



POOR DRAFTING COULD PROVE COSTLY

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It is likely you are all aware of the recent High Court decision (*Vu v Ministry of Fisheries*, May 18, 2010) setting aside a conviction and sentence relating to alleged paua poaching.

The case has been making headlines because the conviction relied on a transaction made with an undercover Ministry of Fisheries officer, and the judge found this meant the transaction was made with the Crown and therefore was legal under the Fisheries Act.

Vu accompanied her co-offender to purchase blackmarket paua from an undercover Fisheries officer and was charged and convicted of being a party to an offence under the act.

Section 192 of the act restricts whom fish can be acquired or bought from, and in particular section 192(5) is the general catch-all. Under s192(5) it is illegal to purchase, acquire or even possess any fish for the purpose of sale unless it is purchased or acquired from a commercial fisher, a licenced fish receiver or a fish farmer.

As *Vu* and her co-offender did not purchase the paua from anyone who fell in the above categories they were in breach of the act. However, s192(10)(c), the crunch point of the appeal, provides that the section does not apply when the transaction is made with the Crown.

If the judgment is upheld it will have serious implications for numerous past and future convictions where fish was acquired as part of undercover operations, and there will need to be amendments to the section. The decision affects not only charges under s192 of the act but also any charges under fisheries regulations based on transactions with undercover fisheries officers. The Ministry of Fisheries is taking the case to the Court of Appeal for an urgent appeal.

On first consideration, the High Court decision seems ridiculous. It defies logic that someone who is buying blackmarket fish can avoid prosecution simply because they are “lucky” enough to be buying that fish from an undercover Fisheries officer and are therefore entering a transaction with the Crown.

The offender has the intention to buy blackmarket fish and does so, and is saved simply by the fact that they are buying it from an undercover Fisheries officer, who is selling it with the intention of catching such offenders.

This raises the issue of whether there is any requirement under the act for the purchaser to know they are transacting with the Crown and if not, whether the Court can read that requirement in to achieve the purpose of the act.

There is no requirement under the act for there to be knowledge that one party is the Crown before s192(10) will apply. The Court considered whether such a requirement could be read in, but determined that the wording of the act could not

be read to imply such a requirement and the section needed to be amended if that was to be an intended requirement. One of the contributing factors to this decision was the fact that the Crown did not attempt to argue for that kind of interpretation of the section.

What is even more disturbing is that the Court found that the effect of the exception extends beyond s192. It is a general principle of statutory interpretation that delegated legislation (eg. regulations) cannot override an Act of Parliament, particularly not the enabling act.

Based on this principle, the judge found that because the ability to acquire fish in a transaction with the Crown is legal under the act, the regulations must be read in that context. Once a transaction is legal under the act, the transacting parties cannot be charged under any fisheries regulations.


This is not the first time poor wording in a statute has caught the MFish wrong-footed and allowed alleged poachers off the hook. In *R v Armstrong* 2004 there was a similar situation where lousy wording in the act created an undesirable outcome.

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In *Armstrong* it was an essential ingredient of the charges that the defendants had acted in breach of the act “knowingly, for the purpose of obtaining any benefit under the act”. The defendants in the case were paua poachers and were merely after financial gain.

The District Court found the financial benefits the respondents sought to achieve were not benefits arising under the act, and thus they were acquitted. The act was amended, with s233 re-worded so that now knowingly acting in contravention of the act to obtain any benefit is an offence.

Unfortunately, s233 still will not catch *Vu* or her co-offender. Despite the fact that they may have thought they were acting in contravention, they were actually unwittingly not acting in contravention of the act because they were transacting with the Crown.

Should MFish fail in its appeal there is bound to be a line of disgruntled criminals (or not, as the case may now be) appealing their own convictions and sentences. This could be an extremely costly piece of poor drafting and it is surprising it has not come to light earlier. 

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