anderson accepted this was an unfortunate breach, but urged that it should not be taken as evidence that MPI could not maintain the confidentiality of data provided in compliance with the Regulations.

[39] Mr Marten submitted that MPI has information-sharing agreements with a number of other organisations, including Maritime New Zealand and the Police. He submitted that the more hands data passes through, the more chance there is of it falling into the wrong hands, whether inadvertently or deliberately. Further, information held by MPI is subject to the OIA so, while it might be withheld by MPI

on the ground of commercial sensitivity, it is still subject to the principle of availability under s 5 of the OIA. Although MPI notes that it may release information under the OIA in an anonymised form, Mr Marten submitted that this misses the point from the fishers' perspective: it is not the identity of the person catching the fish at a particular spot that matters, but that there are fish to be found there.

[40] An additional concern of CFW is that the information passes through the hands of third parties en route to MPI. It notes that two companies who have been involved in the digital monitoring programme, Trident Systems (which was involved in a digital monitoring trial) and FishServe both have directors and shareholders from large fishing companies such as United Fisheries, Talley's and Sanford. These large companies are in competition with smaller fishers such as CFW's members and could eliminate the smaller fishers' local advantages if they had access to their data.

[41] Ms Nelson gave evidence that there are already larger players moving in on fishers working under contract for them, seeking copies of their marks in light of the new regime. She deposed:

> For example, I understand one of the larger fishing companies that some members lease catch from has included a new clause in its contracts with fishers for the 2019-2020 season. This requires the fisher to provide the company with their marks as part of the conditions for fishing for the company. In other words, the fact the electronic monitoring devices will be installed, and the information collected, means the big companies will demand it. The power imbalance in this relationship gives the fisher few options.

[42] MPI requires companies working for it, such as Trident Systems and FishServe, to complete confidentiality agreements. However, Mr Marten submitted that such contractual commitments provide limited comfort for CFW's members. They are the ones who have the most to lose, and yet have no enforceable confidentiality agreement. He submitted that MPI has allowed the big players in the fishing industry to become closely connected with the monitoring process, and it would be commercially naïve to suggest that such proximity to competitors' data does not heighten the risk of a damaging data breach.

[43] In addition, CFW contends that the GPR Regulations expressly anticipate the possibility of MPI sharing a fisher's location data further afield. The GPR Circular,

under the heading "Security of transmission", provides that data does not need to be maintained confidentially if FishServe and MPI agree that it can be shared with other parties.[30]

[44] Concerns that the Regulations will be used to expropriate fishers' property were heightened by the following statement in Ms Blowes' affidavit:

> As soon as the data that is collected through electronic catch reporting, position reporting and camera imagery is received by Fisheries New Zealand (or its agents, including FishServe), Fisheries New Zealand becomes the owner of that information.

[45] Mr Anderson was not able to provide an explanation as to the statutory or contractual basis on which MPI can assert ownership of the data it receives when fishers comply with the obligations under the relevant Regulations. There must at least be a real question as to whether provision of electronic recordings and signals of fishing locations constitutes a transfer of property in the valuable information derived from that data. Although not in issue in the proceeding, there must be an open question as to whether the terms of the Regulations authorise MPI to deal with the data as if it was the owner, for purposes going beyond those specified in the Act.

[46] Mr Anderson suggested that Ms Blowes' statement about ownership of the information simply reflected an analysis by MPI of its ability to control the use and custody of the information by agents such as FishServe, who are contracted to receive and collate the information. Supposedly, the statement was included in the affidavit to emphasise that MPI can control what such agents do with the information and insist on appropriate arrangements to protect its confidentiality.

[47] However, even if the legal position is that the terms on which fishers are required to share such information with MPI do not amount to a loss of property, compliance with the Regulations does involve a risk of diminution in the value of that property, with management of the risk being beyond the fishers' control and arising on terms with no ready avenue for compensation.

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30 GPR Circular, cl 13(2).

[48] To that extent, Mr Marten is justified in characterising the Regulations as having the effect of prejudicing the value of fishers' intellectual property that has thus far been closely guarded as secret by inshore fishers.

CFW's submissions

[49] Mr Marten submitted that the transfer of fishers' property represented by the Reporting Regulations in conjunction with the GPR Regulations is not authorised by Parliament as:

(a) It is contrary to the purpose of the Act, which is to provide for utilisation of the fishery to promote fishers' economic well-being. These measures threaten that well-being by having the property converted into the property of the Crown, or at least forcibly shared with the Crown, where it can then be inadvertently or deliberately delivered to other parties.

(b) In part, the Act is dedicated to setting out a detailed property management regime for fish as a resource. It does not set out a property regime for the knowledge of where fish are. While MPI had well-meaning sustainability goals in mind in introducing this regime, it has not been given permission by Parliament to take this valuable property from fishers.

[50] In summary, CFW submitted that while the Act's regulation-making powers are detailed, it is submitted that they cannot be used in a way that impacts on fishers' property and livelihoods in such a way. The package of Reporting Regulations and GPR Regulations, along with their Circulars, are, in that current format, ultra vires the Act.

MPI response

[51] MPI acknowledged that there is a common law presumption against legislative expropriation of private property rights without compensation. However, Mr Anderson submitted that it is not uncommon for legislation to encroach upon the

rights of individuals to some degree. He cited the Resource Management Act 1991 as an example, which contains a "coherent scheme in which the concept of sustainable management takes priority over private property rights".[31] Mr Anderson submitted that the Act clearly contemplates the collection of detailed information to assist decision-makers in providing for sustainable utilisation.

[52] Mr Anderson argued that provision of information to the level of specificity and detail required by the GPR and Reporting Regulations and associated Circulars does not amount to either an expropriation of private property rights, or undue impact on those rights, it being no different to other statutory schemes (including regulations) which create a duty for commercial operators to provide certain information. Collection of this information by MPI does not alter the nature of any intellectual property rights held by fishers, nor their ability to exercise those rights. MPI does not propose to publish or release the information collected at a level of detail that would undermine those interests. It is not a competitor in the fishing industry and the information is to be used for fisheries management purposes.

[53] Mr Anderson submitted that CFW's concern about claimed security risks arising from the electronic collection method and storage of information relies on a misconception that digital data is somehow less secure than hard-copy information, and on unsubstantiated allegations that information is likely to be intentionally or inadvertently disclosed to third parties. MPI's position is that, as with other commercially sensitive or private personal information and data held by the government, methods of collection, storage and the ability to use such information and data are subject to detailed requirements and processes. Those are reviewed frequently to ensure they operate effectively. Accordingly, CFW's allegations in relation to security concerns should not be relevant to this Court's assessment of the vires of the Regulations.

Analysis

[54] I accept that the fishers have an intangible property right in their marks. I also accept that there is a credible risk to the security of that property once it is conveyed

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[31] *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 633.

in compliance with the Regulations and therefore an unquantifiable risk of diminution in value of that property by disclosure, in whatever circumstances, to third parties able to take advantage of it.

[55] It is to be hoped for all involved that this risk is relatively low, but MPI's assurances of its security on what amounts to an "all care and no responsibility" basis cannot remove the credible risk that CFW has claimed.

[56] In this regard, I take judicial notice of publicised unintended disclosures in comparable circumstances by Crown agencies such as Inland Revenue of individual taxpayers' details, and primary healthcare providers' disclosure of patients' confidential medical records. Mr Anderson reasonably conceded that, however comprehensive the security arrangements, no system is failsafe.

[57] In assessing the extent of the risk of harmful disclosure, it is inappropriate to speculate on the extent to which control of the data collection process by large-scale fishing companies whom CFW sees as their competitors increases this risk to their members' intangible property. It is, however, understandable that the participation by those large fishing entities increases the level of risk as perceived by CFW members.

[58] The closest analogy suggested by MPI is the requirement under the Crown Minerals Act 1991 and its regulations for those granted mining licences of various types to report to Crown Minerals[32] on results of prospecting, exploration and mining of the Crown resource. The results of those activities, which involve a substantial commitment of capital, comprise intellectual property of real value. Unlike the fishers' reported details, holders of permits under the Crown Minerals Act know in advance that much of the data they are required to report to Crown Minerals will then be publicly available.

[59] The analogy with the obligation to provide commercially sensitive details to a Crown agency will be closer for fishers only commencing operation after the Regulations apply to their activity because they will have committed to the business on notice of that reporting requirement. The position is somewhat different for

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[32] Currently New Zealand Petroleum & Minerals.

existing fishers who have committed to their businesses on a basis that their secret marks were not required to be disclosed at all. For them, application of the Regulations constitutes a previously unforeseen business risk.

[60] Reflecting on all the concerns raised in CFW's affidavits and Mr Marten's submissions relying on them, I would not accept that the requirements for provision of more detailed information amounts to an expropriation of the fishers' property. I do, however, accept that it would involve a threat to the value of that intangible property, conceptually at least diminishing its value to an extent that experts would no doubt find difficult to quantify, if they could at all.

[61] Expropriation of such private property or exposing fishers to the risk of diminution in its value is, of course, not a purpose of the challenged Regulations, but rather a consequence of their application.

[62] The issue of vires is to be considered by comparing the content of the Regulations against the scope of the empowering provision in the Act. I accept the submission for MPI that the content of the Reporting Regulations is authorised on the literal terms of ss 297(1)(a)(viii), (d), (h), (y), 297(2) and 304. The Act authorises the making of regulations regarding the use of any kind of equipment or device related to fishing, and the chief executive may require the provision of any information reasonably required for the purposes of the Act. The sustainability and utilisation of the fisheries resource are among the purposes of the Act. Information regarding where and in what quantity specific fish or seafood are being harvested is reasonably necessary for the effective stewardship of this resource. How that information is gathered, and the extent of detail required, is also left to be determined by the Executive, with the Act providing that circulars may be issued specifying in greater detail how those matters are to be achieved.

[63] At the level of detail below the provisions in the Reporting Regulations, reg 47 provides that circulars can specify, inter alia:

- the manner and form in which a report must be completed, including how locations must be identified and the units of measurement that must be used; and

- technical requirements for electronic reporting, including the devices and software used to complete and provide the reports.

[64] So far as the GPR Regulations are concerned, I similarly accept Mr Anderson's submission that, in literal terms, they are authorised by the same provisions in s 297 as well as s 297(1)(e), and again s 304.

[65] It is tolerably clear from the documents created in the course of reviewing the need for an improved monitoring and reporting system, and in particular the "Future of our Fisheries" consultation documents, that the new regulations addressed a need to provide verifiable, accurate, integrated and timely data on commercial fishing activities. That purpose is consistent with the overall purpose of the Act and I therefore find that the empowering provisions do extend to the promulgation of regulations and circulars that have that purpose.

[66] Mr Anderson submitted that no taking of property would occur from the application of the Reporting and GPR Regulations. Further, even if there was a taking of property, the common law presumption against a power to do so without paying compensation would not extend beyond compulsory taking of interests in real property.

[67] Mr Anderson invited analogy with the Supreme Court's decision in *Waitakere City Council v Estate Homes Ltd*.[33] That litigation involved a challenge by the developer of a subdivision to the imposition of a condition of consent to subdivide requiring the developer to transfer land to the local authority for roading purposes, beyond the immediate roading requirements for the proposed subdivision. The Supreme Court held that where a lawful condition on a subdivision consent required the giving up of land in exchange for the right to subdivide, no expropriation or taking will be involved and the common law presumption of interpretation would not apply

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33 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149.

to the empowering legislation. The remedy for a landowner in such circumstances would be to seek invalidation of the condition in the courts.[34]

[68] The Supreme Court observed that the absence of a choice about alternatives for a landowner must be present before the principle of statutory interpretation that there should be no taking of property without compensation would apply. The option in the resource management context is for the developer not to transfer the land, and instead to reject the consent on the conditions offered. The effect of that analysis is that regulatory interference with property rights does not amount to expropriation.

[69] I am not satisfied that the consequence of creating a risk to the value of fishers' intangible property impacts on the achievement of the statutory purposes or is inconsistent with them to an extent that might make such regulations ultra vires the Act. As with the analogy to resource management, rights to privately owned intangible property are not inviolate and, where Parliament has appropriately provided for it, delegated legislation can have adverse impacts on such property interests and nonetheless be intra vires the empowering provision. In the course of carrying out the regulated activity of commercial fishing pursuant to an Annual Catch Entitlement, fishers apply their intangible property subject to presumptively lawful conditions on which the regulated activity is to be conducted. Not only is there no taking of that property, but they have the option not to submit their property to the risk of diminution in its value by not applying that knowledge when carrying out regulated fishing activities. Although this analysis is unpalatable, it is the legal response to their claim that the Regulations, in imposing more stringent reporting requirements, should be declared ultra vires because they involve the taking of, or interference with, intangible property rights.

Challenge to EM Regulations: Ultra vires because of breach of privacy rights

[70] CFW members treat the prospect of constant video monitoring of their fishing operations as an unacceptable breach of their rights to privacy. It is argued that the definitions of "fishing" and "transportation" in s 2 of the Act are such that, under the

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34 *Waitakere City Council v Estate Homes Ltd*, above n 33, at [48].

EM Regulations, cameras would rarely be turned off. Mr Marten characterised the prospect as an existential threat to their way of life.

[71] Concerns expressed in affidavits in support of the application are unapologetically emotional in expressing sentiments such as that video monitoring would engender a "Big Brother" feeling, and having Big Brother on board would make them dread going to sea. Fishers state that they are not criminals and constant monitoring conveys the impression that MPI is monitoring their activities until they can get evidence of alleged offending.

[72] One of the deponents lives on his vessel permanently, and others spend extended periods on their boats, with fishing activities interspersed with private family activities. To varying degrees, they carry out daily routines, including bathing and toileting, in areas that would be recorded on a video monitor because they take place in the same areas as fishing activities. Deponents express a love of the lifestyle which they consider will be ruined by the intrusion of video monitoring. One observes:

> Even a person on home detention does not have a camera trained on them in their own home, but MPI wants me to have one watching me in the place I work and live.

[73] The May 2017 MPI regulatory impact statement on the consequences of introduction of such an electronic monitoring system recognised the prospect of an unquantifiable extent of rationalisation being caused.[35] It recognised that fishers may exit the industry either because they were unable to afford the technology or because they were opposed to its deployment on their vessels. The observation is made because the prospect of rationalisation is a gap in the information available when considering the overall impacts of the proposed scheme. The regulatory impact statement, as Mr Anderson pointed out, does not express a view whether causing such rationalisation is perceived by MPI as advantageous or disadvantageous.

[74] Notwithstanding that point, CFW finds the prospect of MPI persisting with the introduction of an electronic monitoring system as hurtful, when it is recognised that it is likely to cause a material measure of rationalisation among its members.

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[35] Ministry for Primary Industries *Integrated Electronic Monitoring and Reporting System: Regulatory Impact Statement*, above n 8, at 1.

The enabling provision in the Act

[75] Amendments to the Act in 2014 included the introduction of s 227A, which provides:

> **227A Installation and maintenance of equipment on vessels may be required**
>
> The chief executive may require, in relation to any vessel, that specified equipment to observe fishing and transportation be installed and maintained on the vessel in accordance with regulations made under section 297(1)(ca).

[76] The same amendment added subs (ca) to s 297(1) which, for the sake of convenience, is repeated at this point:

> (ca) prescribing requirements or matters relating to the installation and maintenance of equipment (including electronic equipment) to observe fishing or transportation, and to the payment of any associated prescribed fees and charges:

[77] The detail of how the electronic monitoring system is to work is intended to be specified in a circular, but none has thus far been issued.

[78] As the current Minister has deposed, the EM Regulations promulgated in 2017 came into force on 1 October 2018. However, in an amendment regulation, the government amended the first date on which the vessels were to comply to 1 August 2019, with Cabinet appreciating that that was very much a holding position. The Minister's affidavit states that the government is committed to considering onboard cameras once other policy questions have been addressed, and that the government will not require onboard cameras to be installed until it is practical for fishers to comply with the EM Regulations with available technology. During the course of argument, Mr Anderson advised that Cabinet had that day extended the presently intended date for the EM Regulations to come into force to 1 November 2019, with the prospect of staged introduction through various categories of fishing vessels from that date.

Challenge grounds

[79] Mr Marten advanced four grounds for challenging the EM Regulations. The first was that they are ultra vires the Act. Mr Marten did not argue that the Act would

not permit the making of any regulation placing a camera on a fishing boat but rather that, at a general level, passive electronic surveillance of fishing is prohibited, absent a much clearer signal for Parliament.

[80] Mr Marten submitted that the legislature's placement of the new s 227A in Part 12 of the Act, which provides for the "Observer Programme", signals that Parliament contemplated it was to address the powers and obligations of MPI observers when they are on board fishing vessels. He urged an interpretation that s 227A was to provide individuals observing on fishing vessels with additional tools by having equipment installed on the vessels to assist them. Such an interpretation was said to be consistent with the New Zealand Bill of Rights Act 1990 (NZBORA) and therefore to be preferred.[36] It would follow that the new section authorised only the installation of equipment on vessels where observers were present.

[81] I am satisfied that Parliament did not intend any such constraint to arise implicitly from the placement of s 227A within the group of sections headed "Observer Programme". The section contemplates a general power for the chief executive to require the installation of specified equipment to observe fishing operations and there is no basis for narrowing that power to circumstances in which observers are present on vessels. An aspect of Mr Marten's argument urged that the use of the verb "observe" contemplated human involvement, but that does not help in confining the power granted by s 227A to circumstances where human observers are physically present on vessels. A rationale for electronic monitoring is to enable more efficient human observation from a distance.

[82] When the terms of s 227A are considered in light of the contemporaneous re-casting of the breadth of the regulation-making power in s 297(1)(ca), it is clear that the power was created to authorise requirements such as those now challenged.

[83] The second argument is that the EM Regulations are ultra vires the Search and Surveillance Act 2012 (the SSA). Mr Marten argued that regulations dealing with surveillance under the Act must conform with requirements specified in the SSA. Mr Marten relied in part for that proposition on the schedule to the SSA listing powers

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[36] NZBORA, s 6.

in other enactments to which all or parts of Part 4 of the SSA were to apply. That part of the SSA contains general provisions in relation to search, surveillance and inspection powers, including the need for warrants, the mode of carrying out search powers, constraints on surveillance and respect for privilege.

[84] However, the requirement for compliance with Part 4 of the SSA is confined to ss 199, 199A, 200 and 207 of the Act. Those all appear in a separate part of the Act that provides for powers of entry, search and questioning. These enforcement functions under the Act are quite discrete. The sensible legislative cross-reference to constraints generally applying under Part 4 of the SSA cannot bear on the permissible scope of regulations made under the different part of the Act dealing with monitoring fishing activities. The sections in the Act listed in the schedule to the SSA are all framed in terms contemplating consistency of processes, for instance as to the requirement to apply for a warrant to undertake surveillance or seizure in an enforcement role. There is no legislative, or indeed logical, rationale for requiring the same constraints to apply to the monitoring systems provided for under the Act.

[85] The third ground for challenging the EM Regulations is that they are inconsistent with the right confirmed by s 21 of NZBORA. That is:

> … the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[86] Mr Marten's argument on inconsistency with this provision of NZBORA depended on the premise that it was beyond argument that a video camera attached to, and filming, private property at the State's insistence would constitute a search for the purposes of s 21.

[87] This basic proposition was challenged by Mr Anderson. He submitted that for an activity to constitute a search for the purposes of s 21, it needed to infringe a reasonable expectation of privacy so that the person complaining of an infringement of a right to privacy must have a subjective expectation of it being maintained. The subjective expectation must be one that society is prepared to recognise as being reasonable. It follows from these qualifications that s 21 does not provide a general protection of personal privacy.

[88] Both counsel relied, for their competing positions, on observations by the Supreme Court in its decision in *Hamed v R*.[37] Mr Marten cited Elias CJ's characterisation of s 21 as protecting:[38]

> … personal freedom and dignity from unreasonable and arbitrary State intrusion. … The right protects privacy but, more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents. It describes a "right to be let alone". …

[89] Mr Marten also sought analogy with the observation of Blanchard J that the section recognised citizens' "right to go about their lives free from the prying eyes of the state".[39]

[90] Limits on the relevance of the reasoning in *Hamed* in the present context are exemplified by the following extract from the reasoning of Blanchard J:[40]

> [161] In the White Paper which preceded the Act and contained a draft of it, the purpose was said to be to apply the protection against unreasonable search or seizure not only to acts of physical trespass but to any circumstances where state intrusion on an individual's privacy was unjustified. It was intended to extend to forms of surveillance. In his important judgment in *R v Jefferies* Richardson J remarked that the test of unreasonableness requires consideration of the values underlying the right and a balancing of the relevant values and public interests involved. The Supreme Court of Canada had said in *Hunter v Southam Inc* that an assessment must be made:
>
> > ... as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.
>
> After quoting that passage, Richardson J identified that the guaranteed right under s 21 reflects an amalgam of values: property, personal freedom, privacy and dignity. As with the equivalent provisions in the United States and Canada, the touchstone of the section is the protection of reasonable expectations of privacy. The affirmation of a protection against unreasonable search or seizure is not, however, a guarantee of a "reasonable" expectation of privacy. On the other hand, nor is it a source of power for the state. Section 21 does not empower the state to make reasonable searches. The lawfulness of a search must be established elsewhere, either by the existence of a valid warrant or by the invocation of a statutory provision empowering search without warrant, such as s 18(2) of the Misuse of Drugs Act 1975, or by pointing to an express or implied licence justifying what was done.

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37 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.
38 At [10] (citations omitted).
39 At [191].
40 Citations omitted.

[91] Importantly, the analysis focuses on covert surveillance and searches undertaken for the purposes of law enforcement. The balance between the interests of individuals in respect of their privacy and the purposes of the State mandated by legislative provisions is influenced by the nature of that statutory purpose and the context in which the intrusion into privacy occurs.

[92] I am not persuaded that regulations requiring fishers to install and operate devices to electronically monitor their fishing activities will per se constitute the conduct by MPI of a search that is unreasonable in terms of s 21 of NZBORA. The monitoring activity is not covert, and fishers know that compliance with this regulatory requirement is, in effect, a condition precedent to their continuing to fish lawfully in terms of their Annual Catch Entitlements. However unusual, or even exceptional, it is for a system to monitor work activities in private places, its reasonableness is to be assessed in context. Fishers are exercising a regulated privilege to take a resource that is of national significance, and the sustainability of which is a matter of real importance in preserving New Zealand's future resources.

[93] However, that is not to dismiss the prospect that insistence on the use of the devices may raise the spectre of unreasonable search. For example, it could become unreasonable in circumstances that fail to discriminate between a record of fishing or transporting activities, and the conduct by fishers in small-scale operations of non-commercial and personal activities. Despite fishers having to concede the reasonableness of intrusion into their privacy rights to the extent necessary to carry out the statutory purposes, that does not require a concession that MPI has carte blanche to observe everything.

[94] For present purposes, however, I am not persuaded that the vires of the EM Regulations can be challenged by arguing that they are inconsistent with the right recognised in s 21 of NZBORA.

[95] I agree with the analogy Mr Anderson drew with the approach of the Supreme Court of Canada:[41]

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[41] *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 (SCC) at 507 per La Forest J.

> [T]here can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.

[96] Mr Marten's fourth ground of challenge to the EM Regulations is that, as they stand, they are ultra vires on account of lack of sufficient certainty. On the one hand, CFW criticised MPI for lack of clarity in the long delay in producing any circular that it is contemplated will supplement the terms of the EM Regulations by specifying details of the equipment and other operational matters. Arguably, there is an unreasonable delay in those affected by the Regulations being advised of the detail of what will be required to comply with them. On the other hand, Mr Marten relies on the lack of detail that would otherwise be provided in the circular to argue that the EM Regulations as they stand are therefore ultra vires on the ground of uncertainty.

[97] Mr Marten invited analogy with the Court of Appeal decision in *Official Assignee v Chief Executive of the Ministry of Fisheries*.[42] In that case the level of generality in a regulation relating to scampi catch entitlement was held to be ultra vires as its lack of detail left the chief executive with a discretion to allocate individual catch entitlement, effectively without constraint or guidance on how that discretion was to be exercised. The Court of Appeal observed:[43]

> The rights involved are too valuable and the allocations are too far-reaching in their effect for this Court to safely assume that silence on these matters would satisfy Parliament's intent.

[98] In that case, the level of detail was insufficient to bring the terms of delegation within the intention of Parliament when the Act provided for such conduct to be specified in regulations. In the present case, even without the contemplated operational circular, I am not satisfied that there is a gap between the parliamentary intention as expressed in the sections providing for this aspect of the fisheries monitoring system, and the terms of the EM Regulations requiring vessels to carry the equipment, which could justify a finding that the EM Regulations fall outside Parliament's intention.

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42 *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722 (CA).
43 At [82].

[99] More relevantly, whether a regulation in the present terms is intra vires the empowering provisions cannot be determined where the terms contemplate further detail in a circular, which is to be provided before compliance is required with the Regulations. On this argument, CFW can do no better than reserve its position to renew the challenge if, once the circular is promulgated, its members consider it leaves scope for argument that the combined detail is insufficient to establish that the EM Regulations and circular sit within the parliamentary intention, as reflected in the purpose of the empowering Act.

[100] In the course of argument, Mr Marten explained the quandary confronting his client as to the point at which it brought its challenge by way of application for judicial review. Given the delays that have been incurred, it is understandable that CFW would bring the proceeding at the stage it did. However, the fact that delays in settling the terms of a circular create a quandary for CFW cannot alter the analysis as to whether the EM Regulations as promulgated are intra vires the empowering provision in the Act.

[101] More positively, the delay in implementation of the Regulations signals the prospect of MPI being amenable to further dialogue with fishers' interests on the detail of how they are to apply. The application for judicial review did not challenge the vires to create the EM Regulations on the ground of unreasonableness of their content. However, I did hear argument on the alleged unreasonableness of MPI's expectations.

[102] One focus of these arguments was the apparent insistence that, in applying the GPR and Reporting Regulations, the data is to include the location in longitude and latitude to four decimal places. The previous standards required less precise reporting to either a single decimal place or two decimal places. The consequence of this difference is that the location of fishing activities would be accurate to approximately 11 metres, rather than approximately 1.1 or 11 kilometres. That difference is critical in the data revealing the location of fishers' marks.

[103] On the available evidence, it was not apparent that this greater level of detail was necessary for at least the majority of the purposes for which MPI gathers the data. Issues of proportionality may also arise, balancing the smaller size of CFW fishers'

catches against the relative importance to them of the precise locations for the most efficient operation (when compared with much larger fishing operations). When balanced against the risk that disclosure of this greater level of detail creates for fishers' marks, there appears to be scope for refinement to minimise the circumstances in which fishers are required to provide that close level of detail.

[104] In short, in terms of dealings between MPI and fishers' interests, the complaint about the lack of detail that is yet to be provided in circulars may be counter-productive. My impression was that there may well still be opportunities for refinement of the detail to ameliorate the causes of the most acute of the fishers' concerns.

Outcome

[105] None of the grounds of challenge to the vires of the Regulations can be made out.

[106] I recognise the prospect, conceptually at least, on the last ground of challenge I have considered that CFW may consider it has grounds for renewing that challenge once the terms of the EM circular is promulgated. I accordingly do not finally determine the proceedings, but expect an objective analysis of whether the nature and extent of detail in that circular leave any scope for further argument, in light of the reasoning on all other points in this judgment.

Costs

[107] Both parties have sought costs in the event that they succeed. My provisional view is that, in the absence of any subsequent arguments altering the eventual outcome, the respondents are entitled to costs.

[108] Whilst it is also my provisional view that CFW would have difficulty making out a public interest element to their proceeding so as to reduce the extent of their costs liability, I am persuaded of the genuine and heart-felt nature of their concerns at the life-changing consequences of the enforcement of the Regulations they have sought to

challenge. That feature of the proceeding may warrant a reduction in the costs to which the successful respondents would otherwise be entitled.

Dobson J

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