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PART 1

Introduction and Summary

Purpose of the paper	1	The purpose of this submission is to state the Ministry of Fisheries' position on the issues being examined by the Select Committee in respect of management of the scampi fishery.
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Relationships to other material provided to Select Committee	2	This paper continues the process of supplying relevant information to the Committee that commenced last year with the provision of a fisheries management background document and overview chart on the 20 th of December. A background fisheries compliance document will also be provided to the Committee along with this submission. Documents which provide more detail to address the seven terms of reference set out by the Committee will be provided at the time of the Ministry of Fisheries (MFish) first appearance before the Committee on 10 February.
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Structure of the paper	3	The paper is in three parts: Part 1; Introduction and summary Part 2; The main issues relevant to the Inquiry, and discussion and analysis to support the MFish response Part 3; Papers providing detailed analysis of issues encompassed in Terms of Reference 4 and 6.
	4	This structure has been chosen, and the papers drafted, with the intention of allowing an issue to be addressed at different levels of detail, from a high-level overview to a detailed analysis.
	5	A key feature of this approach is the categorisation of "issues" that analysis and response can be built around. The relevant issues were defined by reference to the requirements of the Terms of Reference, and after considering the allegations contained in the <i>Assignment</i> programme, and the original affidavits that triggered the Chief Executive's enquiry.
	6	The MFish approach to categorising issues has been to: i distil out the main issues that derive from the seven Terms of Reference ii group those issues into categories for the purpose of effective analysis. The four categories chosen were: a. allegations of corruption [covering Terms of Reference 6]

	<ul style="list-style-type: none"> b. treatment of staff [covering Terms of Reference 4] c. compliance [covering Terms of Reference 5] d. fisheries management [covering Terms of Reference 1 and 7] e. fisheries administration [covering Terms of Reference 2,3,6 and 7]
Issues of substance are addressed in this paper	<p>7 In some cases the lack of information to support assertions (either in affidavits provided by Mr Penwarden or the <i>Assignment</i> programme) made it difficult to formulate a response. More specific and detailed information will need to be provided before a response can be generated to these issues.</p> <p>8 The list of issues, and the accompanying responses, are preliminary, based on the information known to MFish at this time. If additional detail is provided in the course of the inquiry, MFish will endeavour to locate and present additional information to assist the Committee.</p>
MFish is committed to support the Committee to resolve these issues	<p>9 The allegations and assertions arising from the affidavits provided by Mr Penwarden and the <i>Assignment</i> programme are serious. They have already had adverse impacts on MFish staff and its work programme. They must have started to undermine the confidence of the Parliament and the public in MFish, and in the fisheries management regime itself. The integrity and credibility of the organisation enforcing the rules is critical to the effectiveness of any compliance regime. Restoration of confidence in the policy settings and administration of fisheries management is important for New Zealand. Until these issues are addressed, MFish cannot operate effectively. For these reasons it is important that the Committee considers and resolves these issues.</p> <p>10 More specifically, the current situation in scampi fisheries management means that the full benefits of the fishery cannot be realised. MFish welcomes the opportunity to assist the Committee in resolving these issues, to ensure that the full social, economic, and cultural benefits of operating the fishery under the QMS can be achieved.</p>
MFish approach to the inquiry	<p>11 MFish will support the Committee's Inquiry with professionalism, integrity and openness. MFish's intention is to make available all relevant information. Our staff will provide whatever explanation and assistance is required to assist the Committee to provide a comprehensive and accurate report in accordance with the Terms of Reference. Where MFish considers information should either not be disclosed or should be disclosed subject to qualification, that fact, and the reasons for it will be made known to the Committee.</p>

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- 12 The period to which the Inquiry relates extends from the late 1980s to the present, during which time the former Ministry of Agriculture and Fisheries (MAF) and MFish have undergone significant organisational change, and staff turnover has occurred, to the extent that current staff do not have full knowledge of the events covered by the Terms of Reference. The MFish staff supporting the Committee will have a good knowledge of the documentary record, and therefore the events under review but, will not have detailed personal knowledge of all of the issues.
- 13 MFish's analysis has been undertaken with the objective of ensuring that all of our analysis and conclusions can be substantiated from material held within our systems. The steps in the process included:
- i identifying, collating and listing relevant documentation and objects held by MFish
 - ii using the material to reconstruct events referred to in the affidavits - chronologies have been prepared for all inquiries involving the scampi fishery, and related matters
 - iii preparing responses to the Committee's Terms of Reference.
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Context within which the inquiries take place

- 14 The first scampi fishing occurred in the 1970s. The first specific management steps were taken in the late 1980s and have continued through to late 2002. Over that same period extensive legislative amendment has taken place, MAF and MFish have been restructured, the Fisheries Deed of Settlement was negotiated and implemented, and a substantial number of species have been introduced into the QMS. These events are complex and overlapping. To assist with the context of various decisions and measures for scampi, and how they relate to the wider fisheries management actions, a flow chart has been constructed summarising the main events in New Zealand fisheries management and the scampi fishery. This flowchart was provided to the Committee on 20 December 2002. It is also attached at Annex 1.
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Fisheries management decisions are often contentious

- 15 The activity of fisheries management can be broadly summarised as setting the conditions under which persons can harvest fish, in order to ensure that such harvest can continue on a sustainable basis. This process inevitably involves intervening in i.e. controlling fishers' activities, and such intervention imposes costs on those affected. It follows that fisheries management often generates conflict between managers and fishers, and also between fishers, in respect of the nature and quality of decisions relating to harvest access

Where decisions concern the allocation of a limited amount of very valuable quota, the process can become very contentious because of the long-term effects on individuals and their fishing activities.

Scampi fishery

- 16 The first reported domestic scampi catches of significance were taken in the 1987/88 fishing year (15 tonnes in SCI 1 and 5 tonnes in SCI 2). The total combined commercial catch limit for scampi in 2000/01 fishing year was 1,136 tonnes. There are currently 8 scampi permit holders. During the 2000/01 fishing year these permit holders landed a total of 870 tonnes of scampi. The fishers currently operate using 19 vessels in the fishery (up from 12 boats in 2000/01 and 15 in 2001/02).
- 17 Introducing scampi into the QMS involves the allocation of quota between commercial fishers, Maori and government. The value of the quota likely to be allocated in the fishery is estimated at \$100 million. Based on current legislation existing fishers are likely to receive over \$60 million of this quota, Maori will receive \$20 million, and the remaining \$20 million will be allocated to the Crown.
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Summary of MFish response

- 18 The paragraphs below set out the key issues arising from the Terms of Reference established by the Committee and have regard to the allegations contained in the *Assignment* programme, and the affidavits provided by Mr Penwarden that triggered the Chief Executive's inquiry into alleged corruption. The key issues are set out in the five categories developed by MFish.
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Allegations of corruption

Summary of MFish responses:

- the allegations were first made public after the Minister declined to meet with an individual fisher
 - the two named senior managers from MFish have stated their innocence and called for a full investigation by a competent authority
 - the Chief Executive took the allegations very seriously and made efforts to obtain the allegation material
 - the Serious Fraud Office considered the allegations did not provide a basis to commence an investigation
 - the subsequent review by an independent Barrister found the allegations lacked merit
 - the Chief Executive did not release the Barrister's reports for valid reasons, but is now disclosing the reports to the Committee
 - the Chief Executive welcomes the inquiry and is confident it will dismiss the allegations once and for all.
-

Treatment of staff

Summary of MFish responses:

- during his employment with MAF, questions were raised about Mr Nalder's performance as a manager
- Mr Nalder was investigated on two occasions for misconduct and was reprimanded, and subsequently removed from his existing position
- there is no evidence that Mr Nalder was removed from his role due to his inquiries into Simunovich
- the process that examined Mr Nalder's work performance led to his resignation
- Stan Crothers was not one of the decision makers in the process that led to Mr Nalder's resignation.
- the settlement negotiated by Mr Nalder's barrister with MAF was based on Mr Nalder's employment contract.

Compliance

Summary of MFish responses:

- focusing compliance effort on the QMS during the early 1990s was critical for the integrity of the system
 - the difficulty of detecting fisheries offending leads to a trade off between more resources and deterrent penalties
 - compliance was heavily committed to successful large-scale QMS investigations from 1990.
 - scampi was a lower priority for compliance than QMS offending
 - however, compliance was active in scampi fishery during 1990-1992
 - both Simunovich and Barine received compliance attention during 1990-1992
 - the Ministry rejects allegations that compliance initiatives advantaged Simunovich and disadvantaged Barine
 - the decisions to discontinue compliance initiatives were rational and not made for improper reasons
 - Stan Crothers was not responsible for the discontinuation of compliance initiatives
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- Dave Wood was not responsible for diverting resources from a proposed investigation
 - Barry Nalder's investigation files were not lost or destroyed
 - the action taken on Mr Wilkinson's complaints was proper and Barine Developments Ltd's treatment was fair and reasonable
 - the action taken on an undersize net report by observers was proper and the treatment Barine Developments Ltd received was fair and reasonable
 - there is no evidence to substantiate the inference of favouritism or inappropriate compliance actions.
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**Fisheries
Management**

Summary of MFish responses:

- the QMS is the preferred fisheries management regime for scampi
 - to implement the QMS, the Crown must make the initial allocation decisions
 - use of catch history for quota allocation leads to a focus on past management decisions
 - system capacity and litigation have led to significant delays in the introduction of scampi
 - where the Courts have identified shortcomings in management and made a specific direction, MFish has implemented an appropriate response
 - to achieve introduction, legislative provisions were implemented to validate past management decisions and to limit challenge of them
 - individual catch entitlements should be used to manage a fishery, but not for the purpose of effecting an allocation different than would be achieved by using the catch history criteria in the Act
 - for species currently proposed for introduction, changing catch history years from 1990/91-1991/92 would have significant implications.
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**Fisheries
administration**

Summary of MFish responses:

- permit decisions are challenged where they establish future quota rights
 - the scampi litigation has raised a number of concerns about scampi administration decisions
 - MAF permitting policies prior to 1990 for scampi were inconsistent
 - management decisions in 1991 attempted to rectify previous inconsistent actions
 - scampi decisions initially focused on ensuring sustainability
 - after considering allocation options, individual catch entitlements were applied in fully developed fisheries
 - after consideration by Parliament, permitting decisions made before 1992 were validated by legislation
 - responses to the concerns raised by permit holders
 - the use of prior years to establish any catch history is normal fisheries management practice
 - inconsistent permitting decisions in 1989/90 and 1990/91 were addressed under the national scampi management regime
 - vessel decisions have been made consistently since 1991
 - there was no obligation on MAF to advise that special permits could allow scampi fishing
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PART 2

Part 2A - Allegations of Corruption

Terms of Reference	19	Terms of Reference 6 for the Primary Production Select Committee inquiry is <i>“To investigate and determine whether any allegations made regarding maladministration in relation to the scampi fishery were made for proper reasons, and whether they were dealt with appropriately.”</i>
	20	MFish has interpreted “maladministration” as covering the allegations of corruption contained in the material provided by Barine Developments Ltd and Ocean Law New Zealand against two senior managers of MFish.

Allegations first made public after the Minister declined to meet with an individual fisher	21	The allegations of corruption arose publicly after an individual fisher (Barine Developments Ltd) wrote to the Minister of Fisheries wanting to discuss <i>“... options that will progress the introduction of a fair access regime for scampi ...”</i>
	22	The Minister of Fisheries declined to meet with the fisher to discuss future scampi management measures and urged the fisher to convey any information supporting the allegations of decision making lapses and possible collusion in the management of scampi to the Chief Legal Advisor of MFish.
	23	The allegations of corruption were subsequently made in the House by the Rt. Hon. Winston Peters and an anonymous briefing note was circulated.

Two senior managers stated their innocence	24	The two MFish senior managers, who were named in the anonymous briefing note, named themselves publicly, stated their innocence and called for a full investigation of the allegations by a competent authority such as the Serious Fraud Office (SFO) or the Police.
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Chief Executive took allegations seriously	25	The Chief Executive took the allegations very seriously and made all efforts to obtain a copy of the allegation materials. Despite all efforts, the materials were not made available for some time.
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Serious Fraud Office considered the allegations did not provide a basis to investigate	26	The SFO then received a complaint of allegations of corruption within MFish (and its predecessor).
	27	The SFO reviewed the allegation materials and found they did not provide sufficient basis to commence an investigation and that it was unlikely that further reliable evidence would become available.

Chief Executive had the allegations reviewed

- 28 After receiving the allegation materials and taking advice from both the Crown Law Office and the State Services Commission, the Chief Executive appointed an independent barrister to review the allegations.
- 29 The Chief Executive took a three phase approach to reviewing the allegations – identifying the nature of the allegations, providing an opportunity for the officials to be heard on the allegations, and if necessary to commence a “wide-ranging” investigation into the allegations.
- 30 After phase two, the independent barrister recommended no further action. The Chief Executive accepted this advice.
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Independent barrister found the allegations lacked merit

- 31 The independent barrister reviewed the allegations, interviewed the officials involved and concluded that the allegations "lacked merit" and need not be further inquired into.
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Chief Executive did not release the barrister’s reports for valid reasons

- 32 The Chief Executive, acting on legal advice, did not release the barrister’s two reports on the basis of legal professional privilege.
- 33 However, following further advice and the announcement of two inquiries, the Chief Executive has decided that the two reports should be disclosed to the Primary Production Select Committee.
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Chief Executive welcomes the inquiry

- 34 The Chief Executive welcomes this Inquiry and is confident that its processes will once and for all dismiss these allegations.
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Part 2

Part 2B - Treatment of Staff

Introduction	35	This part of the submission summarises the key issues relating to the alleged mis-treatment of MAF staff. The Primary Production Select Committee has asked for information about: <i>“All circumstances relating to the treatment of any fisheries inspector, or other Ministry of Fisheries staff or staff of its predecessor with respect to the scampi fisheries including any suspension or termination payments”.</i> It has been determined for this submission that the only staff member to whom this Terms of Reference applies is Barry Nalder.
Background	36	This submission is based on substantiated information contained in various files available to MFish.
	37	Mr Nalder was employed by MAF in September 1989 as the District Compliance Manager Tauranga.
Questions raised about Mr Nalder’s performance as a manager	38	At times questions were raised about his performance as a manager. In April 1993 he received a verbal warning as a result of him making verbal personal criticisms about a colleague.
	39	In late October 1992, Mr Nalder went on extended sick leave. It was subsequently agreed that it would be in Mr Nalder’s best interests if he was transferred to Auckland, and in March 1993 he assumed the role of Senior Investigator in Auckland.
Mr Nalder investigated on two occasions for misconduct	40	Mr Nalder was investigated on two separate occasions for misconduct concerning procedural irregularities during Operation Buster. The first related to the engagement by Mr Nalder in August 1992 of KPMG Peat Marwick and a gross over-expenditure related to their costs. In September 1993 the second investigation related to Mr Nalder altering a Quota Management Return furnished by The Papakura Trawling and Fishing Company, on 21 May 1992.
Result of investigations	41	These alleged instances of misconduct were fully investigated internally. As a result of the first investigation, Mr Nalder received a written reprimand and was required to undergo training in financial management. The second investigation was conducted using an external agency engaged by MAF.

42 After considering the outcome of both investigations, the Director-General of MAF concluded that Mr Nalder:

“...has shown by his actions and comments that he lacks the confidence and judgement required of a senior compliance officer and as such, should be removed from his current position of fisheries investigator. Barry Nalder should be advised of this decision, counselled, and best efforts should be made to find him an alternative position more fitting to his skills and competence”.

No evidence of impropriety by Mr Crothers

43 In his affidavit Mr Nalder alleges:

“ I am convinced that Stan Crothers wanted to get rid of me from the Ministry. I am suspicious that it was because my inquiries into Simunovich were too effective.”

44 Stan Crothers, Manager (Fisheries Compliance), had no line control or authority over compliance districts. Compliance resources were not managed as a nationally integrated business group within MAF. Stan Crothers’ only involvement in the process was to report irregularities (as advised to him by his staff) to the Director of Operations (Fisheries Division) of MAF.

45 The process that led to Mr Nalders’ eventual decision to resign was triggered by concerns about his work performance. The key decision makers in the process that led to the disciplinary action against Mr Nalder and his subsequent retirement were:

- Mr Walshe: Regional Manager North, of the Fisheries Division of MAF
 - Ms Hall: Chief Investigating Accountant National Compliance Unit of the Fisheries Division of MAF
 - Dr Allen: Deputy Group Director of the Fisheries Division of MAF
 - Mr Fergusson: Director of Legal and Financial Services at MAF
 - Ms Hinds: Manager Industrial Relations of the Fisheries Division of MAF
 - Dr Ballard: Director General of MAF.
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**Nalder's
barrister
reached a
negotiated
settlement with
MAF**

- 46 Following the decision to transfer Mr Nalder to a role more suited to his skills, he elected to resign. Throughout the latter stages of Mr Nalder's employment, his interests were represented by a Barrister. There is no evidence of Mr Nalder pursuing a personal grievance against the MAF as he had previously advised that he was considering doing.
- 47 The settlement with Mr Nalder, negotiated by his Barrister, Mr Toogood, comprised a number of elements:
- the Director-General of MAF authorised the payment to Mr Nalder of a non-taxable ex gratia payment of \$13,100 as compensation for humiliation and distress, as provided by section 40(1)(c)(i) of the Employment Contracts Act 1991
 - MAF contributed \$5,000 to legal costs incurred by Mr Nalder on production of an invoice
 - Mr Nalder accepted enhanced early retirement within the terms of his employment contract with effect from 6 May 1994. Normal entitlements applied recognising a total of 26 years and six months public service (amounting to \$67,646.81 gross, \$48,705.70 net)
 - Mr Nalder continued to be paid until 6 May 1994 on which date he was paid 22 days outstanding annual leave.
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Part 2C - Compliance

Introduction	48	This part of the paper summarises the key issues for the compliance business group of MAF/MFish with reference to scampi fishery activity in the period 1 January 1990 – 31 December 1992 and allegations made by Mr Penwarden in his affidavit and in the <i>Assignment</i> programme.
	49	The Primary Production Select Committee has asked for information about: “ <i>The relevant reporting, monitoring and policing of commercial fish catches to ensure compliance with the law with relevance to scampi and by-catch during the period 1990/92.</i> ”
	50	To do this, we need to first explain the wider operating environment and priorities of the compliance functions of MAF at that time.

The QMS required a major change to the compliance approach	51	Introduction of the QMS in 1986 required major changes for the fisheries compliance business group of MAF. The approach to the delivery of fisheries compliance services, the skills of staff and the systems they operated were all re-developed.
	52	MAF had to ensure the QMS was effective at controlling catches. Compliance therefore needed to move away from the relatively simple “game warden” approach of surveillance and apprehension of offenders. The QMS needed a more complex enforcement system of complementary surveillance, monitoring, investigation, analysis and audit.
	53	The full development of QMS investigation and audit skills in compliance teams took some time to develop. A major organisational restructure in 1988/89 resulted in a 55% staff turnover. Recruiting staff and familiarising them with a new and unique system took time.
	54	The compliance business group strategy and priorities, which guided where and how compliance resources should be used, also needed to be focused on those species managed by individual transferable quotas (ITQs) within the QMS.

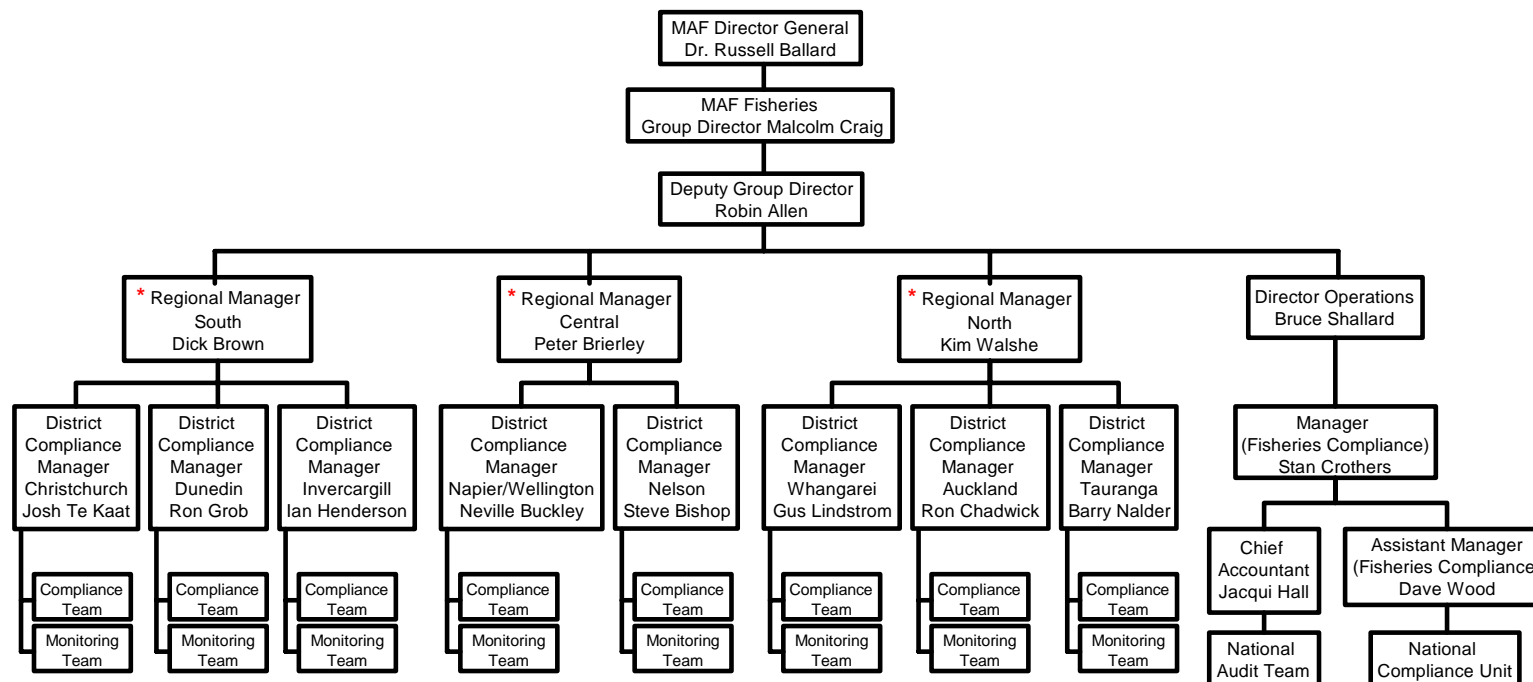
A reporting and record-keeping framework was preferred over dockside monitoring	55	Having compliance staff monitor and verify every landing of fish (“dockside monitoring”) would have been impractical and prohibitively expensive. The fishing industry is geographically spread with many participants and landing points.
	56	The QMS provided industry participants with economic incentives to manage their harvesting activities within their quota holdings. Quota holders and licensed fish receivers were required to report monthly to MAF. MAF would then be able to examine and audit fishing industry records retrospectively to detect offending.

The difficulty of detecting fisheries offending leads to a trade off between more resources and deterrent penalties	57 Any scheme relying on the self-declaration of participants will always have a certain level of unlawful activity. Under this scheme, unlawful acts (eg: fishing without quota, false reporting) are deterred by detection, prosecution and appropriate penalties.
	58 Detecting and therefore deterring fisheries offending is inherently difficult. These difficulties can be dealt with either by increasing resources, so that the chances of being caught are higher, or by severe penalties. Even if the chances of being caught are low, the consequences of being caught are then severe.
	59 The QMS was introduced without additional compliance resources (116 staff in 1986, 114 staff in 1991).
60 The trade-off for not increasing compliance resources has been increased penalties (maximum fines and forfeiture) in fisheries legislation since 1986. The difficulty involved in detecting and deterring fisheries offending was expressly recognised in subsection 107C(3) the Fisheries Act 1983 and section 254 of the Fisheries Act 1996.	
Focusing compliance effort on the QMS during the early 1990s was critical for the integrity of the system	61 The start of the 1990s was a critical time for the integrity of the QMS. Before this period there was little to deter illegal fishing because the chances of being detected, prosecuted, convicted and effectively penalised were perceived to be relatively low.
	62 Given limited resources, compliance effort was targeted at offending having the greatest effect on fisheries sustainability and the most serious impact on the QMS.
	63 Successful prosecutions for QMS fraud offences (making false catch declarations) were essential to deter offending and to protect the property rights of those who were complying with fisheries laws.
	64 In 1991/92 the three most important operational priorities for compliance staff were: <ul style="list-style-type: none"> <li data-bbox="421 1323 1211 1379">i ensuring the security and integrity of the 200 mile Exclusive Economic Zone (EEZ) <li data-bbox="421 1413 1211 1503">ii enforcing the QMS (this priority specifically excluded non-quota species subject to individual or competitive area catch limits such a scampi) <li data-bbox="421 1536 1211 1597">iii enforcing illegal fishing for commercial gain by those without fishing permits (“poaching”).

Compliance was heavily committed to successful large-scale QMS investigations from 1990	<p>65 From 1990 onwards MAF was heavily committed to several successful large-scale QMS fraud prosecutions. This commitment tied up many compliance staff for lengthy periods during the 1990/91 and 1991/92 fishing years (and beyond). Successful results were critical to deter others from offending. The largest investigation and prosecution was Operation Roundup. This operation:</p> <ul style="list-style-type: none"> i involved 21 individuals and companies and over 2,000 charges relating to false reporting of orange roughy ii used half of MAF compliance resources when it was terminated in mid 1991 iii required over 80,000 documents to be seized and analysed iv committed between 10 and 20 staff during a further two years of document analysis and prosecution v resulted in the conviction of the offenders with fines totalling \$2.5 million dollars and forfeiture of quota, fishing vessels and vehicles worth \$12 million.
Major QMS investigations are resource-hungry and not undertaken lightly	<p>66 Major QMS investigations and prosecutions are very resource-hungry. They are not undertaken lightly.</p> <p>67 These types of investigations and prosecutions usually take two to three years and are extremely complex, challenging and hard on staff.</p> <p>68 Major investigations are also very invasive and disruptive for fishing companies, requiring the removal of company operating documents.</p> <p>69 Not every incident, complaint or piece of informant information can or should be followed through to a prosecution. Even if information is of sufficient quality to act, the resources required to investigate and prosecute may not be justified or available because of other priorities.</p>
Compliance resources were not managed as a nationally integrated business group in 1990-1992	<p>70 During 1990-1992 compliance functions were carried out in nine districts and by a small National Compliance Unit and National Audit Team in Wellington.</p> <p>71 Compliance resources were not managed as a nationally integrated business group within MAF. The Manager (Fisheries Compliance) had no line control or authority over compliance districts.</p> <p>72 Without national operational command and control structures, which are a feature of all effective enforcement agencies, there were operational and resource allocation inefficiencies for compliance.</p> <p>73 An organisational chart showing how compliance resources were managed in MAF during 1990-1992 is included on the following page.</p>

MINISTRY OF AGRICULTURE AND FISHERIES

MAF FISHERIES COMPLIANCE ORGANISATION CHART 1990 - 1992



* Regional Managers also had Science, Fisheries Management & Administration Teams reporting to them. For the sake of clarity, the chart has omitted these other MAF Fisheries functions.

Operational managers made investigation and prosecution decisions	74	The nine District Compliance Managers were responsible for implementing national compliance policies, plans, procedures and standards at a district level. This included tactical or field planning, organisation and control, and decisions on investigations and prosecution (other than those involving foreign vessels).
	75	The Manager (Fisheries Compliance) was responsible for establishing national fisheries compliance policies, plans, procedures and standards. He also provided technical compliance advice to the MAF Board; managed the national compliance unit and National audit team, investigations and prosecutions relating to foreign vessels, and liaised with other national and international enforcement agencies.
	76	Only District Compliance Managers and Manager (Fisheries Compliance) had authority to make or change prosecution decisions.
	77	The National Compliance Unit, managed by the Assistant Manager (Fisheries Compliance), was responsible for the enforcement of the 200 mile Exclusive Economic Zone, prosecutions involving foreign-owned fishing vessels, liaison with other enforcement agencies on a national and international level and national intelligence management.
Scampi was a lower priority for compliance than QMS offending	78	Scampi was a lower priority for compliance in 1990/92 than QMS offending.
	79	Scampi was a non-QMS species representing only a fraction of 1% of all New Zealand fisheries by value or volume.
Compliance was active in the scampi fishery during 1990-92	80	However, MAF was aware of potential offending in the scampi fishery during 1990-1992 and focussed some compliance effort on the fishery. The compliance effort and results included: <ul style="list-style-type: none"> i MAF scientific observers being placed on 17 vessel trips in the scampi fishery from May 1991 to the end of 1992. Observers noted non-compliance issues on eight trips resulting in follow up action on four incidents ii Fisheries air surveillance patrols being carried out by the RNZAF to monitor fishing activity within the EEZ. Of the 122 flights during 1990-1992, 44 were in areas where scampi fishing took place. No incidents involving scampi vessels were recorded iii Fishery officers carrying out landing surveillance to ensure all fishing vessels, including those operating in the scampi fishery, were complying with reporting and fishing gear requirements prescribed in regulations. The number of scampi vessels subject to landing surveillance during 1990-1992 is not recorded. Non-compliance by scampi vessels was detected on five occasions, resulting in follow up action.

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- iv Scampi catch limits being monitored from monthly reports provided by permit holders. Additional weekly and daily catch and position reporting assisted MAF to closely monitor catch limits in the fishery. Two potential offences resulting from daily position reports were identified and follow up action taken.
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Simunovich and Barine received compliance attention during 1990-1992

- 81 The Auckland compliance office acted on 9 of the 11 incidents involving scampi vessels recorded from compliance activities during the period 1990-1992. The Napier office acted on the other two. The list was compiled from files located in the Ministry's Auckland, Napier and National Compliance Unit offices and may not be complete as the Auckland Office did not use MAF's computer offences system.
 - 82 The District Compliance Managers made the decisions to either discontinue the actions or issue warnings in each of these incidents:
 - i Five incidents involved Simunovich Fisheries Ltd (Simunovich). Of these, two resulted from observer reports (obstruction and a reporting offence), two from daily monitoring (fishing in a prohibited area) and one from landing surveillance (undersize net mesh)
 - ii Four incidents involved Barine Developments Ltd (Barine). Of these, three resulted from routine landing surveillance (reporting offences) and one from an observer report (illegal trawl nets and discarding quota species)
 - iii Two incidents involved Sanford Ltd (Sanford). Of these, one resulted from an observer report (fishing in a prohibited area) and one probably resulted from landing surveillance (undersize net mesh).
 - 83 In addition to the 11 incidents during 1990-1992 described above, Auckland Investigator, Peter Younger, conducted a preliminary investigation of informant allegations relating to Simunovich from 1991. Barry Nalder continued this investigation upon his arrival in the Auckland Office in 1993.
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Ministry rejects allegation that Simunovich advantaged and Barine disadvantaged

- 84 The affidavits supplied by Mr Penwarden infer that MAF compliance officials have acted to favour Simunovich and disadvantage its competitor, Barine.
 - 85 Stan Crothers (Deputy Chief Executive) and Dave Wood (National Manager Compliance) are named specifically.
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86 MFish rejects the assertion that its compliance officials have acted improperly and favoured Simunovich Fisheries Ltd and disadvantaged Barine Developments Ltd. MAF and MFish have taken compliance actions have been taken against both companies.

Four compliance initiatives evaluated activity in either the scampi fishery or by Simunovich

87 Since 1991, MAF and MFish have conducted four compliance initiatives that either proposed to investigate, or began preliminary investigations, into potential offending in either the scampi fishery or by Simunovich. These are:

- i Operation Export: a preliminary investigation into potential offending by Simunovich during the early 1990s. A summary is provided at Annex 2
 - ii Operation Dog: the collation of intelligence in 1993 and a proposal to undertake an appreciation of potential offending in the scampi fleet. If it had proceeded, the appreciation would have been called Operation Dog. A summary is provided at Annex 3
 - iii Operation Forest: a preliminary investigation, which included surveillance, into possible offending by Simunovich in 1998. A summary is provided at Annex 4
 - iv Operation Metro: a review of informant information in 2001 about alleged offending by Simunovich in the early 1990s. A summary is provided at Annex 5
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Compliance initiatives not discontinued for improper reasons

88 The affidavits supplied by Mr Penwarden assert that MAF officials, Stan Crothers and Dave Wood, actively prevented some of these initiatives, in particular Operations Export and Dog, from being pursued.

89 The Ministry rejects this assertion. This conclusion is drawn from the exhaustive examination of the documents associated with each of the compliance investigations and inquiries into Barry Nalder's performance.

90 The allegations were also examined by an independent barrister contracted by the Chief Executive and the Serious Fraud Office (SFO). The independent barrister concluded that the allegations "lacked merit" and need not be further inquired into. The SFO found the allegations did not provide sufficient basis to commence an investigation and that it was unlikely that further reliable evidence would become available.

The decisions to discontinue compliance initiatives were made by the appropriate people	<p>91 Stan Crothers and Dave Wood did not influence the decisions to discontinue any of the initiatives. Stan Crothers does not feature in the compliance investigation files and is barely mentioned in the material associated with the inquiries into Mr Nalder’s performance. Dave Wood does not feature in the Nalder material but has an association with Operation Dog. Dave Wood’s involvement with this operation was entirely proper.</p>
	<p>92 Records indicate that the decisions to discontinue the initiatives were made by the appropriate operational managers acting within their delegated authority.</p>
	<p>93 Compliance operational managers, not Stan Crothers or Dave Wood, were responsible for the decision to discontinue each of the compliance initiatives in question.</p>
	<p>94 Although the decision to discontinue and supporting rationale were not documented for the initiatives, a paper from the investigator to their line manager appears in each of the four initiatives.</p>
	<p>95 These papers provide advice about the status of their work and recommendations for further action. Therefore, we conclude that the operational managers to whom the reports were addressed were responsible for the decision not to proceed. The exception is Operation Dog. This is explored more fully below.</p>
	<p>96 Managers responsible for operational teams have long been responsible for making decisions about:</p> <ul style="list-style-type: none"> i whether compliance activities should be initiated, continued or discontinued given the strength of the information collected at each stage; ii work priorities; iii resources to support each stage of the compliance process.
	<p>97 District Compliance Managers were responsible for the decisions relating to Operations Export, Dog and Metro. The manager of the Serious Offences Unit was responsible for the decision to discontinue Operation Forest.</p>
The decisions to discontinue compliance initiatives were rational	<p>98 Examination of the material associated with each of the compliance initiatives suggests that the initiatives may not have proceeded because either:</p>
	<ul style="list-style-type: none"> i the preliminary inquiry failed to find information that met the threshold to justify a substantive investigation, AND/OR ii the operation had been compromised in some way, AND/OR

iii the resources to support a more substantive investigation were not available. They were either deployed on higher priorities or the skills needed for the work were not available.

99 These reasons are rational, appropriate and an operational reality for an enforcement agency that cannot commit investigative resources to all incidents of alleged offending.

100 MFish cannot be certain about the reasons for discontinuing the initiatives because the decisions were not documented. Its conclusions are drawn from associated material and knowledge about the operating environment over that period.

Dave Wood was not responsible for diverting resources from the proposed investigation

101 The affidavits supplied by Mr Penwarden infer that Dave Wood was responsible for influencing the availability of John Reid to investigate potential offending in the scampi fishery. MFish rejects this inference; there is no information to support it.

102 Andrew Bedford, a Fisheries Intelligence Officer reporting to Dave Wood, had conducted a superficial analysis of information about possible offending in the scampi fleet. He suggested to a group of investigators that an appreciation of the situation should be made. John Reid volunteered to co-ordinate the proposed initiative.

103 The decision to terminate John Reid's links to the proposed appreciation was made by his manager, Steve Bishop (formerly the District Compliance Officer for Nelson). Steve Bishop states this to be the case in an affidavit of 19 June 2002 as provided at Annex 6). Steve Bishop recalls that he made this decision because John Reid was needed to complete and support other initiatives already underway in the Nelson office.

104 In his affidavit, John Reid asks why Dave Wood did not appoint someone else to take over responsibility for the scampi issues given that John Reid was not made available for the project. The answer is that Dave Wood was not responsible for appointing someone to this task.

105 In 1993 Dave Wood was acting National Compliance Unit manager. The Unit was responsible for collection of intelligence and investigations of possible offending in deepwater fisheries and by foreign vessels. Scampi was a middle-depth fishery under the operational responsibility of the districts.

106 Intelligence gathered by the National Compliance Unit was collated and disseminated to the appropriate operational managers who would evaluate the information and determine if they would start an investigation.

	107	Andrew Bedford collated the information, as was his role, and discharged his duties by relaying it to the district operational arm of the business. The District Compliance Managers were ultimately responsible for choosing to follow through on Andrew Bedford's intelligence. They did not.
Stan Crothers was not responsible for the discontinuation of compliance initiatives	108	The affidavits supplied by Mr Penwarden assert that Stan Crothers was responsible for Nalder's suspension and, therefore, halting Barry Nalder's investigation into Simunovich activities.
	109	MFish rejects this assertion. As discussed in Part 2B, Barry Nalder had a record of poor performance. His incompetence as a senior compliance officer and the inappropriateness of some of his actions led to two inquiries into his performance and, ultimately, his departure from MFish.
	110	Stan Crothers was not closely associated with either inquiry. The decisions to hold the inquiries and the subsequent disciplinary actions are well documented and were not made by Stan Crothers.
	111	The operational manager to whom Barry Nalder reported was responsible for the decision to continue or discontinue the investigation after Barry Nalder's departure and to secure the resources to support that work.
	112	Stan Crothers does not feature in the documents associated with any of the other relevant compliance initiatives. This is appropriate given that Stan Crothers was not an operational manager.
Barry Nalder's investigation files were not lost or destroyed	113	The affidavits supplied by Mr Penwarden infer that Barry Nalder's suspension must have been linked to the Simunovich investigation because the investigation file went missing shortly after Barry Nalder's departure.
	114	The investigation file has not been lost. MFish holds documents and files relating to Barry Nalder's 1993 initiative and information collected before and after that period. The material is collectively called Operation Export.
	115	Although we are not certain that the records are complete, the key documents mentioned by Barry Nalder appear to be included in the material. A list of the documents and other objects related to the operation and held by the Ministry is provided in the summary for Operation Export provided at Annex 2
Barine Developments Ltd was not persecuted by MAF	116	Mr Penwarden asserts in his affidavit that that MAF paid undue compliance attention to Barine. He further asserts that this attention was unwarranted and caused Mr Penwarden to be disadvantaged during what has now transpired to be the catch history years for scampi

<p>The action taken on Mr Wilkinson's complaints was proper and Mr Penwarden's treatment received was fair and reasonable</p>	<p>117 MFish disputes this assertion. Barine Developments Ltd has been involved in several compliance incidents. In all cases, MAF acted fairly and expediently.</p> <p>118 In his affidavit Mr Penwarden infers that Simunovich influenced compliance officers to focus unfair attention on Barine. He cites the removal of his permit in 1989, when it was found he didn't meet Fisheries Act residency requirements, and the 1991 investigation into illegal nets. MFish rejects this inference. Any attention was proper. MAF treated Mr Penwarden and Barine fairly and reasonably.</p> <p>119 Mr Wilkinson of Simunovich twice questioned whether the issue of a fishing permit and vessel registration to Mr Penwarden (December 1989) and Barine (March 1992) complied with the foreign control restrictions in the Fisheries Act 1983. Both enquiries from Mr Wilkinson were valid and it was appropriate for them to be acted upon.</p> <p>120 In both cases the treatment of Barine was fair and reasonable. The Auckland Office promptly resolved the problems highlighted by Mr Wilkinson with minimal disruption to Barine fishing operations.</p>
<p>The action taken on an undersize net report by observers was proper and the treatment Mr Penwarden received was fair and reasonable</p>	<p>121 Mr Wilkinson did not initiate the action taken by compliance staff in respect of Barine relating to use of illegal trawl nets and unauthorised discarding of quota species. This action originated from reports by observers on the Barine vessel <i>Bilyara</i>.</p> <p>122 Action by MAF staff was appropriate and the treatment of Barine fair and reasonable. The treatment of the Simunovich and Sanford vessels was also appropriate given their quite different circumstances.</p> <p>123 The observer onboard the <i>Bilyara</i> reported that the vessel was using trawl nets with mesh sizes on the cod-ends less than the 43mm minimum. It was also using a second layer of net attached to the cod-end as a liner. Both activities are illegal. Observers also estimated that approximately 700 kgs of quota species had been discarded without authorisation on this and a previous observed trip. This information was forwarded to the Napier Office on 10 June 1991 when the <i>Bilyara</i> called in to that port.</p> <p>124 Fishery officers found five undersize cod-ends with a second layer of net attached to the cod-end as a liner on board the <i>Bilyara</i>.</p> <p>125 An inspection of the Simunovich vessel <i>Mutual Enterprise</i> at Napier on the same day resulted in one trawl cod end with undersize net mesh which had not been used for fishing being seized. The vessel was not seized.</p>

126 Due to the serious nature of the offences, the *Bilyara* was seized on 10 June 1991. The following day Mr Penwarden was asked to sign a bond form for its release. Mr Penwarden did not sign the bond form until 14 June 1991 and the vessel was returned immediately. The vessel was released from bond on 26 July 1991 when the District Compliance Manager, Auckland, sent a warning letter to Barine for the undersize trawl net mesh, illegal liners and discarding quota species offences.

127 Warning letters were also sent to Simunovich and Sanford on 26 July 1991 for undersize trawl net mesh. As the file does not show how the Sanford net was detected we have assumed it was also found during routine landing surveillance of the Sanford vessel *San Tangaroa*.

There is no evidence to substantiate inference of favouritism or inappropriate actions

128 Based on our analysis, MFish and its predecessor, MAF, acted fairly and reasonably in its compliance activities in the scampi fishery. Extensive investigation has produced no evidence to substantiate the inferences made of favouritism and inappropriate actions by Ministry compliance staff.

Part 2D - Fisheries Management

Introduction	<p>129 This part of the paper summarises the key issues relating to management decisions for the scampi fisheries over the period since the late 1980s.</p> <p>This part encompasses two of the Terms of Reference set out by the Primary Production Select Committee:</p> <p><i>“The development of policy and the management of the allocation of scampi quota in all fishing areas within the New Zealand’s exclusive economic zone with particular reference to “catch history” methods and periods relating to future allocations of quota”</i></p> <p><i>“To include in its consideration all court cases the committee considered relevant to the inquiry and to consider any relevant investigations undertaken by Crown agencies”.</i></p>
The QMS is the preferred fisheries management regime for scampi	<p>130 The Court of Appeal, in <i>Kellian & others v Ministry of Fisheries & others</i> (CA 150/02, 26 September 2002), has confirmed that MFish and Minister are entitled to have a preference for using the QMS to manage fisheries over other regimes. The Court noted that the course of the development of fisheries legislation and its administration over the past 15 or more years supports this position, and it is reflected in the Select Committee’s report on the Bill that was to become the Fisheries Act 1996. That report emphasised that the QMS is the preferred management system.</p> <p>131 A fundamental component of the Deed of Settlement reached between the Crown and Maori is that the Crown would introduce legislation to ensure that Maori are allocated 20 percent of all quota for species henceforth brought into the QMS (refer s 44 Fisheries Act 1996). The agreement is reflected in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Fisheries Act 1996. There was an understanding between the Crown and Maori that commercial species still outside would be brought into the QMS in the near future. That understanding was reinforced by the 1997 Policy Statement between the Crown and Te Ohu Kai Moana which states: <i>“the Crown intends to implement such processes as are necessary to effect the introduction of all commercial non-QMS species into the QMS as quickly as practicable”.</i></p> <p>132 The allocation of individual transferable quota (ITQ) with a perpetual term, a secure percentage of future catch and a robust compliance regime does much to address the shortcomings of alternative management regimes that result in poor economic and environmental outcomes. There is now substantial evidence that management under the QMS benefits sustainability, leads to efficient harvesting, improves international competitiveness and has resulted in an</p>

increase in export returns and growth in employment within the fishing industry. In recent consultation processes, the industry participants in the scampi fishery have all indicated support for the introduction of scampi to the QMS. The disagreement in this fishery is about how the quota should be allocated to the participants. Mfish considers the QMS to be the best framework for the management of scampi and other commercial fisheries in New Zealand.

To implement the QMS the Crown must make the initial allocation decisions

- 133 The Crown must undertake some key actions when a species is introduced into the QMS. The Crown needs to establish the total catch based on the maximum sustainable yield from the fishery. That total allowable catch (TAC) must then be allocated. First, the Minister must allow for Maori customary fishing, recreational fishing, and other mortality caused by fishing, and then set the total allowable commercial catch (TACC). That TACC must be allocated to commercial participants, with 20% going to Te Ohu Kai Moana at initial allocation in recognition of Deed of Settlement obligations.
- 134 Allocation of access is the most difficult task of fisheries management. In non-QMS fisheries allocation of access decisions are generally undertaken annually. The QMS creates a perpetual access right when the stock is introduced into the QMS. The QMS then allows for transferability between commercial participants. Within the QMS the Fisheries Acts (1983 and 1996) have established a process that has allowed for efficient reallocation of ITQ in the industry for 16 years (subject to limits on holdings e.g. aggregation limits). That process is voluntary trade. Within the QMS the Crown's responsibility for allocation is limited to maintaining the systems to support a registry and the transferability of ITQ, and ensuring the integrity of the monitoring and compliance regime.
- 135 Initial allocation of ITQ could also be achieved by purchase from the Crown (ie tendering) instead of the current regime in the Fisheries Act 1996 of allocation to participants based on either individual catch entitlements (ICE) or catch history. This would ensure that ITQ ends up in the hands of those who value it most. The main constraint on the use of tendering for allocating initial quota rights is the expectations of incumbents who were given access to particular fisheries before introduction into the QMS.
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Successive legislative changes have reduced and ultimately removed the extent to which commitment and dependence is considered in allocation

- 136 New Zealand's QMS regime has always provided some recognition of fishers' past participation in the fishery in the allocation process. But successive legislative changes to the allocation process have reduced the extent to which factors other than catch history in specified criteria years are used as a basis for quota allocation.
- 137 The allocation framework that was established in the Fisheries Amendment Act 1986 provided a mechanism that developed initial allocations based on catch history, but also recognised commitment and dependence in the fishery through a two-step appeal process.
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- 138 The first step provided for a review of catch histories by an administrative body known as the Objections Committee. The determinations of this Committee formed the basis on which the Government buy-back of catch histories was conducted, prior to the initial TACCs being set.
- 139 The second step in the process allowed persons to present information to a semi-judicial body (the Quota Appeal Authority, or QAA) supporting a claim for an allocation of ITQ based on wide commitment and dependence criteria. For example, the QAA allowed some appeals to fishers whose catch history was limited because of vessel breakdowns. A successful appeal led to the allocation of additional ITQ, and an increase in the commercial catch limit. These appeals lead to significant increases in ITQ, and in some cases, unsustainable increases in catch.
- 140 Since 1986 the allocation mechanism has been successively constrained to reduce the extent to which catch history is modified by other factors. Any consideration of commitment and dependence was removed in the Fisheries Act 1996. Incentives to fish for catch history were also largely removed by fixing catch history years in the past.
- 141 In the Fisheries Act 1996, Parliament provided two mechanisms for the allocation of ITQ that have relevance to the scampi fishery:
- i based on the legally recorded catch taken by participants in a fishery using the best twelve months for an individual over two fishing years (1990/91 and 1991/92); or
 - ii based on individual catch entitlements (ICE) that were in a place at the date of declaration of a stock for introduction to the QMS.

Use of catch history for quota allocation leads to a focus on past management decisions

- 142 A decision to recognise catch history with limited opportunity for appeal leads to a focus on the past management regime and the permitting decisions under that regime. This is because the management regime in effect at the time determines a participant's catch history and therefore establishes the subsequent allocation of quota which is a valuable asset in perpetuity. Opportunity for challenging quota allocations based on catch history inevitably focuses on management decisions made at the time.
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To achieve introduction, legislative provisions were implemented to validate past management decisions and to limit challenge of them

- 143 Participants commonly dispute allocation decisions based on catch history taken in criteria years in two ways:
- they may suggest the catch figures are incomplete or incorrect
 - they may suggest that access and management decisions were inappropriate and that they limited their ability to take catch in the criteria period.
- 144 These disputes lead to delays in introduction with consequent economic and sustainability costs and adverse implications for Treaty obligations.
- 145 The current legislation provides limited grounds for appeal of catch figures, based on review of statutory returns establishing legally recorded catch during the criteria period. In light of this provision, the Chief Executive of MFish has established formal procedures to be used in assuring himself that catch histories are based on lawfully caught and lawfully reported catches.
- 146 In order to avoid relitigation of past management decisions relevant to the introduction of new species into the QMS, Parliament put provisions in place to limit the extent of relitigation of those decisions. Section 329 validates all permitting decisions made prior to October 1992 as being, and having always been, valid. An exception was made for decisions being challenged in any Court proceedings. In the scampi fishery only one fisher, Goodship and Pranfield Holdings Limited, had commenced a legal challenge prior to enactment of s329.
- 147 Permitting decisions made between October 1992 and October 1996 were also validated but a wider exclusion was provided so where a permit applicant sought a review from the Chief Executive under s 329 of their permitting decisions within a 12 month period of commencement of the section, the permitting decisions subject to the review request were not validated. The majority of scampi permit holders have sought such reviews.
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ICE should be used to manage a fishery and not for the purpose of effecting an allocation different than would be achieved by using the catch history criteria in the Act

148 The Fisheries Act 1996 provides for allocation based on ICE, if the stock was managed exclusively by ICE at the time it is declared for introduction to the QMS. The Act does not provide any guidance over the circumstances in which ICE should be implemented or how ICE should be allocated. However, it is MFish's view that this provision should only be used to address fisheries management issues, consistent with the purpose of the Act, and should not be used for the sole purpose of changing quota allocation away from that based on the catch history years specified in the Act.

149 ICE is a regulatory mechanism that restricts the individual catch of each fishing entity. It provides an individual allocation, however it is not tradable and there is uncertainty over tenure. MFish considers ICE to be the second best policy option now that the QMS is available as the management option of preference and there are no longer any operational constraints on introduction of stocks into the QMS.

150 The Court of Appeal in Kellian has supported the decisions by MFish and the Minister not to use ICE other than for fisheries management purposes. The Court said, not finally determining the point:

"It may well be that to use ICE for a short period for the purpose of avoiding catch history years which Parliament fixed would thwart the purpose of the Act".

System capacity and litigation have led to significant delays in the introduction of scampi

151 Scampi has been recognised as a priority for introduction into the QMS for some time based on sustainability as well as utilisation benefits. Following signing of the Deed of Settlement in 1992, which removed legal impediments to introduction of further species into the QMS, five attempts have been made to introduce scampi into the QMS.

152 Scampi was first proposed for introduction in 1993 as part of a legislative process to introduce all remaining commercial fisheries into the QMS. The change was never formally submitted to Government. Following this, a further attempt to introduce the species via legislative schedule was initiated in 1994, but not progressed.

153 An opportunity to introduce the fishery by an industry-agreed schedule was again provided in 1996. Industry were unable to reach agreement on allocations even though there was an opportunity for individual allocations to include their catch history and quota that would normally accrue to the Crown could have been secured by incumbents i.e. quota not allocated under the 1990/91 and 1991/92 catch history criteria.

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- 154 In 1997 a declaration was made to introduce scampi into the QMS on 1 October 1998. This process was delayed as a result of judicial actions and the declaration was ultimately repealed by legislation.
- 155 In 2001 the Minister proposed introduction of the scampi fishery into the QMS in 2002 and subsequently 2003. The Minister has decided to defer introduction at this time.
- 156 The cost of the delay to introduction is difficult to calculate. Existing fishers are missing out on opportunities presented by allocation of a transferable and secure property right with an estimated value of \$60 million. Those interests recognised in legislation but who do not currently have access to fishery i.e. Maori, and those new participants who may wish to enter the fishery, are also facing costs. The cost to Maori of the delay is substantial given the value of the species. The value of quota that will be allocated to Maori (227 tonnes) is estimated at \$20 million dollars. In addition, annual returns on these quota assets are being foregone.
- 157 Catch limits in the fishery were over-caught in some areas in the 2001/02 fishing year. The over-catch was partly the result of bycatch being taken by fishing operations for other species and partly the result of increased fishing effort following notification of the intention to close particular fisheries. These issues illustrate the potential sustainability and economic impacts associated with controlling catch in the non-QMS environment. The QMS provides a framework and incentives to ensure that individual fishers are responsible for managing catch within catch limits.
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Where the Court has made a specific direction, MFish has implemented an appropriate response

- 158 A number of Court proceedings have considered issues related to the management of the scampi fishery. These legal challenges have related to the whole regime and also the impact of the regime on individual fishers. Where the Court has made a decision or a specific direction, MFish has acted to address the shortcomings or provide opportunities for redress.
- 159 There are two major cases that have resulted in findings against MFish, which have directly affected the scampi fishery. These cases are Petromont Holdings Limited (High Court 7 September 1993), and Vautier Shelf Co. No14 (High Court 2000 and Court of Appeal 11 October 2001).
- 160 In the Petromont case the fisher challenged the revocation of the Company's permit under 63(13)(c) of the Fisheries Act 1983 and the existence of different permit conditions as to the quantity of scampi that may be taken on each fishers permit. In the decision the judge found that MFish did not have grounds to revoke Petromont Limited's fishing permit pursuant to provisions of the Act. The judge also found that the plaintiff's permit condition limiting the amount of scampi that could be taken was invalid and should
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therefore be set aside on the basis that the Director-General failed to state the grounds on which he was satisfied that permit conditions between permit holders in the fishery were different. In response to this decision the Director-General reissued a permit to fish for scampi to Petromont. The Director-General also re-issued all other scampi permits stating the grounds on which he considered it reasonable that conditions should be different between permit holders in the fishery.

- 161 When the judicial review proceedings concerning Vautier Shelf No.14 Limited commenced in 1997 the fishers/plaintiffs challenged the management decisions from 1992 until 1997. The failure to address individual circumstances in permit decisions was one of the grounds for review. MFish was concerned that if the plaintiffs were successful, it would have no effective management regime to manage the fishery. Crown Law had advised MFish as early as 1993 (following the Petromont decision) that permitting decisions were vulnerable to legal challenge, and the use of regulations would be more secure. Taking into account Crown Law advice on permit conditions, in 1999 regulations were promulgated to enable the allocation of ICE in scampi fisheries. The plaintiffs then amended their claim to include a challenge to the lawfulness of these regulations.
- 162 The High Court found that while s329 operated to deem valid all permitting decisions prior to October 1992, the use of permit conditions to allocate ICEs after that date was invalid, but that the implementation of the regulations “saved” the situation. The majority of the Court of Appeal specifically confined themselves to the issue of regulations and did not comment on the validity of the previous use of permit conditions to implement ICE. Rather the Court focused on the validity of the regulations and found them to be unlawful in that they failed to comply with the empowering provisions in the Fisheries Act 1996.
- 163 In a minority judgment of the Court of Appeal, Justice Thomas agreed with this finding as to the invalidity of the regulations, but went further to comment critically on the earlier management regime, which he considered unlawful. The minority Court of Appeal judgement and the High Court judgment are critical of earlier management practices. The critical comments in the minority Court of Appeal judgment are largely based upon the judge’s acceptance of the argument that the Chief Executive’s permit decisions must be substantively fair. This suggestion is controversial. MFish does not consider this to be a direction of the Court, given that it arises from an *obiter* comment in a minority judgement. The High Court judgement was based on the validity of the regulations, and the High Court judge found them to be lawful, and so his comments on the earlier regime are also *obiter*.
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- 164 The High Court and Thomas judgments are not without difficulty in terms of a clear direction for the use of the Fisheries Act 1996 tools for managing fisheries. First, Thomas J's judgment is primarily *obiter dicta* (that is, something said by a judge other than the main rationale for the judgment) as the *ratio decidendi* (the reason behind the decision) was that the regulations were invalid. Second, the High Court findings that the permitting decisions were unlawful were based, in part, on an interpretation that s 63(9) of the Fisheries Act 1983 (a provision which required substantial sameness of permitting conditions) applied in the scampi fishery. However the same Court of Appeal that decided the scampi case also found, in a judgment delivered on the same day as the scampi decision, that s 63(9) did not apply to non-QMS fisheries (see Westhaven, 2001, Court of Appeal). Finally, the issue of fairness of *outcome*, as opposed to fairness of process, is not an accepted ground of judicial review in New Zealand.
- 165 Further, recent judgements (currently being appealed), Sealord and Goodship, both delivered by the High Court on 9 October 2002 (both concerning the scampi fishery) have also held that section 329 should be given wide interpretation in relation to the validation of past permitting decisions made before 1 October 1992. The Court of Appeal has already made the same finding (see Jenssen and United). The judgements confirm that s 329 means that there can be no challenge to permitting decisions made prior to 1 October 1992. In addition, the Court of Appeal in relation to Kellian and others (26 September 2002) noted that the circumstances of individual fishers need not be considered when determining the costs and benefits of introduction of a stock or species into the QMS.
- 166 In response to the Court of Appeal judgement (for Vautier) MFish advised fishers that ICE in the fishery had been set aside and management was consequently under a competitive catch limit. New reporting requirements were issued in the former ICE fisheries. MFish then analysed future management options for the scampi fishery. The analysis strongly supported introduction into the QMS as rapidly as possible. Consequently, in 2002, the Minister agreed in principle, following consultation, that the species be introduced into the QMS on 1 October 2003. Given the short interim period, MFish did not consider that any fisheries management benefit would be gained from a reintroduction of an ICE regime. The Minister has subsequently deferred introduction given the establishment of the two inquiries into the management and administration of the scampi fishery.
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For species currently proposed for introduction, changing catch history years from 1990/91-1991/92 would have significant implications

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- 167 A number of factors were relevant in the choice of the 1990/91-1991/92 qualifying years for catch history. From a fisheries management perspective it was important to choose years in the past to prevent incentives to race for catch history. When the Fisheries Bill was introduced in 1994, these years were recently completed fishing years. The 1990/91 and 1991/92 years were the two years prior to implementation of the permit moratorium on all non-QMS species. By the time the 1996 Act was enacted, a suitable period had elapsed for appeals of permitting decisions to have occurred and the allocations of quota were therefore less susceptible to legal challenge.
- 168 The use of the best 12 months within 2 years allows each fisher to maximise their position. The use of only one specified period could disadvantage fishers who didn't fish continuously over that time.
- 169 There are disadvantages associated with allocation based on the use of catch history years now a decade old. Despite the moratorium and controls established, there have been changes in the nature and participation in fishing operations. In some fisheries catch histories established in 1990/91 and 1991/92 no longer reflect involvement in these fisheries. However, fishers who have had permits issued to them have enjoyed exclusive access, and protection from competition, and have had the opportunity to recoup investments and make profits.
- 170 Given this situation, MFish has considered and provided advice to the Minister on other options available for quota allocation. These have included changing the catch history years or eliminating catch history as an allocation approach (and tendering the quota). On balance, a change away from allocation based on catch history during the 1990/92 period was rejected because of the following factors:
- amending catch history years would re-open the incentives to fish for catch history, which could only be mitigated by statements that they would not be altered again in the future
 - the industry has based investment and operating decisions on the current legislative framework and change would affect their expectations and investments
 - it would be very difficult and contentious to choose another period – individuals/companies will lobby for the particular period that maximises their allocation and fishers locked out by the moratorium would be particularly disadvantaged.
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171 Ultimately MFish is seeking to allocate quota in the backlog of fisheries requiring management that have been allowed to develop (either fully or partially) outside of the QMS. In the future, MFish will allocate quota in new fisheries introduced into QMS management (which do not have catch histories associated with them) by simple tender.

Part 2E - Fisheries Administration

Introduction	<p>172 This part of the paper summarises the key issues relating to the administration of permits and registration of vessels, with particular reference to the scampi fishery.</p> <p>The Primary Production Select Committee has asked for information about:</p> <p><i>“The development of policy and the granting and administration of permits and registration of vessels to fish within the New Zealand’s exclusive economic zone with particular reference to the treatment of fishing companies involved in the scampi fishery”.</i></p> <p><i>“The treatment by the Ministry of Fisheries and its predecessors of Barine Development Limited and other companies and their principals concerned about the granting and revoking of authorities to engage in scampi commercial fishing from 1989 to the present”.</i></p> <p><i>“To investigate and determine whether any allegations made regarding maladministration in relation to the scampi fishery were made for the proper reasons, and whether they were dealt with appropriately.”</i></p>
General response to allegations of mismanagement	<p>173 The management of scampi over the last decade has been fraught with debate, administrative reviews and Court challenges. The issues are complex and involve extensive documentation.</p> <p>174 In the absence of specific concerns being raised in the Terms of Reference, MFish has attempted to produce a general response to allegations of mismanagement of this fishing. The Ministry will respond to any additional concerns that arise from this Inquiry.</p>
Permit decisions are challenged where they establish future quota rights	<p>175 With the mechanism by which quota rights are calculated (i.e. ICE or catch history) now defined explicitly in the Fisheries Act 1996 there is an increased focus (legal and administrative) on the Ministry’s permitting decisions in the 1990/91 and 1991/92 period. This is because where a fishery is managed without ICE at the date of declaration into the QMS the quota is allocated on the basis of catch in those two criteria years.</p> <p>176 To assist the Committee the Ministry has summarised the key concerns/positions of each permit holder or person who has challenged the Ministry’s scampi decisions in Court. This summary has been based on their statement of claim and affidavits lodged in such cases.</p>

Existing permit holders

- 177 There are 8 current scampi permit holders:
- Barine Developments Limited
 - Sanford Limited
 - Simunovich Fisheries Limited
 - Amaltal Fishing Co Limited
 - Deadman, Brian Sydney & Lees, Robert Whitelaw trading as Mount Fish Market
 - Wayne Terrence Howell
 - Vautier Shelf Company No. 14 Limited
 - Petromont Holdings Limited
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Concerns of permit holders in the scampi litigation

- 178 Three of the current permit holders (*Vautier Shelf Company (no 14) Limited, Barine Developments Limited* and the *Official Assignee on behalf of Mr Howell*) are concerned that MAF's '*biased and or unfair*' treatment with respect to the issue of permits in years 1990/91 and 1991/92 in which catch histories were established. They claim that this resulted in their individual catch histories being kept artificially low.
- 179 *Deadman and Lees* have a different complaint. They believe that ICE based on the catch history generated in 1992/93 should have been allocated in Scampi areas 3 and 6B.
- 180 In contrast *Simunovich Fisheries Limited, Sanford Limited* and *Amaltal Fishing Company* generally support the proposal to introduce scampi into the QMS on the basis of the ICE regime that previously applied. Simunovich states that if the ICE regime is not possible then it supports introduction using the catch history years specified in the Fisheries Act 1996.
- 181 *Petromont* was a plaintiff in the Petromont case but was not a plaintiff in the recent scampi court cases.
- 182 The specific concerns expressed by permit holders can be summarised as follows:
- i The Ministry advised permit holders in the early 1990s that their activities in that period would not establish catch histories. Some permit holders say that the consequence of this advice was that they did not maximise their catch during the relevant period.
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- ii Delays in issuing permits hindered permit holders from fishing in the years ultimately selected as the basis for allocations.
 - iii Different approaches to the issue of permits taken in the Auckland Office and the Nelson Office meant that some people were given permits whilst others were excluded from the fishery;
 - iv The inability to increase the number of vessels on their permit meant some permit holders were treated differently to Simunovich Fisheries Limited which was allowed to do so.
 - v Some permit holders complain that MAF's approach in allocating ICE in QMAs 1, 2, 4 and 6A was not continued in areas 3 and 6B (and other areas). They claim that, in light of these previous decisions on allocating ICE they had changed their fishing practices in order to maximise catch history.
 - vi In the absence of ICE some permit holders argue that to use the 1990/91 and 1991/92 catch history years will continue the same unfairness outlined above. Further, introduction into the QMS will cement these catch histories as the basis for proportional rights in the fishery.

As a result, some permit holders suggest that advantageous treatment of Simunovich Fisheries in comparison with other permit holders has resulted in Simunovich capturing the lion's share of the catch histories.

- 183 Simunovich also has a number of concerns with the management regime operated by the Ministry over the last decade. Simunovich was one of the initial participants in the fishery. It has requested a number of administrative reviews of the regime in the early 1990s. However, in general, it now supports the introduction of the fishery into the QMS as quickly as possible either using the previous ICE regime or, alternatively, using the catch history years specified in the Fisheries Act 1996.
- 184 Simunovich does not support the proposition that individual circumstances should be considered but notes that, if this approach is taken, it wishes to be heard in that regard as it has individual circumstances which inhibited it maximising its catch history in the relevant years.

Concerns of other parties who have challenged scampi decisions

- 185 *Sealord Group* (Sealord) claims that it has (through the administrative and policy failings of MAF) been unlawfully excluded from scampi fishing altogether.
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- 186 It claims that permits should have been issued earlier (in light of their application for a permit in January 1990 which was granted in April 1991). It claims that approvals in respect of the use of vessels effectively precluded it from accessing the fishery until late in the 1991/92 fishing year.
- 187 Its scampi permit was revoked (in accordance with s63(13) of the Fisheries Act 1983). Sealord claim that the Ministry had an obligation to advise it that it could obtain a special permit to take scampi under section 64 of the Fisheries Act 1983. It claims that, had it been so advised, it would have applied and, under the relevant criteria, would have been granted a special permit to take scampi. It further claim that subsequent changes to legislation would have converted such a special permit into a s63 commercial fishing permit.
- 188 *United Fisheries Limited* (United) was not a plaintiff in the scampi litigation but has alleged the same sort of unfair treatment as the plaintiffs.
- 189 United submits that it made various applications to the Nelson Office for permits to enter the fishery between 1988 and 1992 but it was declined on the basis that the Ministry was not issuing scampi permits. However United claims that the Auckland Office was operating a different policy and was issuing permits.
- 190 United submits that the only fair method of allocation is for every permit holder's individual circumstances to be considered afresh by a full inquiry into the management and administration of the scampi fishery from the late 1980's to 2001.
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Permitting policies prior to 1990 for scampi were inconsistent –

- 191 In the lead up to the first introductions of species into the QMS in 1986 and 1987 MAF developed a number of policies for the administration of non-QMS fisheries throughout the country. The Ministry was struggling to develop a robust non-QMS permitting policy which could be applied nationwide due to:
- i A legislative environment which maintained a number of possible management mechanisms for non-QMS fisheries including:
- Fisheries Management Plans
 - Regulatory interventions
 - Controlled fisheries
 - Fishing permit approvals with conditions
 - Special permit authorisations
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- ii In particular the need for QMS, Fisheries Management Plans, and non-QMS permitting regimes meant there was no one prevailing management framework in fisheries management. Additionally, at that time there was no clear linkage between these potential legislative mechanisms and management of associated fisheries under a QMS environment.
 - iii Court cases (e.g. the Salmon case)¹ found that the creation of ITQ had established firm property rights that could only be diminished with care. This led to a cautious approach when non-QMS policies could impact on access to QMS species.
 - iv Uncertainty over the role and extent of the QMS as an option for managing all fisheries.
 - v The lack of a nationally co-ordinated approach to non-QMS management.

192 The late 1980's was also a period where MAF had a stronger focus on bedding down the new (and radical) QMS introduced in 1986 and grappling with the impacts and resolution of Maori grievances than with developing non-QMS management frameworks.

Categorisation of fisheries and types of permits

193 Ultimately, different permitting rules applied in different offices throughout the country. These permitting policies changed over time, not always consistently throughout the country. The management of a stock was essentially determined by the regional office and involved the categorisation of each stock into one of the following categories:

- i open
- ii developing
- iii fully developed
- iv overdeveloped
- v protected

194 Each category of fishery had different rules about the nature of permits to be issued and the pre-conditions which should apply before a permit should be issued. In some cases the policy dictated that only a special permit would be issued.

195 To successfully trawl for scampi a permit holder would need an authorisation to use smaller net mesh than would otherwise be allowed. The use of this small mesh raised concerns about

¹ Sanford (South Island) Ltd vs. Moyle (Minister of Fisheries) High Court of New Zealand CP 3/89

environmental damage and the capture of juvenile fish. During the late 1980s and early 1990s there was some internal debate within MAF about the best mechanism to give such approvals (i.e. either by a special permit alone, a specially conditioned commercial fishing permit or a mixture of both). Further, there was a view in some offices that, where special permits were to be used they should only be issued in accordance with strict investigative fishing criteria and not for commercial fishing.

- 196 Each regional office established their stock policy for areas of the country they were responsible for. This meant that some fisheries were in different categories in different parts of the country. It was expected that all other offices would then make permitting decisions in accordance with these regionally established policies. In practice this did not always occur.
- 197 Accordingly over this 3-4 year period (1986-1990) some commercial fishing permits for scampi were issued, some special permits were issued whilst in other areas permits and special permits were declined. In addition, in a limited number of cases permits were issued but without an endorsement to use smaller mesh (effectively nullifying the permit approval). In other cases decisions were deferred until a consistent approach could be developed. The timeframes for decisions differed from office to office depending on the categorisation of the species concerned and the extent to which the various offices sought national consistency.
- 198 By September 1990 MAF identified that such inconsistencies could not continue and a more robust non-QMS regime had to be established (NB: the use of the QMS was not available at that time because of the Maori injunction and was not considered at that stage appropriate for all fisheries.)
- 199 The Courts have considered the permitting power and its scope extensively over the last decade however during the mid to late 1980s there was little jurisprudence about the scope of the power in the Fisheries Act 1983. For example, until the cases “Gunn” and “Vickerman” in the High Court, the Ministry’s view was that it could use a permit to exclude people from the fishery (akin to a moratorium). It was not until 1994 that the Courts made it clear that this was not lawful.

By 1990 MAF realised a nationally consistent scampi management policy was required

- 200 By late 1990 MAF determined that a national approach to scampi management would be centralised. This national approach was intended to improve management of the identified problems of expanding effort in the scampi fishery, the particular fisheries management issues raised by scampi fishing and inconsistent permit decisions in the previous two years. This was seen as necessary in light of:
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- i the aspirations of incumbent fishers to continue fishing and additional applications from fishers seeking access to the scampi fishery
 - ii the inconsistent permit decisions in different offices;
 - iii a need to control burgeoning effort in scampi fisheries to ensure that those fisheries were not over-fished (as the Ministry did not want a repeat of what had occurred in the stressed inshore fisheries before these were bought into the QMS in 1986);
 - iv the lack of knowledge of the biology of scampi
 - v increasing concerns over the environmental damage of small mesh trawl nets and the potential impacts of small mesh on by-catch of QMS stocks.
 - vi MAF's recognition of the need to provide for Maori fishing rights and the Crown's obligations to Maori under the Treaty of Waitangi. An unconstrained expansion in commercial fishing in non-QMS fisheries could prevent the Crown accommodating any settlement of Maori Fishing claims which might be reached.
 - vii a legislative environment i.e. a general policy of allowing access to non-QMS fisheries unless specifically prohibited and a catch history based allocation process when introducing species into the QMS, which encouraged racing for catch history.

201 This situation was not unique to scampi. With the introduction of many species into the QMS in 1986 and 1987 many fishers were looking at expanding their effort rapidly into species that were not subject to the QMS. This had resulted in a moratorium being imposed in other non-QMS fisheries in 1988. This moratorium was further utilised and expanded in 1989 and again in 1990.

202 In respect of scampi, a species-specific moratorium on the issue of scampi permits was imposed under s65 of the 1983 Act on 1 October 1990. The Ministry initially re-issued existing permits under interim criteria and then began establishing final rules and criteria for the granting of exemptions to this moratorium.

Management decisions attempted to rectify previous inconsistent actions

- 203 Having imposed a species-specific moratorium on scampi access but recognising the inconsistencies in permitting decisions in the late 1980s MAF, in early 1991, attempted to find mechanisms to fairly allocate access into the scampi fishery and to manage those fisheries until they could be introduced into the QMS.
- 204 These included approving exemption criteria that recognised previous access to scampi fisheries and, where such access had not been granted, provided access following an assessment of any demonstrated commitment to the scampi fishery. Additionally, those fishers who had been granted scampi permits but did not meet the confirmed criteria did not have their permits withdrawn until well into the 1990/91 fishing year. Further opportunities were given for disaffected fishers to review these exemption decisions. Some fishers who did not meet the criteria have continued to seek access to the fishery.
- 205 MAF and MFish have applied a nationally consistent approach to scampi access decisions since April 1991, adjusting as appropriate in accordance with Court decisions.

Scampi decisions initially focused on ensuring sustainability

- 206 Leading up to the start of the 1991/92 fishing year MAF had identified that scampi fishing in SCI 1 and SCI 2 could be nearing optimal level and that existing input controls were unlikely to appropriately constrain catches to sustainable levels.
- 207 The short-term answer was to cap catch. Observer coverage (to collect further information on finfish by-catch) was also seen as necessary. However the Ministry had inadequate information on the abundance of scampi and its impact on juvenile by-catch and the environment. Therefore MAF established an interim (6 month) management regime across all scampi fisheries including the first catch limits imposed on all scampi stocks. These initial catch limits were subsequently increased for the balance of that year. In 1991 scampi was included in the Ministry's formal stock assessment processes for the first time.
- 208 Various changes to gear able to be used on scampi vessels to minimise juvenile by-catch and to limit damage on the environment were developed over the next few years. Most of these initiatives have been proposed by industry and endorsed by the Ministry.
- 209 Additionally, vessel limits were placed on each permit i.e. a permit holder could only use vessels they had previously used in scampi fishing without specific approval from the Ministry.
- 210 The Ministry's subsequent decisions to allow or refuse new vessels as replacements on a permit were made on a case-by-case basis based on the criteria established in April 1991.
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- 211 Vessel restrictions remained in place until the Chief Executive of MFish removed them following a review in 1999. He concluded that vessel limits were no longer necessary with catch limits in place for all fishery areas and ICE in place for four of those areas.
- 212 Because 1991 became a critical year for the subsequent allocation of ICE in SCI1 and SCI2 and formed part of the statutory catch history years some fishers continue to be unhappy with their permitting treatment in the 1989/90 and 1990/91 fishing years.
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After considering options ICE was applied in fully developed fisheries

- 213 By mid-1991, whilst sustainability issues in the scampi fishery were being addressed by catch limits and management decisions on fishing gear the thorny problem of how to allocate the catch limits remained. At this time management in the QMS was not available.
- 214 MAF believed that competitive fisheries were economically inefficient, led to overcapitalisation and caused other management difficulties. All other available mechanisms in the Act (Controlled fisheries, management under a Fisheries Management Plan) were considered and rejected. There was no consensus on the mechanisms to be used to allocate these catch limits to the small number of participants permitted in the fishery. This led to MAF's view that ICE (or Individual Quota it was termed at that time) should be used.
- 215 The Act did not (and still does not) provide any guidance on how to allocate ICE. Permit holders were increasingly threatening litigation if their 'rights' were diminished. Most options raised by fishers to offset unfairness involved either arbitrary increases in catch limits (which could not be justified based on the knowledge of the stock's abundance) or splitting QMAs to suit their circumstances (which could not be justified on biological grounds).
- 216 MAF was forced to find a solution. Various options were considered as part of this process for the 1991/92 and subsequent fishing years.
- 217 MAF determined that ICE should be allocated based on a permit holder's catch history in the previous fishing year as shown in the following table:

Quota Management Area	Catch History Year used for ICE calculation	Fishing Year ICE first imposed
QMAs 1 and 2	1990/91	1991/92
QMAs 4 and 6A	1991/92	1992/93

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- 218 Some permit holders complain that the Ministry did not proceed to allocate ICE in areas 3 and 6B in the 1993/94 fishing year. They claim the fishery was fully developed at that stage. When making his decision in 1993 the Director-General determined that the fisheries in areas 3 and 6B were not fully developed and declined to allocate individual allocations in those areas at that time.
- 219 All allocations of ICE were initially established by permit conditions. In light of legal advice these permit conditions were replaced with ICE Regulations in 1999. All scampi fisheries not subjected to ICE by 1993 have been managed with competitive catch limits (with limited access) since 1991.
- 220 The amount of ICE allocated remained substantially the same until the Court of Appeal decision in late 2001 that scampi ICE regulations were unlawful. Since this decision all scampi fisheries have been managed under competitive catch limits. When the total competitive catch limit for a stock is caught the stock is closed to further target fishing for the balance of that year.
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Allocation years for scampi were set in 1996

- 221 The criteria for allocation of scampi quota (when it is finally introduced into the QMS) are the same as all other non-QMS fisheries (excluding tuna). These were enacted in 1996 (after Cabinet decisions in mid-1994) for fisheries which are competitive at the time the Minister declares scampi subject to the QMS. Allocations are based on the best 12 months in the catch history years of 1990/91 and 1991/92. In fisheries which are subject to ICE at the time the Minister declares scampi to be subject to the QMS, allocations are based on that ICE.
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Permitting decisions made before 1992 are validated by subsequent legislation

- 222 Scampi management decisions have been subject to both administrative and judicial review since 1991. All permitting decisions made before 1992 (except for the single case where Mr Goodship who was excluded under the S65 moratorium which had commenced before the section came into force) have been validated by subsequent legislation.
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Parliament considered permitting issues in 1996

- 223 Parliament considered the disputes over access to non-QMS fisheries (including scampi) and the likely ongoing cost and delay associated with resolving individual permitting decision. In 1996 when passing the new Fisheries Act, Parliament decided to validate all permit decisions made before the end of the catch history years (i.e. all permitting decisions before 30 September 1992 are specifically validated by the Fisheries Act 1996 unless proceedings commenced before the section came into force).
- 224 In order to recognise concerns raised by permit holders (including some of the current complainants) Parliament allowed limited scope for review of permit decisions made in the period 1 October 1992 – 30 September 1996. This validation would not apply to persons who
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sought a review of the decision within 1 year of the Act's passage or who had already challenged permit decisions in Court.

QMS management proposals have prompted Court action by fishers

225 Most fisher's concerns only resurfaced when the Minister made a declaration in 1997 that scampi would be introduced into the QMS. Fishers recognised (rightly) that this would mean that their ICE allocations would become the foundation for allocation of ITQ and immediately sought judicial action to delay this introduction.

Specific responses to permit holder concerns

226 As noted earlier the Ministry has summarised its understanding of current concerns by permit holders and other scampi litigants. To assist the Committee the Ministry has developed an initial response to these concerns.

The use of prior years to establish any catch history is normal fisheries management practice

227 Some fishers note that MAF issued special permits in the late 1980s and early 1990s containing the following wording:

"The taking of any fish while fishing under this permit shall not entitle the holder to any advantage or privilege with respect to any of the species taken or the issue of any future fishing permits"

228 They claim that by virtue of this wording they approached their fishing activities in the key criteria years in a different fashion than they would have if they had known that catches in those years were going to be used as the basis of allocation of ICE or ITQ.

229 This condition related to fishing under a special permit, which allowed the use of fine mesh. At that time the sustainability effects of the use of fine mesh was unknown. This condition made it clear that MAF retained the absolute right to remove or amend the permit. This was an appropriate condition in the circumstances.

230 MAF accepts that the rules used to manage the scampi fishery did change quite quickly in 1990 and 1991 (with the imposition of the moratorium and the first allocation of ICE respectively). This reflects the increasing fishing effort and increased interest in the fishery occurring at that time.

231 In a situation where a stock has reached sustainable levels of fishing (to established sustainability limits) and the input controls established were unlikely to constrain these catches MAF had little option, but to cap the level of catch. This was done in 1991. However MAF believed controlling the total catch in a competitive environment was economically inefficient, led to over-capitalisation and caused other management difficulties.

232 MAF therefore determined that catch history should be used as the basis of future ICE allocations in scampi. As is normal in any fisheries management jurisdiction, if catch history is to be used for quota allocation, there is little point in setting the criteria years in the future as this purely encourages fishers to race for catch to establish

their catch histories. It is normal that the catch history years set will always be in the past. In fact in the New Zealand environment all quota based on catch history has been based on catch history years in a prior period.

233 The stated 'representation' by MAF cannot preclude Parliament using those years for the purposes of catch history allocation. It merely provides that the fisher himself cannot rely with any certainty on future access and rights generated in accordance with that special permit.

234 MFish also notes that all catch is taken and used for catch history and ICE conditions were under S63 permits which did not contain the condition that some permit holders complain about.

Inconsistent permitting decisions in 1989/90 and 1990/91 were addressed under the national scampi management regime

235 Fishers have some concerns that delays in issuing permits in 1989/90 and 1990/91 hindered permit holders from fishing in the years ultimately selected as the basis for allocations.

236 Other fishers complain that there were different approaches to the issue of permits taken in the Auckland office and the Nelson office. These differences meant that some people were given permits whilst others were excluded from the fishery

237 MAF recognised very early on that there had been inconsistent permitting decisions in different offices. When the initial moratorium was established for scampi in 1990 MAF commenced the development of a national scampi management regime in 1990/91 that involved limiting access.

238 MAF attempted to resolve permitting inconsistencies through the creation of access criteria that did not rely solely on previous access decisions but did require some form of commitment to scampi fishing.

239 These criteria allowed access to scampi to fishers who had some demonstrated fishing effort in scampi or had an established financial commitment in preparation for scampi fishing. Therefore some fishers who did not initially receive permits prior to 1990 were granted access if they met this criteria.

240 MAF and MFish have applied a nationally consistent approach to scampi access decisions since April 1991 adjusting as appropriate in accordance with Court decisions.

Vessel decisions have been made consistently since 1991

241 Some permit holders believe that the inability to increase the number of vessels on their permit meant some permit holders were treated differently to Simunovich Fisheries Limited.

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- 242 When establishing the initial management regime for scampi in 1991 MAF determined that fishers would be limited to the vessels they used in fishing for scampi as at 30 September 1990. This was designed to limit expansion of effort in fisheries where MAF was concerned about scampi sustainability and environmental concerns.
- 243 Simunovich was granted permission for an additional vessel in November 1991 to fish in areas 3-9. This approval was conditional on Simunovich agreeing to cease to use a vessel in areas 1 and 2. This condition was accepted by Simunovich.
- 244 In granting this approval MAF determined that similar rules should be used for other scampi permit holders (i.e. additional vessels could be used in areas 3-9 so long as there was a consequential reduction in the use of vessels in areas 1 and 2).
- 245 To the best of the Ministry's knowledge this criteria was applied consistently from 1991 onwards until vessel restrictions were removed in 1999.
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Decisions to not allocate ICE in Area 3 and 6B were made in 1993 and 1999

- 246 Some fishers complain that MAF's approach in allocating ICE in QMAs 1, 2, 4 and 6A was not continued in areas 3 and 6B (and other areas). They claim that, in light of these previous decisions they had changed their fishing practices in order to maximise catch history.
- 247 MAF first made decisions on whether to allocate ICE in these areas in 1993. At that time the Director-General determined that the fisheries in areas 3 and 6B were not fully developed and declined to allocate individual allocations in those areas at that time.
- 248 The Chief Executive of MFish reviewed whether to allocate ICE in 1999 and determined that new information available suggested that the catch limits in areas 3 and 6B were in fact fully developed within the then existing catch limits. The Chief Executive determined that, due to the lapse of time since 1993, he could not form a view as to an allocation that was fair and reasonable. At that stage he declined to allocate ICE in areas 3 and 6B.
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There was no obligation on MAF to advise that special permits could allow scampi fishing

- 249 Sealord claims that the Ministry had an obligation to advise it that it could obtain a special permit to take scampi under section 64 of the Fisheries Act 1983. It claims that had it been so advised it would have applied for a special permit and under the relevant criteria been approved.
- 250 The High Court, in October 2001, decided, among other things, that there was no such obligation on the Ministry to advise Sealord of the special permit process and dismissed their judicial review. Sealord has appealed this decision.
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PART 3

Part 3A – Allegations of corruption

Introduction and Background

Terms of Reference 6

251 Terms of Reference 6 of the Primary Production Select Committee inquiry is “*To investigate and determine whether any allegations made regarding maladministration in relation to the scampi fishery were made for the proper reasons, and whether they were dealt with appropriately.*”

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252 MFish has interpreted “maladministration” as covering the allegations of possible corruption made by Barine Developments Ltd and Ocean Law New Zealand.

Content of this paper

253 This Part 3 paper details the background to the allegations and the process followed by the Chief Executive to review them.

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The Court of Appeal decision

254 On 11 October 2001 the Court of Appeal decided that the Fisheries (Allocation of Catch Entitlement) Regulations 1999 were invalid because:

- i the Regulations were not specific enough and left too many matters open for the Chief Executive’s discretion with little or no guidance
- ii the Regulations made no reference to the particular stock for which they were made, contrary to the regulation making power that anticipated the regulations would be specific to a stock
- iii the Regulations provided no provision for the management and control of the stock, the choice of stock and basis for allocation had been left solely to the discretion of the Chief Executive.

255 As a consequence the individual catch entitlements in the scampi fishery were also invalidated and the fishery was left as a competitive fishery, with no individual catch entitlements but overall catch limits.

256 In the course of his decision Justice Thomas, without endorsement by the other members who confined their judgment to the Regulations, commented that²:

“Even without the advantage of a trial, it is readily apparent that the Ministry’s management of the scampi fishing allocations is

² *Vautier Shelf Company No. 14 Ltd & Others v The Chief Executive of Ministry of Fisheries & Others* [2002] 2 NZLR 722,734-735.

open to criticism of mismanagement. One accepts that the Ministry's officers are conscientious, well intentioned and carry out their duties in good faith. But the respects in which sound administration would seem to have been lacking is troubling, more particularly as sound administration is the bedrock of fair and reasonable treatment for those citizens affected by that administration."

"No excursion into the various respects in which the Ministry's management is questionable is required in this judgment. Suffice it to say that the Ministry has seemingly moved from one regime to another in a manner which has caused considerable confusion; policies have been announced but have been revoked or then changed without due consultation or notice; other policies have been applied inconsistently as between competing fishers; advice to fishers has not been given even-handedly and the treatment of fishers has been unequal; assurances have been given which have not been kept and statements have been made which have been misleading; different systems have operated in different regional offices; needless mistakes have been made in processing and granting fishing permits; and delays, at times inordinate and particular to a region or fisher, have occurred. The Ministry appears to have been all too ready to build on errors and injustices committed in preceding years and to rely on changing the legislation or adopting a new regime to overcome the problems caused by the earlier mismanagement. Its focus may, perhaps, have been directed to reducing 'litigation risk' at the expense of sound administration. The impression created is that much of this alleged mismanagement could have been avoided if, instead of defending questionable past decisions and focusing on legalities and 'litigation risk' management, the Ministry's officers had, when making decisions, simply asked the straight-forward question: 'Is this reasonable and fair?'"

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- 257 MFish readily accepts that there has been inconsistency of administration, which the Ministry of Agriculture and Fisheries attempted to rectify in 1991. Justice Ellis in the High Court recognised these efforts³:

"After problems arose, MAF officers made efforts to rectify errors and introduce fairness, but by then it was too late."

- 258 Until early 2002 there was never any suggestion of corruption or impropriety in the actions of officials. This was noted by Justice Ellis in the High Court⁴:

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³ *Vautier Shelf Company No. 14 Ltd & Others v The Chief Executive of Ministry of Fisheries & Others* (High Court Wellington, CP 20/97, CP 327/97, CP 357/97, CP 21/98 & CP 262/98, 24 July 2000, Ellis J) page 79.

⁴ *Vautier Shelf Company No. 14 Ltd & Others v The Chief Executive of Ministry of Fisheries & Others* (High Court Wellington, CP 20/97, CP 327/97, CP 357/97, CP 21/98 & CP 262/98, 24 July 2000, Ellis J) page 78.

⁵ *Vautier Shelf Company No. 14 Ltd & Others v The Chief Executive of Ministry of Fisheries & Others* [2002] 2 NZLR 722,734.

“This is a very robust industry managed by astute, even opportunistic fishers, and MAF is armed with powerful means of control. Further, any reviewer must be aware of judging dynamic and stressful situations in hindsight. In this case I need only mention the very considerable pressure placed on MAF by Simunovich. I do not say this in criticism, as there is no suggestion of any impropriety.”

259 And further recognised by Justice Thomas⁵ in the Court of Appeal:

“One accepts that the ministry’s officers are conscientious, well intentioned and carry out their duties in good faith.”

**The
consultation
paper**

260 Following the Court of Appeal decision MFish advised the Minister of Fisheries on a number of scampi management options, and on the 28th of November 2001 MFish commenced consultation with stakeholders on the options for introducing scampi into the quota management system. A copy of the consultation paper is attached as Annex 7. The paper stated that the quota management system was the preferred management framework for scampi

261 The consultation paper contained two options for introducing scampi into the quota management system. The preferred option was to implement an individual catch entitlement regime for scampi fishing areas 1, 2, 4 and 6A to facilitate the introduction of those fisheries into the quota management system by the 1st of October 2002, with the remaining scampi areas being introduced on the 1st of October 2003. The other option was to introduce all scampi fishing areas into the quota management system on the 1st of October 2003.

262 In the absence of legislative guidance for the allocation of individual catch entitlement, it was the Ministry of Fisheries’ preference to use catch history to allocate individual catch entitlement and to determine catch history by reference to the fishing years 1990/91 and 1991/92. These are the catch history years, specified in the Fisheries Act 1996 for allocating quota in open or competitive fisheries.

263 MFish received a number of submissions from scampi fishers on the proposal to use individual catch entitlement in fishing areas 1, 2, 4 and 6A. Two of the submissions supported the proposal to introduce individual catch entitlement using the catch history criteria years specified in the Fisheries Act. The remaining submissions supported the use of individual catch entitlement based on some alternative allocation mechanism that would recognise individual circumstances in the scampi fisheries.

264 On 13 March 2002 Mrs Penwarden on behalf of Barine Developments Ltd wrote to the Minister of Fisheries. A copy of that letter is attached as Annex 8. In that letter Mrs Penwarden commented:

“We are well aware that scampi QMS decisions may well already be on your desk and, as a consequence, you will not be of a mind to discuss relevant issues with any of the principals involved.

However, Barine has serious misgivings about both process and management of the scampi fishery within the Ministry of Fisheries which we believe could lead to public debate that has the potential to harm the whole industry. As a result of further investigations over the last two months we believe these concerns must be brought to your immediate attention. We have not come to this conclusion lightly, nor do we regard our position on this issue as in any way an attempt to leverage special consideration.

As you will be well aware, attempts in the past to discuss our concerns directly with you pivot around both High Court and Court of Appeal findings. Both Courts have admonished the Ministry for what was described as a history of inconsistency and unfairness when it came to dealing with scampi allocation grievances.

In the opinion of our legal advisors since these findings, the Ministry has continued to ignore the Court’s opinion and defied the judgements made. We now have further evidence that suggests serious decision-making lapses and possible collusion with specific parties over allocation within the management of the Ministry.

Barine has absolutely no interest in further inflaming an already difficult situation. We acknowledge that the Ministry may well have what they perceive as good reasons for taking the stance they have adopted to our case over recent times.

What we do want to discuss with you directly are options that will progress the introduction of a fair access regime for scampi and help ameliorate potential confrontation that could end in damage to the reputation of all parties involved.

This letter is a heart-felt request for Ministerial access without fear or favour. It is made at an informal level in the very real hope that mediation, conciliation or even explanation can obviate a return to the courts and further corrosive public confrontation.”

**Decline by
Minister to
meet**

265 On the 3rd of April 2002 the Minister of Fisheries responded to Mrs Penwarden by declining to meet to discuss future scampi management measures and urging Mrs Penwarden to convey any information supporting their allegations of decision making lapses and possible collusion in the management of scampi to the Chief Legal Advisor of MFish.

266 A copy of the Minister's letter is attached as Annex 9.

**Statements in
the House**

267 In the general debate in Parliament on the 24th of April 2002, the Rt. Hon. Winston Peters said that MFish includes officials "*whom our High Court and Court of Appeal have roundly condemned for inconsistency, unequal treatment of citizens, incompetence, mismanagement, and, even worse, unprofessional behaviour and unlawful acts.*"

268 The member also stated that MFish is "*guilty of condoning corruption, aiding and abetting corruption, and involving itself in corruption*".

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269 It was stated by the member, *inter alia*:

- "*....over the next few weeks I will produce documentary evidence that the Ministry of Fisheries knew full well about and condoned in the misreporting of, for example, species catch history, and that it knowingly condoned the evading of catch history records, whilst advising others in the industry that catch history would be irrelevant.*"
- "*I will produce evidence that the Ministry knowingly condoned the packaging of catch in cartons and other packaging with grossly understated weights in order to disguise the volume, that the Ministry knowingly condoned the mis-declaration of one species for another species in order to avoid quota restrictions, that the Ministry knowingly condoned the systematic alteration of fishing returns, and that the Ministry knowingly condoned the packaging of one species of fish in cartons labelled as being another species of fish, thereby again inflating the catch history.*"

270 A copy of the Hansard record of these comments is attached as Annex 10.

**Anonymous
briefing note**

271 At a meeting on the 3rd of May 2002, the Minister of Fisheries passed to the Chief Executive an anonymous document, "Scampi Briefing Notes" received by the Minister from the Hon. Doug Kidd containing allegations similar to those made by the Rt. Hon. Winston Peters. A copy of the briefing note is attached as Annex 11.

272 The briefing note named two senior MFish managers, Stan Crothers, Deputy Chief Executive and Dave Wood, National Manager Compliance as being involved in the alleged corrupt behaviour.

273 On the 14th of May 2002 the two senior managers named themselves publicly as being the officials accused of corruption in order to protect other MFish staff from suspicion, declared their innocence and called for a full investigation of the allegations by a competent authority such as the Serious Fraud Office or the Police. A copy of the two senior managers' press statements is attached as Annex 12.

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Chief Executive's Approach

General approach

274 Right from the start, the Chief Executive's general approach has been to take the allegations very seriously. This is because if the allegations were true they would undermine the integrity of fisheries management in New Zealand, MFish and the wider public service. He was also aware that the allegations called into question the integrity of all staff in MFish and staff in the former Ministry of Agriculture and Fisheries. The Chief Executive was also cognisant of his responsibilities to all MFish staff under the State Sector Act and in terms of those responsibilities, he wanted to ensure that the two named senior managers were treated fairly.

275 A copy of the Chief Executive's press statement of the 14th of May 2002 is attached as Annex 13.

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276 Part of the general approach adopted was to work very closely with the Solicitor-General on the matter and to keep the Minister of Fisheries briefed on a regular basis. The State Services Commissioner was also kept informed.

Access to allegation materials

277 Key to resolving the matter was to receive the allegation materials, so that they could be properly considered.

278 This involved:

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- the Chief Executive, following two similar letters from the Minister of Fisheries, writing to the Rt. Hon. Winston Peters on the 6th of May 2002 requesting access to the material referred to in the House. A copy of this letter is attached as Annex 14
- the Solicitor-General making approaches on the Chief Executive's behalf to obtain access to the allegation materials.

Delay in obtaining allegation materials

279 In the event the allegation materials were not made available for some time – from either the Rt. Hon. Winston Peters or the other parties involved in the allegations.

280 Of relevance is a letter of the 17th of May 2002 from Mr Penwarden of Barine Developments Ltd to the Minister of Fisheries advising:

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“We previously considered an offer to provide the information to the Solicitor-General's Office but, due to the recent developments and his association with the Ministry of Fisheries, we have decided not to proceed with that proposition and, as offered in the Minister's letter of 13 May 2002, provide the information direct to the SFO as indicated above.”

281 A copy of that letter is attached as Annex 15.

Serious Fraud Office Review

Supply of allegation materials to the Serious Fraud Office

282 The Chief Executive understands that the allegation materials were provided to the Serious Fraud Office by Ocean Law New Zealand or Barine Developments Ltd in late May 2002.

Serious Fraud Office letter

283 On the 20th of June 2002 the Chief Executive received a copy of the letter from the Director of the Serious Fraud Office to the Solicitor General. A copy of that letter is attached as Annex 16. That letter stated:

“I had a complaint made to me of allegations of corruption within the Ministry of Fisheries (and its predecessor) in relation to the allocation of scampi quota. I had to determine initially whether there was a sufficient basis for me to suspect that an investigation may disclose serious or complex fraud (which for these purposes I took to include possible offending by officials).

I have concluded that on the material available to me I do not have a sufficient basis to commence an investigation. Nor do I consider that it is likely that further reliable evidence will become available given the time that has elapsed since many of the alleged improprieties are said to have occurred. I noted that both the High Court and the Court of Appeal concluded that whilst they found certain actions by officials to have been undertaken unfairly they had not seen any evidence of impropriety.

The real issue, I believe, following the Court decisions, is for the Crown to establish a procedure for the allocation of scampi quota that will be accepted by all parties as a fair procedure. That action falls outside of my jurisdiction. It is, however, something that the Crown Law Office may well be able to assist the Ministry with and thereby reinforce public confidence in the allocation procedures and officials. I leave that matter in the hands of yourself and the Ministry.”

Independent Barrister's Review

Allegation materials received by the Solicitor-General

- 284 On the 5th of June 2002 the Solicitor-General received a facsimile from Ocean Law New Zealand advising that the allegation materials would be couriered to him that day. A copy of that letter is attached as Annex 17.
- 285 On the 20th of June 2002 the Solicitor-General advised that he had now received the materials previously expected and that following a Crown Law Office review, the Solicitor-General and the Chief Executive should meet to discuss the appropriate action to be taken.
- 286 A meeting subsequently took place on the 25th of June 2002 at which the affidavits and other materials were passed across to the Chief Executive for his consideration. Despite the conclusions of the Serious Fraud Office, the Solicitor-General's view was that while the allegations of corruption were not strong, they could not be ignored.

Terms of Reference for the first review

- 287 Following subsequent advice from within MFish, the Crown Law Office and the State Services Commission, the Chief Executive considered proceeding with a "wide-ranging" Terms of Reference for an independent review of the allegations. Being mindful of his obligations as a good employer, he also consulted the two senior managers who were named in both the anonymous briefing note and in the allegation materials.

288 The Chief Executive was concerned that a "wide-ranging" review may be too extreme an approach given the apparent lack of evidence contained in the allegations. He was concerned to ensure that his employment obligations to the named officials be met, balanced against satisfying himself on the matters contained in the allegations. Therefore he deferred a "wide-ranging" review and instead decided upon an independent review by a barrister recommended by the Crown Law Office, Peter Andrew, who would advise on:

- i the nature of the allegations against the two senior managers
- ii whether the allegations meet a minimum or reasonable threshold that the Chief Executive needs to consider them further together with the related reasons
- iii if they don't meet a minimum or reasonable threshold such that the Chief Executive needs to consider them further, the reasons for this conclusion
- iv if the answer to the second question above is in the positive the options available including the scope of the necessary further work
- v any other matter relating to the materials in relation to the two senior managers or beyond.

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**First report
from Peter
Andrew**

289 Mr Andrew reviewed the allegation materials and on the 15th August 2002 reported to the Chief Executive. A copy of that report is attached as Annex 18.

290 The report stated, *inter alia*:

“In summary, my view is that the allegations do meet the requisite threshold such that you should take further steps to have them formally investigated, i.e. there is sufficient substance to them to justify real concern.

I recommend that you proceed with a formal independent review as contemplated by the draft terms of reference. The allegations raise fundamental unanswered questions and impugn the integrity of the Ministry’s law enforcement responsibilities. The better approach is to initiate a rigorous and independent process of review.”

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**Chief
Executive
considerations**

291 The Chief Executive considered the first report and accepted its conclusions. However he again considered a number of factors relevant to whether commencing a “wide-ranging” review was appropriate, including the following:

i the serious nature of the allegations questioning the integrity of MFish staff, MFish itself, the public service and fisheries management in New Zealand

ii being a good employer

iii the allegations were supported by signed affidavits from more than just one former employee

iv the on-going litigation in the scampi fishery

v the Serious Fraud Office conclusions

vi the inherent limitations in the affidavits with the bottom line being that they were not strong

vii Barine Developments Ltd, the party behind the allegations being an interested party in the scampi fishery

viii the Chief Executive’s experience in working with the two senior managers over the previous seven years.

292 The above considerations were discussed with the Solicitor-General and the Chief Executive decided that Peter Andrew be instructed to review any written or oral information from the two senior managers and to then:

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i review the responses against the allegations

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ii advise whether those responses resolve any of the allegations or whether there remain allegations in respect of which further inquiries should be made and what the nature of any such inquiries should be.

293 A copy of the Solicitor-General's instructing letter is attached as Annex 19.

Second report from Peter Andrew

294 On the 2nd of October 2002 Mr Andrew reported to the Solicitor-General. A copy of that report is attached as Annex 20. Mr Andrew wrote:

"In accordance with your instructions I have reviewed the allegations against Messrs Crothers and Wood and the responses received from them in relation to those allegations, with a view to determining whether or not any further investigation is warranted.

Attached is a copy of my report. You will note that I have recommended that Mr Tuck need take no further steps to investigate the allegations against Messrs Crothers and Wood. In my view, Mr Tuck can legitimately conclude that their responses have resolved the allegations against them and that there is no need for further inquiry."

Public statement

295 The Chief Executive subsequently publicly stated, "*It is clear that there is absolutely no basis in the allegations against the senior managers concerned. The allegations include factually incorrect statements, unsupported assumptions and flawed reasoning. There is no justification for me to consider the allegations any further.*"

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296 A copy of the Chief Executive's press statement of the 11th of October 2002 is attached as Annex 21.

Claim of privilege to the reports

297 When the Chief Executive received the report he took advice on its release. Acting on that advice he withheld disclosure of the report on the basis of legal professional privilege. Based on further advice, and in light of the two inquiries, he has now decided that the two Peter Andrew reports should be disclosed to the Primary Production Select Committee.

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Conclusions

Chief Executive has taken the allegations seriously

298 The Chief Executive has always taken and continues to take the allegations of corruption against two of his senior managers very seriously, while also being aware of his responsibilities under the State Sector Act to treat all staff fairly.

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Proper reviews have been conducted

299 Both the Serious Fraud Office and the independent barrister, Peter Andrew, have undertaken independent reviews of the information that has been provided. They have both concluded that there was insufficient evidence of corruption to warrant further investigation.

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Full confidence

300 On the basis of all information available to date the Chief Executive has concluded that the allegations of corruption against his two senior managers are baseless and lack merit.

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301 The Chief Executive has expressed and continues to express full confidence in the two senior managers and in their personal integrity.

PART 3

Part 3B - Treatment of Staff

Terms of Reference	302 Terms of Reference 4 set out by the Primary Production Select Committee seeks information on “ <i>All circumstances relating to the treatment of any fisheries inspector or other MFish staff or staff of its predecessor with respect to the scampi fisheries including any suspension or termination payments</i> ”.
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Outline of the response	303 This Part 3 paper relates entirely to Barry Nalder. The scope of the response will cover: <ul style="list-style-type: none">i details of Mr Nalder’s employment history with MAFii details of two investigations concerning work related activities by Mr Nalder that resulted in his decision to retire from MAFiii details concerning the process that led to Mr Nalder electing to retire from MAF, and the various amounts that constituted the agreed settlementiv conclusion.
	304 It should be noted that this paper is based on substantiated information contained in files available to MFish. These files do not clearly explain information about some aspects of the circumstances surrounding the confidential agreed settlement between MAF and Mr Nalder.

Employment history – relevant episodes	305 Mr Nalder was employed by MAF in September 1989 as the District Compliance Manager based in Tauranga. Between October 1992 and March 1993, Mr Nalder was absent on sick leave after which it was subsequently agreed that it would be in his best interests that he transfer to Auckland. Consequently, he was seconded to the position of Senior Investigator in Auckland.(Annex 22)
	306 During Mr Nalder’s employment, questions were raised about his performance as a manager. In April 1993 he received a verbal warning as a result of him making verbal personal criticisms about a colleague (Annex 23). In addition, he was investigated for misconduct on two separate occasions. These instances are detailed in the next section.
	307 On 23 September 1993 Mr Nalder was suspended from duty on full pay pending the outcome of an investigation of alleged misconduct. As a result of the investigation into Mr Nalder’s work performance it was eventually agreed between MAF and Mr Nalder through his legal counsel that he would voluntarily retire. Mr Nalder retired from MAF on 6 May 1994.

**Investigation
One**

- 308 In August 1992 Mr Nalder was officer in charge of Operation Buster. He engaged the services of the accounting firm KPMG Peat Marwick to assist with some work on the Operation. During the course of Operation Buster the extent of the work by KPMG was questioned by some senior MAF staff. This resulted in an allegation of misconduct against Mr Nalder and a subsequent investigation in March 1993.
- 309 The allegation concerned Mr Nalder authorising payment of KPMG's costs far in excess of his delegated authority. According to information available to MFish, Mr Nalder estimated the costs to be about \$15,000, however the final amount was closer to \$70,000. Although it is scant in detail, the information suggests that during the course of the investigation Mr Nalder had his financial delegation suspended and was transferred off his duties. The investigation resulted in Mr Nalder receiving a formal written reprimand for unacceptable management practices. Moreover, he was required to undertake training in financial management and team building skills to prevent similar incidents in the future. (Annex 24)

**Investigation
Two**

- 310 On 14 September 1993, in a report on Operation Buster, concerns were raised about procedural irregularities with respect to a statutory declaration in a fishing return by Papakura Trawling and Fishing Company (PTFC). It was suggested that, in May 1992, Mr Nalder might have altered some information on a statutory declaration filed by PFTC. After further inquiries into the matter, on 23 September 1993 Mr Nalder was suspended on ordinary pay pending an investigation into allegations that he fraudulently misrepresented MAF information.
- 311 On 24 September 1993, Mr Fergusson, Director of Legal and Financial Services of MAF, engaged the services of Morley Security Group Ltd to assist in the conduct of an independent investigation of the apparent unauthorised provision of a report by Mr Nalder and matters surrounding the action. The NZ Police were notified by MAF of the possibility that a crime had been committed. It was agreed that MAF should continue with its own investigation, only notifying the police if there was evidence of criminal actions.
- 312 On 6 December 1993 Morley provided its report. The files note that during the intervening period Mr Nalder had, both directly and through his legal counsel, expressed concern about the length of time the investigation was taking. In response, on 2 December 1993, the Director General (DG) of MAF wrote to Mr Nalder explaining the situation and assuring him that the investigation would be pursued as quickly as possible. (Annex 25)
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**Director-
General's
consideration
of the
investigations**

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- 313 On 9 December the Director of Legal and Financial Services, MAF, wrote to Mr Nalder enclosing a draft report to the DG MAF concerning the investigation outcome. He invited his comments before submitting the report to the DG. The report concluded that:
- i Mr Nalder did complete the quota management return
 - ii he was not expressly or impliedly authorised to do so and should not have believed that he was
 - iii Mr Nalder displayed an appalling understanding of the ramifications of what he did given his position as a Fishery Officer and senior manager
 - iv his actions constituted serious misconduct in terms of negligence, carelessness or unacceptable incompetence.
- 314 On 21 December 1993, through his legal counsel, Mr Nalder responded and in essence rejected any allegation of misconduct, serious or otherwise. In his response he advised that he was considering commencing a personal grievance claim against MAF. However a final decision about this would depend on the actions taken by MAF as a result of any report to the DG and “ the time it takes for the DG so to act”.
- 315 Having considered Mr Nalder’s response, a report was provided to the DG MAF on 22 December 1993 with the same conclusions as those contained in the draft provided to Mr Nalder. On 24 December the DG wrote to Mr Nalder’s legal counsel advising that at that time he was unable to draw any conclusions but would address the matter early in the New Year. He further advised that in the meantime Mr Nalder’s suspension would continue until further notice.
- 316 In a letter dated 13 January 1994 the DG concluded that *“in considering this and previous factors as they related to the KPMG Peat Marwick Contract enquiry, on balance I conclude that Mr Nalder’s actions constituted serious misconduct but did not justify summary dismissal. He has shown by his actions and comments that he lacks the confidence and judgement required of a senior compliance officer and as such, should be removed from his current position of fisheries investigator. Barry Nalder should be advised of this decision, counselled, and best efforts should be made to find him an alternative position more fitting to his skills and competence”*. (Annex 26)
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**Employment
Termination
Process**

- 317 On 13 January 1994 MAF advised Mr Nalder through his legal counsel of the DG's decision and invited both parties to meet with MAF to discuss the matter. This action resulted in MAF being advised by Mr Christopher Toogood, a barrister, that he was now advising Mr Nalder's legal counsel and, if necessary, would act for Mr Nalder.
- 318 It would appear from the files that during the period 4-11 February 1994 a number of meetings were held between MAF and Mr Toogood to discuss Mr Nalder's options. It is further apparent that a decision was quickly reached that Mr Nalder would retire from MAF with full benefits as provided by his employment contract. A letter to MAF from Mr Toogood dated 18 February 1994 confirmed that Mr Nalder had instructed him to advise MAF of Mr Nalder's acceptance of the terms of his retirement.
- 319 There is no evidence to suggest that at any stage of this process Mr Nalder pursued a personal grievance against MAF, as he was entitled to do under the Employment Contracts Act 1991.
- 320 The settlement to Mr Nalder comprised the following elements:
- the DG of MAF authorised the payment to Mr Nalder a non-taxable ex gratia payment of \$13,100 on account of compensation for humiliation and distress, as provided by section 40(1)(c)(i) of the Employment Contracts Act 1991
 - MAF would contribute \$5,000 to legal costs incurred by Mr Nalder on production of an invoice
 - Mr Nalder accepted enhanced early retirement within the terms of his employment contract with effect from 6 May 1994. Normal entitlements applied recognising a total of 26 years and six months public service (amounting to \$67,646.81 gross, \$48,705.70 net)
 - Mr Nalder continued to be paid until 6 May 1994 on which date he was paid 22 days outstanding annual leave

Documents pertaining to Mr Nalder's payment are attached as Annex 27.

**Key Decision
Makers**

- 321 The following individuals were the key decision makers in the process that led to Mr Nalder's retirement and payment of associated benefits.
- Mr Walshe: Regional Manager North, of the Fisheries Division of MAF. Mr Nalder reported to Mr Walshe. Among other actions, Mr Walshe managed the relocation of Mr Nalder to Auckland and subsequent disciplinary matters directed by MAF senior managers.
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- Ms Hall: Chief Investigating Accountant National Compliance Unit of the Fisheries Division of MAF. Ms Hall oversaw and reported on the accounting aspects of Operation Buster. Ms Hall alerted Stan Crothers to the possibility that Mr Nalder had altered the PTFC documentation.
 - Dr Allen: Deputy Group Director of the Fisheries Division of MAF. Dr Allen concluded that Mr Nalder had not acted appropriately with respect to the contracting of KPMG Peat Marwick and ordered the reprimand. Dr Allen also ordered the suspension of Mr Nalder after the PTFC incident was revealed.
 - Mr Fergusson: Director of Legal and Financial Services at MAF. Mr Fergusson managed the investigation process into the PTFC irregularity and reported the outcome and possible actions to the Director-General of MAF.
 - Ms Hinds: Manager Industrial Relations of the Fisheries Division of MAF. Ms Hinds provided advice to Dr Ballard regarding the investigation into Mr Nalder's activities and matters to do with his employment termination.
 - Dr Ballard: Director General of MAF. Dr Ballard made the decision to remove Mr Nalder from his primary role into a more suitable role. Dr Ballard approved the Confidential Settlement Agreement concerning Mr Nalder's retirement and payment.

Conclusion

322 From the evidence available on the files, it can be reasonably concluded that the actions taken by MAF against Mr Nalder were related wholly to incidents concerning Mr Nalder's poor performance in discharging his duties while he was the Officer in Charge of Operation Buster. In particular, these were the actions he took regarding the engagement of KPMG Peat Marwick, and the altering of the statutory declaration furnished by the PTFC.
