

**IN THE DISTRICT COURT  
AT WELLINGTON**

**CRI-2017-085-002299  
[2018] NZDC 1126**

**MINISTRY FOR PRIMARY INDUSTRIES**  
Prosecutor

v

**WAYNE DAVID MACFARLANE**  
Defendant

Hearing: 24 January 2018

Appearances: V Sagaga for the Prosecutor  
P Dawson for the Defendant

Judgment: 24 January 2018

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**NOTES OF JUDGE P A H HOBBS ON SENTENCING**

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[1] Mr Macfarlane, you have pleaded guilty to three charges of making false statements in an application to register a commercial fishing vessel.

[2] Essentially, you made an online application to register two fishing vessels so they could be used to fish commercially in New Zealand waters. You falsely declared that the flag of both vessels was a New Zealand flag when they were, in fact, Australian flagged. You also gave a false international call sign for one of the vessels as part of that application process.

[3] I think it is relevant to note that these are strict liability offences and there is no suggestion that you have acted dishonestly or with intent to deceive the authorities.

[4] There is a background to the offending that is, in my view, relevant to your culpability. You are a commercial fisherman and a 50 percent shareholder in Tuna Fishing Company Limited, which has been fishing commercially in New Zealand waters since 2001. Your father is also a 50 percent shareholder in that company and has been its sole director since 2001. Until April 2016, your role in the company was focused on the on-water operation of the vessels. Your father, during this period, in his capacity as director, had primary responsibility for all off-water issues such as business administration, company structures, tax, GST, compliance issues, vessel registration and certification in Australia and New Zealand, purchasing quota, obtaining the necessary permits to allow the company's vessels to fish in Australia and New Zealand. Your father is not a commercial fisherman, nor a mariner.

[5] In 2014 the company moved its two vessels from New Zealand to Australia to facilitate commercial fishing in Australia. Your father attended to the compliance requirements to allow the vessels to depart New Zealand and be registered and flagged to operate commercially in Australia. In April 2016, your father was involved in a serious traffic accident, suffering among other things head injuries, and he continues to suffer concussion and memory problems. Due to your father's injuries, you took over the administration of the business in mid-2016.

[6] In September 2016, a decision was made that the fishing vessels would be moved from Australia back to New Zealand. It was decided that they would be brought back as Australian flagged vessels to avoid the costs of registering them with Maritime New Zealand prior to departure.

[7] There are a number of administrative steps that must be undertaken to allow the vessels to depart Australia and re-enter New Zealand to fish commercially. Mr Dawson on your behalf would submit that it is a relatively complex process and that you simply got it wrong in the ways I have previously described. Mr Dawson submits that your errors are directly attributable to your administrative inexperience and the complexities inherent in transfer of a vessel from Australia to New Zealand.

[8] Mr Sagaga for the prosecutor points out that these are strict liability offences and the duty is on you to make sure you get it right. Mr Sagaga submits that it is important for fisheries management that such things are correct.

[9] In sentencing you, I must have regard to the purposes of the Fisheries Act 1996, the difficulties inherent in detecting fisheries offences, and the need to maintain adequate deterrence against the commission of fisheries offences.

[10] The prosecution accepts that your offending falls within the low culpability band as set out in *Department of Labour v Hanham & Philp Contractors Ltd.*<sup>1</sup>

[11] It is relevant to note, in my view, that there was no impact on the New Zealand fisheries, there was no commercial gain to you, the offending was neither sophisticated, nor was it continuous. The errors were always going to be detected, and all other necessary steps seemed to have been taken to legitimately transfer the vessel to New Zealand to allow commercial fishing in New Zealand.

[12] For the reasons advanced by Mr Dawson in his comprehensive written submissions, you were of the view that you were entitled to list the vessel as a New Zealand vessel when, in fact, it was an Australia flagged vessel.

[13] As I have said, these are strict liability offences. You are obliged to get these things right. You made errors in relation to the flag of the vessels and in relation to the call sign. There seems to be nothing more sinister or nefarious involved in this offending.

[14] Mr Sagaga submits to me that a starting point of \$10,000 fine for each charge is appropriate. He refers to several cases, including probably most significantly, *Minister of Fisheries v Antons Trawling Company Limited.*<sup>2</sup> He does refer to two other cases, but it seems to me, with respect, that those cases are more serious in terms of the offending than yours and are of a different type, albeit under the same statutory provisions. To some extent the case referred to by Mr Dawson of *Ministry of Fisheries*

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<sup>1</sup> *Department of Labour v Hanham & Philp Contractors Ltd* (2009) 9 NZELC 93,095, (2008) 6 NZELR 79 (HC).

<sup>2</sup> *Minister of Fisheries v Antons Trawling Company Limited* [2006] DCR 833.

*v Tawera Fishing Co Ltd & Anor*<sup>3</sup> seems to me to be slightly more relevant than the other three cases the prosecution have referred to.

[15] Both Mr Sagaga and Mr Dawson have acknowledged that there are very few relevant cases in relation to offending of this kind.

[16] Ultimately, it seems to me that what I am dealing with is strict liability offending where there has been no commercial gain or profit and no nefarious or deceitful intent. I do, however, accept what Mr Sagaga says: that it is incumbent upon those who operate in the commercial fishing world to get these things right. It is necessary, if one stands back and looks at the fisheries management system globally, that these things are correct. There was a consequence of this form not being completed or process completed correctly, which involved dispatching the Navy and the Air Force. Now, I do not necessarily think you can be directly held responsible for that in the circumstances of this particular case, but I guess it is an example of the potential consequences. And clearly, getting these things right is designed to ensure that foreign vessels are not fishing in New Zealand waters without authority to do so.

[17] But in this case, you have made an error, you should not have made those errors, they are strict liability offences, and I think there needs to be some fine to deter others from getting it wrong and to ensure that in the future you get it right. But I do not think \$10,000 is the appropriate starting point for each of these charges. I think in the circumstances, that is too high.

[18] In my view, a more appropriate fine on each of these charges is \$2000, giving a total of \$6000.

[19] You have pleaded guilty and cooperated with the authorities. I think you are entitled to the maximum credit available to you of 25 percent for that, which reduces that overall fine by \$1500, leaving a total fine of \$4500.

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<sup>3</sup> *Ministry of Fisheries v Tawera Fishing Co Ltd & Anor* DC Tauranga CRN 04070501810, 26 January 2006.

[20] So, I fine you on each of these charges \$1500.

P A H Hobbs  
District Court Judge