



A BRAVE NEW WORLD IN FISHERIES LAW

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The 1st October 2001 will mark a major new chapter in New Zealand fisheries law. The 1983 Act will be effectively scrapped, and the Fisheries Act 1996 will finally be launched in all its glory. It is difficult to think of the 1996 Act as a new Act, as its keel was laid down as long ago as 1992. It has been radically re-designed and re-engineered while it was still on the drawing board, and was finally declared finished in 1996, but the Government still wasn't prepared to launch it completely. In the past five years, the 1996 Act has slowly worked its way down the ramp, being introduced into the murky waters of commercial fishing law a section at a time, while all along the policy engineers worked furiously on re-jigging various compartments.

During this time, the old 1983 Act continued to ply its trade, regulating commercial fishing in New Zealand waters. Many cursed the old Act's complications and idiosyncrasies, but we still believed it was the most capable system of its type in the world, besides which we had got used to the way it worked, however imperfectly.

As of 1st October 2001, the 1983 Act will sail into the sunset and we will have to get used to the new régime. The 1996 Act is designed to be more efficient and easier to operate. There will be some fundamental changes in the engine room of the Act, dealing with the Quota Management System. These changes are rather innocuously referred to as "a new catch balancing régime" in the literature. Quota will be allocated as shares, so that the quota owner will own a fixed proportion of the total allowable catch (being "x" number of shares out of

100,000,000 shares for each quota stock). But the most fundamental change under the 1996 Act is to split ownership rights in quota from catching rights. Each year, quota will "spawn" annual catch entitlement (ACE), which will be a freely-traded commodity. If you have any involvement or interest in commercial fishing, you will, if you haven't already, be hearing a lot more about ACE. Leasing of quota will be a thing of the past, and instead you will buy ACE. As the Act stands at present, any permit holder will be able to go fishing for any quota species, provided they have a minimum holding of quota for any quota species (currently set at 5,000 tonnes) without having to have quota in the particular species targeted. If they catch that species, they will have the option effectively of purchasing ACE or paying deemed value. The focus of the enforcement régime will move from criminal sanctions to civil (ie financial) provisions. As part of this civil régime, various arrangements for calculating ACE holdings or deemed value on a monthly basis will be put in place. Deemed value will be assessed on an interim and annual basis. There will be many administrative and legal changes involved in the new system, and many of those changes are still being debated and worked through between the Industry and Government.

Notwithstanding the move to a civil régime rather than a criminal one for the catch balancing aspects, the new Act will in some ways have heavier armament than the 1983 Act, in that as of 1st October 2001 fishers can face imprisonment for breaches of the 1996 Act.

It is fair to say that the 1996 Act and, in particular, the ACE provisions, have caused more than a few ripples with some questioning why the Industry should risk a radical redesign of the quota and catching laws when the 1983 Act appeared to be performing its functions to a reasonable standard. It is the age-old question of tinkering further with an established design to get extra performance out of it, or to implement a completely new system. In any event, it is clear that there will be further fine-tuning to this Act before 1st October 2001, and that also it is inevitable that it will be returning to Wellington on a reasonable regular basis after its first trials for further work.

The above is, of necessity, a highly superficial look at the new régime, designed for the general reader. If you want to find out more about the implications of the new Act and, in particular, the ACE system, then you should contact one of the fishing organisations or professional advisors who have a particular expertise in this area.

MATHERS APPEAL

Addendum to column in previous issue

The conviction of Mr Mathers for permitting a vessel to operate in a manner which caused unnecessary risk has been quashed by the Court of Appeal on the basis that the Presiding Judge gave incorrect directions to the Jury. In summary, the Judge's directions probably would have left the Jury with the impression that it was up to Mr Mathers to prove his innocence, rather than for the Maritime Safety Authority to prove his guilt. The Court of Appeal noted that, given the contested expert evidence, such a change in the burden of proof

could have had a significant impact on the Jury's decision and this made the verdict unsafe. A new trial has been ordered, and the MSA will need to consider whether it proceeds with the trial.

DIESEL

Losses flowing from the diesel which didn't

By now, operators will be over the practical problems caused by the faulty diesel, but may not have recovered from the financial problems caused by the down-time. Given the nature of the problem, those with the smaller vessels will have been hit the hardest. You may have considered legal action to recover your losses, but dismissed it as being beyond your limited means. If operators have suffered losses, they should consider the benefits of joint or representative actions. A representative action is similar to a "class action" which you may have about from America. If a large number of plaintiffs have the same interest in a claim, then their claim can be certified as a representative action, which then proceeds in the name of one representative plaintiff. This saves the cost of individual plaintiffs having to prove their claims, and considerably streamlines the claim process. The difficulty is that all the plaintiffs have to have an identical interest in the claim, and it is very seldom that this occurs. In fact, representative or class actions are very rare in New Zealand. An alternative is a joint action, whereby a large number of plaintiffs can join together to run their cases at the same time. Each individual plaintiff will still have to prove their claim, but many of the legal and expert costs can be shared. If any operators are interested in considering representative or group claims, they should contact a lawyer with experience in the relevant area.