



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Fisheries Judicial Review Application Dismissed

An application for judicial review of the Fisheries Act 1996 under the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules has recently been dismissed in the Wellington High Court by Judge Robert Dobson.

The application was brought by Commercial Fishers Whanau Inc (CFW), a society representing the interests of smaller operators within New Zealand's inshore fishing industry, against both the Attorney-General and Director-General of the Ministry for Primary Industries.

BJ Marten and MRK Redding acted for the applicant and NC Anderson and DJ Watson acted for the respondents in the May 13 hearing.

CFW's concern related to a series of regulations promulgated in 2017 under the Fisheries Act 1996, which updated reporting requirements for commercial fishing activities to require geospatial position reporting and to facilitate electronic monitoring (EM) of fishing activities.

Claiming these regulations impinged on the property and privacy rights of fishers in a manner that the Act does not permit, CFW consequently sought:

- 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 EM of fishing activities are void on the grounds of uncertainty
- d) costs

In his judgment, Judge Dobson said on the first argument he was 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," stated the May 30 decision.

"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."

On the second argument, Judge Dobson observed that requirement for compliance with Part 4 of the Search and Surveillance Act 2012 (SSA) was confined to specific sections.

“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.”

However, on the third argument, Judge Dobson noted that although detail of how the EM system was to work was intended to be specified in a circular, “none has thus far been issued”.

“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.”

In his summing up, Judge Dobson declared that “none of the grounds of challenge to the vires of the Regulations can be made out”.

However, he recognised 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.”

Although awarding costs to the respondents, Judge Dobson noted the “genuine and heart-felt nature of their concerns at the life-changing consequences of the enforcement of the Regulations” may warrant a reduction in costs to which the respondents would otherwise be entitled.

September 2019

