IMPORTATION OF MARRON (Cherax tenuimanus)

Investigation of the Ministry of Agriculture and Fisheries

Approval Procedures

Office of the Parliamentary
Commissioner for the Environment

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Mr M L Cameron
Director-General
Ministry of Agriculture and Fisheries
Private Bag
WELLINGTON

Dear Mr Cameron

IMPORTATION OF MARRON

Attached is my final report on Importation of Marron. My Conclusions and Recommendations are contained in para.42.

I have indicated that I consider

(a) there is urgent need to amend the Animals Act;

(b) new procedures for evaluating the introduction of exotic animals need to be adopted;

(c) a review of the decision to import marron is urgently required

If the review concludes that marron should be prohibited, then I believe current stock should be destroyed. The Ministry may have to negotiate with the importer. If the review concludes marron can be permitted entry, the vital consideration is post entry control and farming. I consider the Ministry should be able to impose appropriate conditions. This means there is also urgent need to establish the adequacy of powers to impose such conditions.

Marron is the second case, after Chinchilla, where the importation of an exotic animal has been seen by the public to pose an ecological risk. There should not be a third case and I look forward to hearing the Ministry is seeking appropriate legislative amendment to the Animals Act and has adopted new administrative procedures.

Finally, I would like to thank the Ministry for the co-operation and assistance extended to me and my staff during the course of this investigation.

Yours sincerely

Helen R. Hughes

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Parliamentary Commissioner for the Environment

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1 INTRODUCTION

(1) On or about 22 April 1987 the Minister of Agriculture and Fisheries declined a recommendation from the Ministry of Agriculture and Fisheries (MAF) against the introduction of marron into New Zealand. On the basis of the Minister's decision imports of marron were subsequently approved.

(2) These actions drew strong criticism from a number of organisations, including the New Zealand Forest and Bird Protection Society, the Nature Conservation Council, and the New Zealand Ecological Society. The comments made by these organisations raised some fundamental questions about the adequacy of the law relating to the importation of exotic species and MAF's internal procedures to handle importation or introduction proposals.

It was clear from newspaper coverage and discussions with the organisations referred to above that there was concern that if marron were to escape and establish in the wild they may have a significant impact on native freshwater species - koura in particular. It was felt that such impact could be by direct competition for food or by predation and habitat destruction. Concern was also expressed regarding the possible introduction of disease.

I therefore decided to investigate the matter pursuant to s. 16(1)(c) of the Environment Act 1986. The terms of reference of my investigation were conveyed to you by letter of 30 July 1987. (Appendix 1.) I decided to investigate whether:

(a) the existing legislation was adequate to deal with the proposal to import marron;

(b) MAF, in the case of marron, adequately applied

(i) its own policy guidelines on the importation of exotic species for aquaculture;

(ii) Government's environmental protection and enhancement procedures;

(c) the decision to permit the importation of marron was reasonable given the weight of scientific advice available on the environmental risk posed by that species.

(3) I am required by s. 17 of the Environment Act 1986 when carrying out my functions to have regard to various matters, including:

> (e) Whether any proposals, policies, or other matters, ... are likely to -
>
> (iii) Result in the introduction of species or genotypes not previously present within New Zealand...; or
>
> (iv) Have features, the environmental effects of which are not certain, and the potential impact of which is such as to warrant further investigation in order to determine the environmental impact of the proposal, policy, or other matter;

I note, as an aside, that the Ministry for the Environment (MFE) in carrying out its functions (some of which are relevant) is required, so far as is practicable, to have regard to the same matters.

(4) I am required by s. 16(1)(c) of the Environment Act, following an investigation, to advise the appropriate public authority of the preventive measures or remedial action which should be taken and to report the results of the investigation to the House of Representatives.

Investigation Process

(5) In the course of my investigation my Office sought and received comment from the critics of the decision and a number of agencies including the Department of Conservation, the Department of Scientific and Industrial Research, and MFE.

A comprehensive report prepared by MAF and relevant files have been studied.

(6) During the investigation a legal opinion was sought on a number of questions relating to the importation and introduction of exotic species of animal. A copy of the opinion, prepared by Dr G Taylor, is attached as Appendix 2. The answers provided in the opinion were most helpful. This report should be read in association with the opinion.

2 THE ANIMALS ACT 1967

(7) The law relating to animal importations and introductions into New Zealand is governed by the Animals Act 1967. The Act deals with importation and introduction of animals in two ways, namely prohibition of certain undesirable animals and the regulation of entry in individual cases. Relevant portions of the Act read as follows:

> 13 **Restrictions on importation of animals, etc.** - (1) No person shall import or introduce any animal, animal product, animal manure, packing material, fittings, or fodder into New Zealand:
>
> (a) Without the written permit of the Minister or of a person authorised by him in that behalf (or pursuant to an exemption given by the Minister by notice under subsection (4B) of this section); or
>
> (b) In contravention of any regulations made under this Act; or
>
> (c) In contravention of section 14 of this Act ...
>
> 14 **Prohibition on importation or liberation of certain animals** - (1) No person shall import or introduce into (New Zealand, any of the following animals in a live state):

(a) Any snake of any species whatever; or

(b) Any venomous reptile, or any (stage in the development) of any venomous amphibian, venomous fish, or venomous invertebrate; or

(c) Any red vented bulbul (Molpastes cafer L.); or

(d) Any American grey squirrel (Sciurus carolinensis gmelin); or

(e) Any red fox or silver fox (Vulpes vulpes L.); or

(f) Any musquash (or muskrat) (Ondatra zibethica L.); or

(g) Any hamster (Mesocricetus supp.); or

(h) Any mongoose (Herpestes supp.); or

(i) Any coypu or nutria (Myocastor coypus); or

(j) Any mink (Mustela vision); or

(k) Any other animal that is likely to become a nuisance or to cause injury or damage.

(2) No person shall liberate or allow to go at large in New Zealand any noxious reptile, or any living stage of any noxious amphibian, noxious fish, or noxious invertebrate.

(8) The three paragraphs in s. 13(1) of the Act are alternatives and provide a hierarchy. In considering an application the Minister or authorised person must ask:

(a) does the animal fall within s. 14(1);

(b) does the animal come within a prohibition in any Regulations under the Animals Act;

(c) if not, should a permit be granted under s. 13.

The approach to be followed is set out in more detail in Dr Taylor's opinion.

(9) The Minister, or authorised person, has a discretion as to whether to grant a permit provided the animal in question is not prohibited by s. 14 or by regulation.

The proper approach to the exercise of statutory discretions has recently been restated very clearly by Richardson J. in New Zealand Maori Council v Attorney-General (1987) 6 NZAR 353 (CA) at page 385. His honour said:

> "As in the case of any authority entrusted with statutory powers of decision they must direct themselves properly in law and then act according to law. They must observe the criteria expressly or implicitly laid down in the legislation. So they must call their attention to matters they are bound by the statute to consider and they must exclude considerations which on the same test are extraneous. In the end it is for the Court to decide whether those entrusted with authority have acted within their statutory discretion both in the determination of whether the facts on which the exercise of the discretion depends exist and whether the discretionary decision has indeed been made upon a proper self-direction as to the legal criteria and their application to those facts. These principles are well settled in our law and it is perhaps sufficient to refer to the discussion in CREEDNZ Inc v Attorney-General [1981] 1 NZLR 172, 182-183, 196-198 and 208-209. The other side of the coin is that the outcome of the exercise of the discretion must be reasonable otherwise the only proper inference is that the power itself has been misused. Discretion is not absolute or unfettered. It is to be exercised to promote the policy and objectives of the statute. And the result or outcome may itself be such as to compel the conclusion that the discretion was exercised unreasonably in that sense (Padfield v Minister of Agriculture, Fisheries and Food (1968) AC 997; Secretary of State for Education and Science v Tameside Metropolitan Borough Council (1977) AC 1014; and Wheeler v Leicester City Council (1985) 1 AC 1054)".

(10) Sections 13 and 14 of the Act are not without difficulty. First, it is not entirely clear who is to determine whether or not an animal is likely to become a nuisance or cause injury or damage. By inference this task will fall to the decision maker under s. 13. Secondly, the notions of "nuisance", "injury", and "damage" are not defined in the Act. The Minister's (or authorised person's) sense of nuisance, injury, or damage in the individual case is crucial in the application of the legislation. Thirdly, nuisance, injury, or damage to whom or what? Again this is not clear. Finally, the Act does not state the matters the decision maker must take into account in exercising his discretion under s. 13.

The General Character of the Act

(11) The general character of the Act, covering matters which may be taken into account in granting permits to import or introduce animals is dealt with by Dr Taylor in his opinion. Dr Taylor considers it is not entirely safe to see the Act simply as a successor to the Stock Act 1908. While the core aim of the acts is considered to be the same the Animals Act is regarded as having been given a wider import by virtue of:

(a) the shift of provisions relating to importation and introduction of animals to an independent part of the Act; and

(b) the wider definition of "animal" which made the Act more comprehensive.

(12) Dr Taylor concludes in his opinion that the range of matters to be considered in decisions on the importation and introduction of animals into New Zealand is, therefore, at least those relevant to determining whether the animal is likely to become a nuisance or cause injury or damage. That this is so may also be inferred from a study of the dominant characteristics of the animals listed in s. 14(1). Those characteristics include:

(a) human risk (e.g. snakes, venomous reptiles);

(b) horticultural risk, including damage to soil and waterways (e.g. muskrat, coypu, red vented bulbul);

(c) ecological risk, including predation (e.g. gray squirrel, mink, mongoose).

Nuisance, injury and damage

(13) The meaning of these terms is discussed by Dr Taylor in his opinion and I understand there is some acceptance of his conclusions by MAF. The Act does envisage the prohibition of animals on grounds other

than animal health and disease. However, the range of considerations which should be taken into account cannot be stated with certainty. In Dr Taylor's view it is arguable that ecological considerations as such are relevant.

(14) Dr Taylor's opinion together with MAF's comments on s. 14 indicate that the expression "likely to become a nuisance or to cause injury or damage" should be given a generous interpretation. While the word "nuisance" may be restricted in a legal sense it is considered that the combination of the concepts of "nuisance", "injury" and "damage" permit a wide range of considerations to be taken into account. It is my view, for reasons stated above, that ecological considerations are relevant under the Act. I understand that MFE agree that such considerations are relevant. Given the impact that an unwise importation or introduction could have on the New Zealand environment it is, I believe, essential that the legislation require the assessment of possible ecological damage.

"Likely"

(15) As Dr Taylor says in his opinion, the structure of sections 13 and 14 is that the chances of nuisance, injury, or damage are to be assessed and a prohibition on import or introduction made in appropriate cases. Section 14 deals with animals that, because of their characteristics, are not wanted in New Zealand under any circumstances. The section suggests that even a small possibility of escape is a risk the country is not prepared to take. The prohibition seems to be commensurate with a high chance of damage.

"Likely" was in Dr Taylor's view something less than a certainty. For the reasons stated in the opinion he concluded that the word would be interpreted to mean more probable than not. That interpretation is, I understand, acceptable to MAF.

Environmental risk and economic benefits

(16) The question whether the Act contemplates balancing economic benefits against environmental risk has been considered by Dr Taylor and by MAF and there is, again, some measure of agreement.

Section 14(1)(k) raises a prohibition if the specified risks are "likely" to eventuate. As this is so, economic considerations are not among the range of considerations to be taken into account.

However, the question remains - against what does the decision maker measure the risk of damage when considering an application to import or introduce an animal which is not prohibited from entry under s. 14 or by regulation. It is suggested that it is

permissible for the decision maker in such cases to weigh any risks to the environment against any benefits to be derived from the importation or introduction. However such balancing is permissible only when the decision maker is required to exercise his discretion under s. 13 and:

(a) the animal concerned is not prohibited by regulation, or by s. 14(1)(a) to (j);

(b) any risk posed by the animal is less than that which would cause it to be prohibited under s. 14(1)(k).

I understand MAF accepts this position.

"Import" and "Introduce"

(17) The words "import" and "introduce" are not defined in the Act. The words could mean the same thing or they could bear different meanings. As Parliament is presumed not to use words pointlessly one would assume that the words have different meanings. It is not clear what those meanings may be.

Properly inform

(18) The Act appears to place an onus upon the Minister (or authorised person) as decision maker to obtain the information required to enable an application to be properly considered. There is no explicit statutory obligation requiring the applicant to provide information to the Minister or any other person.

It would seem to be clear that the Minister (or authorised person) must properly inform himself or herself on matters relevant to the decision. These matters include whether or not the animal is likely to become a nuisance or to cause injury or damage.

The Minister may properly inform himself or herself in a number of ways. This may involve MAF undertaking investigations or asking the applicant to provide the relevant evidence.

The Act does not require the Minister to consult and any reference to a third party for advice or comment is therefore wholly voluntary.

(19) The Ministry for the Environment believes that MAF in exercising its responsibilities under the Act is subject to the Government's Environmental Protection and Enhancement Procedures (EP & EP). Those procedures have not legal effect and there is, accordingly, no legal obligation on MAF to follow their terms. There is not doubt, however, that the EP and EP would provide an appropriate mechanism for identifying the issues raised by an application.

3 DEFICIENCIES IN SECTIONS 13 AND 14

(20) It is apparent from the above that sections 13 and 14 of the Act contain a number of deficiencies. These may be summarised as follows:

(a) the meaning of key parts of the two sections cannot be stated with certainty. For example, words such as "nuisance", "injury", "damage", "import" and introduce".

(b) it is not clear to whom or what the nuisance etc in s. 14(1)(k) must relate.

(c) the onus would appear to rest with the decision maker to obtain the information required. This is not supported by any mechanisms for the obtaining of such information. There is no obligation on the applicant to provide information, and no provision for consultation.

(d) ecological considerations are not stated as being clearly material to the decision and there is no provision for any form of environmental impact assessment.

(e) it is not clearly stated that economic benefits are not relevant under s.14 but may be considered by the decision maker when exercising his discretion under s.13. It is, further, not clear that, in the latter case, environmental risk is the determining factor.

4 ADMINISTRATIVE PROCEDURES

(21) Records show that the former Commission for the Environment and the Ministry for the Environment have had numerous communications with MAF with respect to species imported for aquaculture. A draft of an aquaculture importation policy was sent to the Commission in March 1986 and was commented on verbally and at an indepartmental meeting held by the Commission on 9 July 1986. A subsequent version of the policy was published in "Catch", November 1986 without further comment from the Commission.

(22) A copy of the Policy on importation of exotic species for aquaculture was forwarded to me with MAF's report of 2 October 1987. The policy records that the importation of exotic species poses threats in three broad ways, namely:

(1) Public health - the organisms themselves or the medium in which they travel may harbour disease-causing organisms. The transport medium and containers are easily sterilised but the exotic species may continue to pose a threat e.g.

turtles are reputed to harbour Salmonella.

(2) Animal health - New Zealand aquatic organisms appear to be relatively free of serious diseases. Measures aimed at maintaining this situation should be preserved.

(3) Ecosystem health - characterised by mechanical damage such as bank erosion or through a multiplicity of biological outcomes, some examples of which could be:

- Competitive displacement of native species by predation or aggression ...

- Interspecific hybridisation leading to the loss of pure-bred native. Note: hybridisation may be regressive (potential in oyster, abalone, etc).

- More subtle ecological effects leading to changes in habitat or community structure."

(23) The policy records that Fisheries Division of MAF remains the "core" group within which decisions on exotic imports should be made, "drawing on expertise in other agencies as an when required". It is also recorded that "MAF's expertise in predicting possible ecological impacts from scope of exotics is relatively low".

(24) Other aspects of the policy are:

(a) Fisheries Division is to establish an expert group "to assess the importation of exotics on a case by case basis with regard to the likelihood of survival in the wild, possible ecological impacts, benefits and disease risks".

(b) Where the exotic species has the demonstrable ability to displace or hybridise with established or native species its importation is to be assessed on a case by case basis.

(c) The potential import "must" provide an environmental impact assessment for the proposal together with a disease and environmental profile of any organism prior to any application for an import permit and must indicate the net economic benefit of the proposal.

5 ENVIRONMENTAL PROTECTION AND ENHANCEMENT PROCEDURES

(26) In 1973 Government agreed that all Government works, policies and actions (including the granting of any Crown permit) would be subject to environmental impact assessment. This policy is contained in the Environmental Protection and Enhancement Procedures (EP and EP). The government agency responsible for promoting a proposal, for approving any Crown loan or grant, or for granting any licence, permit or authorisation which may have environmental implication is, according to EP and EP, also responsible for ensuring that an environmental impact assessment is carried out. The intention is that all environmental implications of a proposal are adequately considered before decisions are made whether or not to grant approvals.

The Animals Act 1967 is not among the Acts to which the EP and EP specifically apply. The Ministry for the Environment, however, relying upon more general statements in the EP and EP, believes that MAF in exercising its responsibilities under the Animals Act is subject to the procedures.

In an attachment to a letter of 2 May 1988 MAF accepts a moral obligation to work in accordance with EP and EP procedures but notes that this is not a legal obligation in terms of the Animals Act. In the latter respect MAF is clearly correct. The EP and EP are a form of self-discipline by Government and have, of themselves, no legal effect.

6 ADMINISTRATIVE DEFICIENCIES

(27) In accordance with the policy an expert group was established to assess the application to import marron into New Zealand. A MAF background paper dated 10 July 1986 summarised the results of introductions of exotic crayfish in other countries and concluded that there was no biological reason why marron could not survive in the wild in some parts of New Zealand. The report said that marron would at some time escape and establish in the wild, that it was unlikely to interbreed with koura; but how the two species would interact and the effect of marron on the native and salmonid fauna was unknown.

An environmental impact assessment was prepared by the potential importer and, once received by MAF, was sent to the Commission for the Environment (CFE). Information was also supplied by the importer concerning the economic benefits of the proposal.

(28) Although the policy provided a basis on which a proper evaluation of the proposal could have been undertaken there were shortcomings in its application on this occasion. MAF failed to adequately inform itself as to the environmental risks and the economic benefits of the proposal.

First, although the importer provided an environmental impact assessment (EIA) it was seriously deficient as regards both disease and environmental profiles. This was recognised by MAF at the time and was again acknowledged in its report to me. The deficiencies were pointed out by CFE by letter to MAF of 28 November 1986. In the letter CFE concluded:

> "... the EIA provides insufficient information on which to assess the likelihood of escape and the ecological implications if the species was to escape and establish in the wild."

It was suggested that a supplement to the EIA be prepared and submitted to MAF including, amongst other things, a detailed disease and environmental profile and a discussion of the implications for native freshwater species if marron were to establish in the wild.

MFE, in a letter to MAF of 15 April 1987, said it believed the concerns expressed by CFE had not been addressed and added, in summary:

> "the EIA provides insufficient information to assess the ecological implications if the species was to establish in the wild, and, in particular its potential effect on the native koura."

MFE concluded that it believed MAF would "have considerable difficulty in discharging its responsibilities of environmental assessment in the absence of more detailed information." It is pertinent to note that MFE's comments were offered one week before the Minister's decision.

I accept that MAF, recognising the EIA's deficiencies, had earlier gathered some information on the biology of marron and so were able to address certain issues.

Secondly, MAF failed to circulate the EIA to relevant experts/agencies for informed comment prior to the decision being made, despite having been advised to do so by CFE and MFE.

CFE in its letter of 28 November 1986, referred to above, suggested that the EIA and additional information should be made available to other agencies and individuals for comment. Among names suggested by CFE were DSIR Division of Marine and Freshwater Science (Taupo Research Laboratory), NZ Wildlife Service, Nature Conservation Council, and the Department of Conservation.

MFE for its part also recommended that the EIA be circulated to relevant (unspecified) experts/agencies for informed comment.

On 15 April 1987 the Department of Conservation wrote to MAF expressing its concern and seeking discussions before a decision was made. The Department said the EIA should be debated and public comment sought.

Notwithstanding the above and despite concerns expressed within MAF regarding possible environmental risk and limited benefits no outside consultation took place before the decision was made. As a result MAF deprived itself of the expertise and experience of agencies such as those listed above.

Thirdly, I am left with the impression that MAF's response to the application was hampered by organisational problems despite the existence of the expert group. These problems also indicated difficulties with Fisheries Division being required to promote aquaculture on the one hand and maintain strict import controls on the other. The expert group should have ensured proper co-ordination of the various divisions of MAF involved. It should have been directly responsible for meeting with interested and affected parties, gathering information, and directing MAF's external communications.

Instead matters seemed to progress in an uncoordinated way. The importer was involved in discussions on quarantine facilities with MAF's Auckland office while at the same time dealing with other officials in Wellington about the importation. Although there was frequent contact between offices it is apparent that internal communication was not as good as it should have been.

An example of this is that a MAF officer in Auckland who had been primarily concerned with quarantine matters was as early as 5 March 1987 prepared to draw up an import permit. Discussion of quarantine requirements at an early stage may have been taken by the importer as an indication that approval would be forthcoming.

Poor communication, both internal and external, was evident. In particular, the reservations of MAF staff do not appear to have been communicated to the importer. If such reservations had been conveyed there would have been no confusion as to MAF's position. Instead it would seem the importer believed there were no difficulties and that as a result of statements from MAF staff there was an expectation that a permit would be forthcoming.

It was not clear that there was any identified spokesman for MAF regarding the marron application. The importer had contact with two officers most often (one in Auckland and one in Wellington) but also spoke to various other staff members during the processing of the application. This increased the possibility of misunderstanding particularly if all staff were not fully informed when speaking to the importer or his representatives. A file note of 31 March 1987 indicates that staff were not fully informed when it states "Information from [the importer] to one official was not circulated among other members of the MAF group involved."

Fourthly, MAF's ability to decline the application may have been compromised by the importer's actions in arranging finance and undertaking a considerable amount of work on the marron farm. During March and April 1987 in particular the importer was pressing for a decision on the application. The importer complained of delay by MAF and applied pressure to the Minister and MAF on the basis that:

- $500,000 had been spent on facilities;
- loan moneys were being held up owing to lack of a permit;
- the stocks of marron in Australia had to be freighted to New Zealand urgently;
- a bank was pressing for repayment of bridging finance.

Clearly those factors should have had no bearing on the decision. MAF did, however, have a clear responsibility to advise the importer that a decision would be made on the basis of a thorough analysis of relevant information and that it would not be influenced by any development undertaken or contractual obligation entered into in anticipation of a favourable decision.

In the circumstances however, the importer may well have developed an expectation that a permit to import marron would follow and MAF left itself open to accusations that it was influenced by extraneous considerations.

Finally, the policy does not adequately express the points at which economic benefits are, and are not, relevant. The files indicate some confusion in this respect. This is perhaps not surprising as it is only since Dr Taylor completed his opinion that the point has been clarified.

7 THE SOUNDNESS OF THE DECISION

(29) My investigation, was in part, intended to ascertain whether the decision to allow marron to be imported into New Zealand was sound given the information available on the environmental risk posed by the species. The first matter, therefore, was to ascertain the information on which the decision was based.

(30) First, a report dated 16 March 1987, assessed the proposal to import live marron in the light of ecological risk and prospective benefit to New Zealand and said in summary:

> "1. that the water ways of Northland and warm areas elsewhere may support wild breeding populations of marron;
>
> 2. they may survive throughout New Zealand and they are likely to compete with and prey on native animals including koura (Paranephrops);
>
> 3. the semi-intensive culture of marron is a high risk venture. The economics of farming marron for other than on-selling to other farms are such that in the absence of skilled personnel any projects will inevitably be uneconomic;
>
> 4. there do not appear to be any established export markets for marron thus there is no demonstrable benefit to New Zealand in terms of export dollars.

[The importer] claims that the Australian parent farm has undertaken to buy back his surplus production, but no evidence for this has been seen by us."

The recommendation contained in the report was:

> "As there is high ecological risk and negligible economic benefit can be demonstrated, we recommend that the application be refused until such time as the applicant can produce evidence to overcome the facts stated here."

The report considered disease risk, ecological impact, and the economics of marron farming.

With regard to disease risk it was stated:

> "So little is known of the diseases of marron that no informed decision on disease risk can be made at this time".

It was considered, however, that disease could not be considered a major factor in the proposal as:

(a) the one identified serious disease of freshwater crayfish ("crayfish plague" caused by the fungus Aphanomyces astaci) was unknown in Australia the proposed source of the stock, and

(b) the imported stock was to be examined prior to shipment by the Australian Federal Disease Laboratory at Benalla and this would give a reliable indication of disease risk.

The report stated that "the ecological impact of the proposal should be thoroughly researched and a documented account examining positive and negative factors should be presented in the EIA". The EIA presented to MAF was regarded as "totally inadequate" as it gave no details of survival, growth and breeding parameters, and did not review the literature on the biology of marron. It was recorded that MAF had accumulated published information and contacted those involved in freshwater crayfish farming overseas and so could address the biological inadequacies in the EIA. These were discussed as follows:

> "From this it is apparent marron can survive in cold water, they become active above 10°C (Morrissy, 1976), their preferred temperature range is 15-25°C, above which they become sluggish (Talbury and Oliver, DPI). Smaller marron eat detritus, dead plants, and aquatic invertebrates and therefore would compete with small fishes and koura (Paranephrops spp.), while large marron (EIA p. 9) are aggressive, will catch and eat small fish and their eggs, eat smaller marron and are therefore likely to eat koura".

It was considered likely:

> "marron would be active, grow and breed in Northland, and probably the north of the North and South Islands, and could survive but not breed in the rest of New Zealand".

Claims that wild self-perpetuating populations of marron have not established in countries outside its natural range (South-West Australia) were discounted first because some countries have "crayfish plague" which would prevent marron establishing and secondly because:

> "we know from bitter experience that transplanted species do not necessarily have the same biology in the country of introduction as in the country of origin ..."

The report also deals with suggestions that experiments be undertaken to determine the interaction between koura and marron. It stated:

> "Any experiments set up in tanks would have to be carefully designed, would take a long time to complete, and would probably be inadequate and unreliable as an indicator of behaviour in complex natural eco-systems. Trials under maximum security in the wild would involve a high risk of escape, would be long term, would need close policing and therefore be very expensive".

The authors of the report were also concerned that later distribution of juvenile marron to satellite farms would increase the risk of accidental or other liberation.

The authors concluded their report with the statement:

> "... the available evidence suggests New Zealand conditions would permit the survival and breeding of marron in the wild, and if so they will compete and may prey upon native species including koura. There is therefore a high ecological risk. The inability of the proponent and ourselves to identify successful satellite farms overseas making good profits supplying a specific market, the flimsy economics and the stark contrast between the hype originating from proponents and the failure to develop a recognised industry, suggest economic benefit would be negligible.
>
> We therefore recommend that until the applicant can produce a convincing argument to overcome the facts stated here the application should be refused".

(31) The report of 16 March 1987 was discussed at a meeting with the importer on that day. On 18 March 1987 MAF wrote to the importer advising that the recommendation in the report had been accepted. The application was refused "until such time as you can produce evidence which shows an economic benefit that can be weighed against the risks of importation". The letter ended:

> "As economic benefits are the main factor in the decision I am prepared to review it if you provide well documented evidence on net expected benefits, and in particular on the nature, size and prices achieved for markets for marron or similar species".

(32) A report was sent to the Minister by MAF on 21 April 1987. The report recommended that the Minister decline to issue a permit to introduce marron into New Zealand.

In a section headed "Background" the report advised that marron farming was not a well developed industry in Australia and that marketing information was scarce. It also recorded advice from the Office Solicitor for MAF that the Animals Act 1967 did not contemplate balancing the benefits of introducing exotic species against the risk of introduction. The Act was said to be, for the most part, concerned with preventing the introduction of disease into New Zealand. The report continued:

> "The issue is not one which can be assessed unequivocally by the provisions of the Act. While there are clearly risks in any introduction of exotic species I do not believe they are sufficient in this case to say that the Act forbids the issuing of a permit. The Government's environmental policies require that caution be exercised in making decisions of this kind."

The report next dealt with ecological issues and said the application should be considered in the light of possible impacts if marron were introduced to the wild. It continued:

> "Our investigations have shown that the water temperatures in at least Northland and the Bay of Plenty and possibly also in northern parts of the South Island would be high enough to allow marron to survive and breed. In crowded situations marron

> are cannibalistic and thus may prey upon the native koura. Whether this would happen or not is uncertain and could not be determined without a field experiment.
>
> "It may also be that other factors would inhibit survival of marron stocks in the wild. For example the native range of marron is in a part of Western Australia in which eels are not present. Marron hibernate, but do not burrow (as koura do) and may prove to be limited by eel predation.
>
> "Thus we are not able to say that marron are likely to become a nuisance or to cause injury or damage. On the other hand the record of introductions of exotic species has included many which have had widespread impacts on the environment which could be said to be harmful. Some of those have also provided significant benefits which would now be seen by many as being sufficient to justify their costs; an example of this could be provided by brown and rainbow trout."

The report also recorded the views of the MFE and Department of Conservation that it would be premature to allow importation of marron without wider consultation.

(33) MAF officials saw the Minister on 22 April 1987 to discuss MAF's recommendation. A file note of 4 May 1987 records that the issues were canvassed. The impact of other introduced aquatic species, particularly trout and koi carp, were discussed and it was said that none of these could be seen to be a major problem. The file note records that the Minister said it was his view that permission should be given to import marron. MAF's recommendation was declined on 22 April 1987.

(34) MAF also canvassed its contact with the importer and "Timing" in its report of 21 April 1987. The relevant sections of the report stated:

> "MAF Contact with [the importer]
>
> [the importer] has been in contact with MAF staff regarding his application since July last year. He has said that he was given the impression that a permit would be issued and on that basis has invested $500,000 in building a farm. I have

> provided you with a separate report describing the contacts between [the importer] and MAF staff. The report shows that [the importer] was told that a recommendation would be made to me to the effect that a permit be issued. He was also told that those recommendations would have to be considered by me and could not be taken to indicate that a permit would be issued.
>
> Timing
>
> Since February [the importer] has been stressing his need for an early decision. This is because the availability of juvenile marron is seasonal and they will shortly be unobtainable. Further he is using bridging finance until permanent financial arrangements are made. These depend on the granting of an import permit".

An earlier briefing note to the Minister, dated 24 March 1987, had touched on the same matters in the following terms:

> "In December 1986 [the importer] discussed his request with a member of a MAF Committee which had been set up to evaluate proposals for importing exotic species. He was told that a recommendation would be made to issue a permit that would allow the holding of marron under quarantine conditions, but that he should take no action until that had been confirmed".
>
> "Nevertheless [the importer] developed a farm, including quarantine facilities. He states he has spent $500,000 on work to date. This sum includes $145,000 from the Department of Trade and Industry. Mana Enterprises has earmarked and additional $300,000 to be provided when an import permit is issued. [The importer] is being pressed by his bank for repayment of bridging finance".

Conclusion

(35) I consider that MAF failed to adequately inform itself as to the environmental risks and the economic benefits of the proposal by:

(a) not ensuring that an EIA was prepared which properly addressed the key environmental issues, and

(b) not consulting relevant experts/agencies.

This has an impact on the soundness of the decision. Decisions about the importation or introduction of exotic animals should be based upon information adequate to enable an informed decision to be made about the risks and benefits.

(36) It is evident that there was concern within MAF as to the risk posed by marron. The report of 16 March 1987 quoted earlier, for example, refers to "high ecological risk". Such concerns were not adequately addressed in the report to the Minister dated 21 April 1987. The possibility of predation on koura was regarded as uncertain; and reference was made to the possibility that survival of marron may be inhibited by eels.

No reference was made however to competition for food source, displacement of native species by aggression, disease, or any more subtle ecological effects which may lead to changes in habitat or community structure.

The information available to MAF, and the concern expressed by its own experts, pointed to the need for caution in reaching a decision and for further information (by consultation or otherwise). In the circumstances I believe the favourable decision given was not sound.

(37) It has been suggested by MAF staff that the report to the Minister was saying, in effect, that any risk posed by marron was insufficient to cause the species to be prohibited under s. 14(1)(k) but, nevertheless, the discretion under s. 13 should be exercised so as to prevent entry. It must be said that the report was not so clearly worded as to suggest that interpretation. Even so the information available to MAF was insufficient to warrant a conclusion that marron were not likely to become a nuisance or to cause injury or damage.

(38) Finally on this point I believe that the way in which the report was written there was the risk of the Minister being influenced by extraneous matters such as the extent of the development of the farm and the financial arrangements entered into by the importer.

These factors plus the importer's assertion that they had been encouraged to believe the application would be successful must have raised the prospect of compensation claims in the minds of the Minister and officials.

The possibility that the importer may seek monetary redress was quite properly a matter to be drawn to the attention of the Minister. However, the Minister should have been told that this was not a relevant consideration in making a decision on importation. The effect of raising the extraneous matters in the report without such advice would surely raise in the mind of the Minister the difficulties which may flow from a negative decision.

The information seen, however, does not allow me to draw any conclusion as to whether or not the Minister was so influenced. I note MAF's recent assurance that the question of possible compensation was regarded as irrelevant to the consideration when advice to the Minister was drafted.

9 DISEASE RISK

(39) Disease risk was, as previously mentioned, not considered to be a major factor in the proposal. However, subsequent events have raised doubts. First, the shipments of marron allowed entry to New Zealand were not accompanied by a certificate from an Australian Government agency indicating that the stock were disease free. This was in breach of a condition in the permit.

Secondly, subsequent studies revealed the presence of a fungus (Psorospermium) and a worm (Craspidella).

I note that MAF is trying to ascertain:

(a) whether cross infection of koura by the organisms on marron occurs, and

(b) whether koura are detrimentally affected.

Attempts are also being made to interrupt the life cycles of the organisms by preventing infection of progeny by infected parent stock.

Examination of koura from New Zealand waters failed to reveal the the presence of the two organisms.

I understand that decisions have yet to be made on how to respond to the presence of the organisms as much will depend upon the outcome of the experiments being undertaken.

(40) The finding of the two organisms of concern shows that a more cautious approach to disease risk would have been prudent. I have already quoted the report of 16 March 1987 as saying that so little was known of the diseases of marron that an informed decision on disease risk could not be made at that time.

Similar sentiments were expressed by Mr Ric Fallu of the Victorian Department of Conservation, Forests and Lands (Freshwater Fish Management Branch) to the Nature Conservation Council in July 1987. Mr Fallu commented:

> "It is also possible that marron may carry pathogens in a sub-clinical quantity or that there are pathogens that never express themselves as disease in marron. Native New Zealand fauna may have no resistance to these pathogens and virulent disease in wild stocks may be the result."

Clearly MAF would have benefited from more information on the disease status of marron before the decision to import was made.

9 MARRON FARMING

(41) At present marron has not been approved as a species for aquaculture and no person has been issued with a licence to farm marron pursuant to the Freshwater Fish Farming Regulations 1983.

The power to grant a fish farming licence is discretionary and the Minister must take into account relevant matters. It is my understanding that the prevention of spread of disease is relevant but that wider environmental considerations may not be taken into account. If this is so then it would seem unusual and would point to a defect in the legislation and regulations.

It is Dr Taylor's opinion that the Regulations only apply to species of fish specified by the Director General by notice in the Gazette and that any other fish may be farmed without a licence. If that opinion is correct it follows that marron may be farmed without a licence under the Regulations. This would be most undesirable and indicates a review of the Regulations is warranted.

10 WHO SHOULD DECIDE ON IMPORTATION/INTRODUCTION

(42) MAF have advised me that in recent years its role and responsibilities have been examined and redefined. The current mission statement in the MAF Corporate Plan contains no reference to the environment. MAF also referred to its declining resource base and said that while acknowledging its responsibility for risk assessment it had no additional resources available for the purpose. MAF stated they "would expect considerable input from other Ministries and Departments whose purpose is environmental protection but who appear to have neither the tools nor the resources to achieve it."

The fact that the word 'environment' is not contained in the mission statement is, I think, of little consequence. MAF, in carrying out its roles in relation to the farming, horticultural and fishing industries, is very much concerned with the environment. First the word 'environment' bears a very wide interpretation and secondly MAF must accept that, for example, an unwise importation may have a major effect upon any one of the above industries. MAF has a very clear role to play in controlling the importation or introduction of exotic biota. In the new environmental management regime in New Zealand however the conservation mission and the various responsibilities of the Department of Conservation point to that department having a role to play in that area. The Department's conservation role would provide a balance to MAF's responsibilities in the farming, horticultural and fishing industries and in particular those concerning advice on how to maximise the national benefit from those industries.

11 CONCLUSIONS

(43)

(a) The importation or introduction of an exotic animal into New Zealand is a serious matter and must be approached with caution. There should be a presumption against importation or introduction and any person wishing to bring such an animal into the country should be required to make an overwhelming case.

As a general principle, decisions about the importation or introduction of exotic animals must be based upon information adequate to enable informed decisions to be made about their possible impacts on New Zealand's ecosystems. The decision makers must have the ability to obtain the information required and must, ultimately, be accountable for their actions.

The Animals Act 1967 should be amended:

(i) to require an examination of the ecology of the exotic species of animal and its potential impact on the environment - this is to be carried out prior to any decision being taken;

(ii) to provide that no exotic animal shall be permitted entry to New Zealand if it is judged, based upon assessment of its possible impacts upon New Zealand's ecosystems, that the animal would or may have a significant adverse effect on those ecosystems;

(iii) to indicate the criteria that the decision makers must take into account in exercising their discretion when considering an application to import or introduce an exotic animal not prohibited under para (ii) above;

(iv) to place an onus upon the proposed importer to provide information material to the decision;

(v) to provide that no animal shall be imported or introduced into New Zealand without the written permit of the Minister of Agriculture and Fisheries and Conservation acting jointly;

(vi) to provide authority for post-import management and control of exotic species allowed entry to New Zealand and to clarify which agency has responsibility for such management and control;

(vii) to clarify the meaning of the words 'import' and 'introduce'.

One aim of the amendments would be to ensure that any animal which, in the opinion of the Ministers (following proper evaluation), will or may have a significant adverse affect on New Zealand's ecosystems shall be prohibited from entry to New Zealand.

Much will depend in practice on the word 'significant'. The meaning of this word is common knowledge but it is nevertheless difficult to describe sensibly without reference to specific circumstances.

The Minister's sense of significance in the individual case will be crucial and underlines the need for a thorough evaluation of ecological risk in the first place.

I understand that two opportunities exist for amending the legislation. The first involves a complete revision of the Animals Act within the next twelve months. The second concerns a proposal for legislation to control the introduction of exotic biota and genetically modified organisms. I would ask to be kept informed as to which avenue is chosen.

(b) MAF should, as a matter of priority, establish clear procedures for considering proposals to import or introduce exotic animals into New Zealand. The procedures should be developed by MAF together with officials from the Ministry for the Environment and the Department of Conservation.

I understand that there is a working group under MFE currently examining all aspects of the introduction of exotic biota with the aim of proposing improved control systems. This group, including Department of Conservation officials, should continue its work.

There is a clear need for MAF, as the agency primarily responsible for risk assessment, to learn from its experiences with chinchilla and marron and to ensure that its procedures eliminate the present inadequacies. The transfer, with effect from 10 February 1988, of responsibility for administration of the Animals Act 1967 in respect of aquatic animals from MAFFish to MAFQual is a welcome first step.

(c) The investigations of marron (and the associated organisms) held in quarantine at Warkworth concerning "disease" risk and cross-infection must continue. If disease risk is proven and/or the associated organisms are found to be harmful I believe that MAF, acting in accordance with the principles of natural justice, should exercise its powers to seize and destroy in the Animals Act. I believe that the marron should be retained in quarantine pending the outcome of the investigations.

(d) As I believe, for reasons expressed earlier, that the decision to allow the marron to be imported was not sound, there remains the possibility that the marron should have been prohibited from entry under s. 14. Accordingly, I recommend that MAF carry out an urgent review of the import decision. I suggest that the process to be followed be established in consultation with the Ministry for the Environment. The process should in my view allow for consultation, particularly with the Department of Conservation.

If the review establishes that marron poses such a risk that it should be prohibited from entry to New Zealand then I believe that the stock in the country should be destroyed. If MAF's ability to destroy the marron in such event is limited (or non existent) MAF should endeavour to resolve the problem by agreement with the importer or by other means thought appropriate.

(e) No more shipments of marron should be allowed entry into New Zealand and no further permits should be given until the issues of ecological and disease risk have been resolved.

Similarly, marron should not be approved as a species for aquaculture, nor should any fish-farming licence be issued in respect of marron until the above issues have been resolved.

(f) It would seem from my investigation that the Freshwater Fish Farming Regulations 1983, made under the Fisheries Act 1983, should be reviewed. In particular the present situation which would allow marron to be farmed without a licence needs to be addressed urgently. I would also recommend that environmental considerations should be matters required to be taken into account in the issue of a licence. It is of concern that on current legislation it is only in the context of importation and introduction of an animal for aquaculture that environmental considerations may be taken into account and conditions imposed.

APPENDIX 1

Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT

30 July 1987

EXO 2/1

The Director General
Ministry of Agriculture and Fisheries
Private Bag
WELLINGTON

Dear Mr Cameron

IMPORTATION OF MARRON CRAYFISH

The Minister of Agriculture and Fisheries recently approved the importation of the Australian freshwater crayfish marron (Cherax tenuimanus) for the purposes of experimental aquaculture. This decision has been strongly criticised by a number of organisations. I have read newspaper coverage of concerns expressed by the New Zealand Forest and Bird Protection Society (NZFBPS), the Nature Conservation Council (NCC), and the Ecological Society. The June 1987 newsletter published by Environment and Conservation Organisations of New Zealand (Inc) has also criticised the Minister's decision.

My Office has had discussions with representatives of NZFBPS, NCC, and the Ecological Society regarding their respective concerns. My Office has also discussed the matter with officials from the Ministry for the Environment, the Department of Conservation, the Department of Scientific and Industrial Research (Ecology Division), and your Ministry.

Initial inquiries suggest that in the case of marron there is some doubt as to whether:

(a) the law relating to animal importations into New Zealand was adequate to deal with that species;

(b) your Ministry adequately applied either its own policy guidelines on the importation of exotic species for aquaculture or the Government's Environmental Protection and Enhancement Procedures (EP&EP);

(c) the Minister's decision to permit the importation of marron was a reasonable one given the weight of available scientific advice on environmental risk posed by that species.

Grand Annexe, 84 Boulcott Street, Wellington PO Box 10-241, Wellington, New Zealand Telephone: (064)(04) 734-090

These questions raise some more fundamental questions about the adequacy of the law generally relating to the importation of exotic species and your Ministry's internal procedures to handle importation proposals.

I am aware that the Ombudsman has completed an investigation concerning the importation of chinchilla into New Zealand. It is my understanding that in his final report the Ombudsman identified a serious deficiency in the law relating to the introduction exotic animals into New Zealand and that he made some specific recommendations covering possible amendments to legislation and the future application of EP&EP to imports of all exotic animal species. The Ombudsman is, I am told, still waiting to hear from your Ministry (and the Department of Conservation) on the means proposed to remedy the deficiency in the law.

It is clear from the newspaper coverage and discussions with the bodies referred to earlier that there is concern that if marron escape and establish in the wild they may have a significant impact on native freshwater species like koura, inanga, and eels. Such impact, it is felt, could be either through direct competition for food or by predation and habitat destruction. Concern has also been expressed regarding the possible introduction of disease and in this respect it has been suggested by ECO and the Ecological Society that the first shipment of marron may have arrived in New Zealand without certification that they were disease free.

In view of the above, I have decided to investigate -

(a) whether the existing legislation was adequate to deal with the proposal to introduce marron into New Zealand;

(b) whether, in the case of marron, your Ministry adequately applied:

  (i) its own policy guidelines on the importation of exotic species for aquaculture (stated in 'Catch' magazine, November 1986);

  (ii) Government's environmental protection and enhancement procedures,

(c) whether the decision to permit the importation of marron was reasonable given the weight of scientific advice available on the environmental risk posed by that species.

I should be pleased to have your report on this matter, together with relevant files. I would ask that, inter alia, your report address the questions listed in the appendix attached.

I have forwarded a copy of this letter to the Minister of Agriculture and Fisheries for his information.

Yours sincerely

Helen R. Hughes

Helen R Hughes
Parliamentary Commissioner for the Environment

attach

APPENDIX

Importation of marron crayfish

1. In your view is the law adequate to prevent the importation of exotic animal species on ecological grounds?

2. Do you agree that there is a deficiency in the law relating to the introduction of exotic animal species into New Zealand and if so what proposals do you have to remedy such deficiency?

3. Do you consider that the Animals Act 1967 should be made subject to the Environmental Protection and Enhancement Procedures (EP&EP) in relation to imports of all exotic animal species? Do you consider that the Ministry is already obliged to follow EP&EP and, if so, how was EP&EP implemented in the case of marron?

4. Does the article by John Town in Catch November 1986 accurately state your policy on importing exotic species for aquaculture and, if so, how was such policy implemented in the case of marron? Do you have a general policy on importing exotic animal species?

5. Was the Commission for the Environment and/or the Ministry for the Environment consulted as to the procedural matters relating to and the scope of an Environmental Impact Assessment (EIA) for marron? If so, what advice was received and how was it acted upon?

6. How was the EIA scoped and what advice did you give to the proponent in this regard? Did you arrange review procedures and if so, what were they?

7. What government departments and other interested parties were consulted by you during the preparation of the EIA and prior to the decision to permit importation?

8. What advice was given by your Fisheries Research Division concerning the proposal to introduce marron and how was it acted upon? Did FRD have any concerns regarding the proposal and did the EIA adequately address those concerns?

9. Did FRD consider that marron may establish in the wild in New Zealand should they escape and what did it consider the ecological consequences of this might be?

10. Did the proponent provide you with:

    (a) an EIA;

    (b) a disease and environmental profile of marron;

    (c) an indication of the net economic benefits of the proposal.

    If so, please provide copies.

11. What view did you form as to:

    (a) the possible threat to aquatic ecosystems, public health, or animal health posed by marron.

    (b) the long term economic benefits to New Zealand from marron farming.

12. Did any marron arrive in New Zealand without proper certification that they were disease free and, if so, what action did you take?

APPENDIX 2

Graham Taylor

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OPINION

- for -

Parliamentary Commissioner for the Environment

Importation and Introduction of Marron

1. I have been asked for my opinion on eight questions which are:

(a) The scope and meaning of sections 13 and 14(1)(k) of the Animals Act 1967.

(b) Does the Act envisage the prohibition of animals on grounds other than animal health and disease; if so what is the range of considerations MAF should take into account? Specifically, are ecological grounds included?

(c) Does the prohibition in s 14(1)(k) of the Act apply where the animal may become a nuisance (or cause injury or damage) but this cannot be stated with certainty?

(d) Does the act contemplate balancing economic benefits against environmental risk? Is the MAF policy statement re aquaculture in fact consistent with the Act?

(e) Is MAF obliged to undertake any form of environmental impact assessment in processing an application to import an exotic species and is MAF obliged to comply with government's EP & EP?

(f) Can MAF require an importer to prepare an environmental impact assessment together with a disease and environmental profile as contemplated by the policy? Is MAF able to require an importer to construct quarantine facilities before the permit is issued?

(g) What considerations are relevant to the decision to grant a fish farming licence? Is the Director General able to take into account the possibility that the species to be farmed may pose an environmental risk should it escape and establish in the wild?

(h) Can you give any guidance as to what is meant by the term "noxious" in s 14(2)?

2. The request follows from an investigation being undertaken by the Commissioner resulting from a permit issued by the Ministry of Agriculture and Fisheries to Koru Aquaculture Limited to import the Western Australian native freshwater crayfish cherax tenuimanus (marron). I am instructed that no action has been taken to grant a permit to farm marron under the Freshwater Fish Farming Regulations 1983, a course which would, in any event, require marron to be gazetted as a species for purposes of the Regulations. I infer that the marron which has already been imported is still held in quarantine conditions.

3. The permit issued was to "import the Marron Cherax Tenuimanus into New Zealand" on conditions:

> "2. All the marron imported under this permit must come from a licensed Australian fish farm, and must be accompanied by a permit issued by a Government agency stating that the marrons are free of disease.
>
> 3. Immediately upon arrival in New Zealand the imported marron must be placed into quarantine by an Inspector of the Ministry of Agriculture and Fisheries and thereafter shall be kept at all times in the approved quarantine area at the premises specified in condition 4 and kept separate from any other consignment of imported marron.
>
> ...
>
> 17. All imported marron shall be destroyed after prior notification to an Inspector of the Ministry of Agriculture and Fisheries within 24 months of the date of importation, unless written approval is given to extend this period by an authorised officer of the Ministry of Agriculture and Fisheries.

18. No live imported marron or live descendants of the import marron are to be removed from the approved quarantine area at any time without written consent from the Minister of Agriculture and Fisheries or a person delegated by him.

19. At their discretion, the Ministry may destroy all imported marron and any progeny of the imported marron. No compensation shall be payable to the Company

...

22. Any live marron that escape from the quarantine area or the descendants of any marron that escape are to be recovered or destroyed at the expense of the permit holder.

4. It is convenient to deal with the eight questions in groups under general headings but with each question specifically answered at the conclusion of each section. The headings are:

(a) The general character of the Animals Act 1967 (covering matters which may be taken into account in granting permits to import or introduce animals - related to questions (b) (answered in para 18) and (d) (answered in para 26)).

(b) The particular meaning of ss 13 and 14 (relating to questions (a) (answered in paras 14-16, 27-31), (c) (answered in para 34) and (h) (answered in para 35)).

(c) Environmental impact assessment (relating to questions (e) (answered in para 38) and (f) (answered in paras 42-43)).

(d) The Freshwater Fish Farming Regulations 1983 (relating to question (g) (answered in paras 44-48)).

(e) The actual decision to permit import (not relating to any questions asked but a matter which must be touched on because any decisions taken by the Ministry or recommendations made by the Commissioner should be taken against that background and any possible litigation relating to the permit (whether by environmentalists challenging the permit or by Koru challenging any further action contrary to its interests).

(a) GENERAL CHARACTER OF THE ANIMALS ACT 1967

5. The Animals Act 1967 is, to quote its long title, "an Act to consolidate and amend the Stock Act 1908". In turn, the Stock Act 1908 was "to consolidate certain enactments [the Stock Act 1893 and amendments] ... relating to the importation, removal, and branding of stock, and the introduction and spread of diseases affecting stock". The 1893 Stock Act's long title was materially the same as the 1908 Act.

6. It is considered that it is not entirely safe, but in a very general sense it is accurate, to see the Animals Act simply as a successor to the Stock Act. That it has a wider import appears from the terms and organisation of the Animals Act and also from Hansard reports on the debate on the Bill.

7. While the Hon Duncan McIntyre, Minister of Agriculture, said in introducing the Bill (351 NZPD 1173):

> "The principal change is that it liberalises the compensation provisions as they have been administered through the years. It makes a number of procedural changes in relation to the admission

> of animals and in dealing with outbreaks of disease in New Zealand."

he said in moving the motion to commit the Bill (353 NZPD 3875):

> "Because the purpose of the Bill is to protect our farm productivity, Federated Farmers ... were given an early opportunity to study the Bill."

He had earlier said (3873):

> The Stock Act is an important piece of legislation in that it contains the law on the importation of animals into New Zealand, sets out the law on the control of disease and the payment of compensation, makes provision for the dipping of sheep and the control of tuberculosis in animals, and it contains the law on the use of brands - in short this legislation lays down the rules for livestock farming. ... However, the modern concept of animal health and quarantine embraces all species of animals and the new title is a simple acknowledgment of that fact."

There is also this exchange between Sir Basil Arthur (3885):

> "Surely we in this country could turn this animal [rabbit] to our own advantage and profit, instead of keeping it on the list of prohibited animals. It would have to be farmed under such conditions that it could not become a menace, but we must not be too rigid in our views against these prohibited animals."

and Mr McIntyre (3888):

> "The honourable member for Timaru mentioned mink and pointed out that they were on the prohibited list. I am not sure whether he was entertaining the idea that they might some time be introduced into New Zealand, but I can only mention the

> experience of other countries. The United Kingdom imported an animal. I think it was mink - at one stage, and also imported a rodent, the coypu, from South America, with the idea of establishing fur farming. However, in both cases, as seems to be almost inevitable, there were escapes, an in some parts of the country the animals have now become something of a pest. Considerable sums of money are being spent trying to get rid of them or control them. We must give consideration to the experience of other countries which have been motivated by exactly the same ideas as have been suggested - that there is a possibility for some diversification in that a new industry can be established ... it would be contemplated only under strict conditions, and I am certain that when these animals were introduced into the UK they were brought in under strict conditions; but accidents happen and experience has shown that it leads to trouble."

8. The Stock Act 1908 contained only four sections dealing with importation of animals (ss 18-20) and these were in Part II "Stock Diseases" and under a group of sections headed "Prevention of Introduction of Disease". In contrast, the Animals Act now contains 14 sections in Part II "Importation".

9. Sections 19 and 19A(1)-(4) of the Stock Act were materially the same as ss 12 and 13(1)-(4) of the Animals Act respectively, except that there was no reference to s 14 and Regulations in s 19A(1). Section 19A(5) was as s 14(1) is now except that there was no reference to coypu or mink. Section 19A(6) is now part of s 19(1). Section 19A(7) was the same as s 14(2). Section 19A(8) was along the lines of the present s 18. Section 19A(9) is now part of s19(1). The Animals Act ss 19(2)-(5) and 20-23 expand vastly on the Stock Act s 19A(10)-(15).

10. Next, the Stock Acts 1893 and 1908 defined "stock" as:

> "All horses, cattle, and sheep, ... and all goats, deer, llamas, antelopes, buffaloes, and other ruminants, dogs, and swine, ... and also all other animals and their carcases to which the Governor shall at any time, by Order in Council, declare that the provisions of this Act, or any of them, shall apply".

In 1955, the Stock Amendment Act altered that definition to read:

> "(a) All horses, cattle, sheep, goats, deer, dogs, swine and other mammals ...; (b) All birds .. except domestic fowl, ducks, geese, and turkeys; (c) All other animals to which the provisions of this Act or any of them are declared to apply by any Order in Council ..."

In contrast, the Animals Act 1967 defines "animal" as:

> "Any living stage of any member of the animal kingdom except human beings; and, in the case of any mammal, bird, fish, or reptile, including the egg or semen or the carcase thereof".

Given that "animals" has the natural and ordinary meaning of an "organised being endowed ... with life, sensation and voluntary movement" (Concise Oxford Dictionary) the ambit of the Act is as wide as possible. Clearly, it covers marron.

11. The breach of the Act is therefore widened by two things though the core aim remains the same as in the Stock Act. First, there is the shift of provisions relating to importation and introduction of animals to an independent Part of the Act which emphasises the point to be inferred from considering the dominant characteristics of the animals listed in s 14(1) (the old s 19A(5)), namely, that the rationale for controlling importation and introduction

is not just controlling disease but preventing entry of animals likely to become a nuisance or cause injury or damage (including disease).

12. Secondly, the wider definition of "animal" makes the Act comprehensive and looks to disease or injury found in or likely to be spread to non-farmed animals. The Act is not just what Mr McIntyre described the 1908 Act to be, "legislation [which] lays down the rules for livestock farming".

13. The ambit of matters to be considered in decisions on the importation and introduction of animals into New Zealand is therefore at least those relevant to determining whether the animal is likely to become a nuisance or cause injury or damage and if so to what extent, but it is convenient to start by examining that phrase. It gives rise to two questions: What is a nuisance etc, and nuisance etc to whom?

14. The Office Solicitor for Ministry of the Environment in an opinion provided to me along with my instructions concludes that a phrase bears the specific civil law connotation of nuisances, damage and injury "actionable at law" which he said requires "some person or body ... able to take legal proceedings and recover costs if they suffered loss to their property as a result of importation". "This narrow interpretation would rule out refusal to import on grounds other than, for example, damage to agricultural plants or stock." He supported his view by referring to the fact that the Agricultural Pests Destruction Act was passed the same year as the Animals Act. I disagree with the Solicitor's ultimate conclusion for several reasons.

15. First, while I consider he is right in limiting nuisance etc to "those things actionable at law" it has to be noted that private nuisance is defined as actionable per se and without establishing any losses to stock. It extends to any land and therefore includes wasteland, native forests or other forests owned by the Crown.

16. Secondly, nuisance is not only private but also public nuisance, ie interference with the freedom of the public to use and enjoy a public place, eg in New Zealand the foreshore, navigable waterways, roads, public parks and reserves, zoos, etc. Public nuisances are actionable by the Attorney-General on behalf of the public or by an individual whose private rights have been infringed along with the public's or if he suffers damage different in quality or quantity from the general public - Boyce v Patterson Borough Council [1903] 1Ch 109. The ambit is not, therefore, as restricted as the Office Solicitor suggested.

17. Thirdly, the definitions of "nuisance" in dictionaries make relevant reading: Concise Oxford Dictionary - "Anything injurious or obnoxious to the community or members of it for which legal remedy can be had", Longman's Dictionary of Contemporary English - "A person or animal that annoys or causes trouble; pest". "Pest" in turn is defined as a "Troublesome or destructive person, animal or thing" (Concise Oxford Dictionary), and "a usually small animal or insect that harms or destroys food supplies" (Longmans Dictionary of Contemporary English).

18. While the 1967 Act predates the main impact of the Environmental movement, there was then existing the Wildlife Act 1939 and the Soil & River Conservation Act 1941 and the Water & Soil Conservation Act 1969 was soon to be enacted. Thus, while it cannot be said positively, it seems there is a reasonably strong argument in favour

of taking a range of matters as relevant to the importation or introduction of an animal which bears on injury or damage to non-farm values, at least as represented by the policy covering wildlife, soil and water represented by those 1969 and earlier Acts. Further, it is considered to be clear that the relevant considerations extend to injury or damage actionable by reason of loss to the Crown's non-farming enjoyment of land and to the public's enjoyment of public places.

19. Question (b) was:

> "Does the Act envisage the prohibition of animals on grounds other than animal health and disease; if so what is the range of considerations MAF should take into account? Specifically, are ecological grounds included?"

The answer to the first sentence is Yes. The answer to the second sentence is: At least damage to the enjoyment on land which is not being used productively and to the public's enjoyment of public places, and quite possibly (indeed probably) bearing on the values found behind legislation such as that referred to in para 18. Since the meaning of the Act has to be fixed as at 1967, though it can apply to situations not foreseen then, one can only say that it is arguable that ecological considerations as such are relevant.

20. Questions (d) was:

> "Does the Act contemplate balancing economic benefits against environmental risk? Is the MAF policy statement re aquaculture in fact consistent with the Act?"

This requires different argumentation. Economic factors can be said always to have been relevant to the Stock Act because New Zealand's traditional overwhelming dependence on export of animal products meant that an outbreak

of disease could severely reduce products available for export - quite apart from closing markets to New Zealand products in reaction to an outbreak of disease. However, the issue relevant here is that of economic factors in decisions whether to allow the import or the introduction of animals. This could arise in the context both of economic benefits which might be derived from importation or introduction of the animal and economic detriments of importation or introduction by disease or, if the argument in paras 14-19 is correct, predation or displacement of other animals. These can be seen to be opposite sides of the same coin.

21. In viewing the headings of sections in the Animals Act, it can be seen that all but Part V "Branding" and related sections in Part VI "Miscellaneous Provisions" are about preventing and limiting risks of damage. There is arguably scope for considering economic matters even in that area to the extent that loss consequent on the action of, eg, declaring an infected place (s 29), may be so great that the evaluated risk of damage would be insufficient to make taking that action reasonable in the Wednesbury sense or make the action disproportionate - see Lord Diplock in Counsel for Civil Service Unions v Minister for Civil Service [1985] AC 374 (HL). Having said that, economic consequences of actions would be no more than secondary and not primary factors.

22. Turning now to decisions in s 13, the question must be against what does the decision maker measure the risk of damage in permitting importation or introduction. There are two possibilities. First, one can say that there is nothing to balance - a decision maker simply asks for an evaluation of risks and, if they are significant, refuses. The defect in this approach is that it seems inconsistent with the counterpoint of ss 13 and 14. Section 14(1)(k) raises a prohibition if the specified

risks are "likely" to eventuate. If the significance for the purposes of s 13 is the same as "likely" in s 14(1)(k), then the discretion (and there would seem clearly to be a discretion notwithstanding absence of the word "may") in s 13 disappears. Yet, if the significance is less than "likely" then the function of s 14(1)(k) disappears. Accordingly, it is concluded that the balance must be against the benefits argued to be derivable from the importation or introduction.

23. It is necessary at this point to deal with the consequences of the use of the words "import or introduce". Those two words could mean either the same thing or "introduce" could mean to bring in a species for the first time while "import" means to bring in particular animals, or "import" means to bring in physically within the boundaries of New Zealand for quarantine while "introduce" means to bring into the general territory beyond quarantine. Since Parliament is presumed not to use words pointlessly, the first two possibilities appear to be wrong; the first by definition and the second because "introduce" becomes pointless as it is in every case absorbed by the concept of "import". On the other hand, the third possible meaning makes a functional distinction of relevance to the purposes of preventing nuisances, injury and damage (including disease) and has a value in evaluating risks. It is considered to be the correct interpretation although it does not appear to be one which has been adverted to in the past.

24, The relevance of economic factors can therefore be found to depend on the nature of the permit. A permit to import to quarantine only has scarcely any economic dimension, while a permit to import with a view to introduction once particular animals are found to be disease-free or to

permit introduction following an earlier permit to import to quarantine could have economic dimensions. At the same time, a permit to introduce or to import with a view to introduction could have a different range of risk factors from import solely to quarantine.

25. A permit to import only to quarantine was said to have scarecely any economic dimension. That expression has been used rather than "no economic dimension" because obviously an applicant must have a purpose in seeking import. Having made, eg, a plausible case for there being some economic advantage in farming the animal, the decision maker then concentrates solely on the risks of escape from quarantine and the consequences of escape and makes a decision. That cannot commit the Ministry to grant a permit to introduce the animal since a very different balance of factors becomes applicable at that stage.

26. Question (d), which is:

> "Does the Act contemplate balancing economic benefits against environmental risk? Is the MAF policy statement re aquaculture in fact consistent with the Act?"

can now be answered. The answer is Yes so far as a permit to introduce the animal beyond quarantine or a permit to import to quarantine with a view to introduction of <u>those</u> animals thereafter; and Yes in a very formal sense for a permit to import to quarantine only. The answer to the second sentence is that the policy is deficient in failing to make the import/introduction distinction, but if it is seen as dealing with introduction (as seems to be the thrust) it is consistent with the Act.

(b) MEANING OF SECTIONS 13 AND 14

27. Question (a) is:

> "The scope and meaning of sections 13 and 14(1)(k) of the Animals Act 1967."

Section 13(1) provides:

> "No person shall import or introduce any animal, animal product, animal manure, packing material, fittings, or fodder into New Zealand -
> (a) Without the written permit of the Minister or of a person authorised by him in that behalf; or
> (b) In contravention of any regulations made under this Act; or
> (c) In contravention of section 14 of this Act."

The three paragraphs are alternatives and provide a hierarchy. The approach is:

(i) Does the animal fall within s 14(1)?;

(ii) If not then go to (vi);

(iii) If so, does the application come within the savings in ss 15 or 16 which would permit an import?

(iv) If not, then a permit cannot be issued;

(v) If so, then a permit can issue though the balancing factors against risk are the relevant ones in s 15 or 16 as appropriate;

(vi) Does the animal come within a prohibition in any Regulations under the Animals Act? (Note here that prohibitions and regulations under the Fisheries Act 1983 or other Acts do not count - this may be a defect);

(vii) If not then go to (xi);

(viii) If so, does the animal come within any savings similar to those found in ss 15 and 16 of the Act?

(ix) If not, then import or introduction cannot be permitted;

(x) If so, then a permit can be granted but the factors to be balanced against risk will be those relevant to the appropriate saving;

(xi) A permit may be granted under s 13(1)(a) with the relevant factors to balance against risk including those discussed in section (a) of this Opinion.

28. Section 13(2) requires conditions to be imposed at the time of the permit, though they can be ones which take effect later and after importation or introduction. To provide that conditions may be imposed later (save as provided for by subsection (4)) would mean the permit was void for uncertainty.

29. Section 13(3) means that a permit may allow a species to be imported or introduced by the holder as and when wished or may allow a specified occasion for import or introduction. It is the occasion which would be specified in the latter case. In either case, conditions under subs (2) may limit the numbers to be imported or introduced on any one occasion and in the former case the conditions may specify time gaps between occasions for importation or introduction.

30. Section 13(4) carries the implied requirement that natural justice be adhered to vis-a-vis the permit holder.

31. Section 13(5) would also be subject to natural justice, though hearing before seizure and destruction would not be necessary on occasions of urgency - De Verteuil v Knaggs [1918] AC 557 (PC).

32. As to the second part of Question (a), this has been covered in paras 12 to 16 above.

33. As to question (c), "likely" has been held to have several meanings. These range from "a distinct or significant possibility result might occur ... above a slight chance and below an expectation ... without question mentally conceivable" - Commissioner of Police v Ombudsman [1985]

1 NZLR 578, 589, R v Gush [1980] 2 NZLR 92 (CA), R v Boughy (1986) 65 ALR (HCA) - through "probable", ie 50.1% chance - Dowling v South Canterbury Electric Power Board [1966] NZLR 676, Transport Ministry v Simmonds [1973] 1 NZLR 359, 363, Koufos v C Czarnikow Ltd [1969] 1 AC 250 (HL), Australian Telecommunications Commission v Krieg Entertainments Pty Ltd (1976) 27 FLR 200 - to much more likely than not - see dictum of Lord Hodson in Koufos at 410-411 and Taplin v C Shippam Ltd [1978] ICR 1068.

34. All the above formulations of possibilities fall below a certainty, but the real importance is which is most likely to be the correct interpretation. The structure of ss 13 and 14 is that the chances of nuisance, injury or damage are to be assessed and a prohibition on import or introduction made in appropriate circumstances. In colloquial language, s 14 animals are ones for which "there is no way we would want them here". That approach is supported by the very limited categories for import or introduction notwithstanding the application of s 14 set out in ss 15 and 16. Since the prohibition in s 14 extends even to import to quarantine only (which by nature has a very low risk of escape), the prohibition seems commensurate with a high chance of damage. What it is saying is that even a small possibility of escape is a risk the country is not prepared to take. This points to the meaning of "much more likely than not". The problem is that that has only once been adopted as a meaning in a formal holding by a court (and that was the Employment Appeal Tribunal consisting of one High Court Judge and two assessors). For that reason only, it is considered that the interpretation most likely to be applied by the court to s 14(1)(k) is "probable". The answer to question (c) is therefore Yes, "likely" means more probable than not, though it is possible a court would hold that it means "much more likely than not".

35. Question (h) is:

> "Can you give any guidance as to what is meant by the term "noxious" in s 14(2)?"

The dictionary definitions of "noxious" are (Shorter Oxford English Dictionary) - "Injurious, harmful, unwholesome", Longman's Dictionary of Contempory English - "Harmful to people, plants or animals". "Harm" means "damage, hurt" (Concise Oxford Dictionary) and "damage, wrong" (Longman's Dictionary of Contemporary English). "Wholesome" means "promoting physical or moral health, salubrious, salutory, not morbid" (Concise Oxford Dictionary) and "good for the body or mind" (Longman's Dictionary of Contemporary English). The natural and ordinary meaning of noxious is supported by R v Marcus [1981] 1 WLR 774 (CA) where the offence of causing another to take any poison or other destructive or noxious thing was held to cover putting sleeping tablets (enough to cause sleep but not enough to cause death) in another's milk. "Noxious" was seen as being less than poison or destructive thing and meant something harmful, capable of causing injury to bodily health. All this suggests that "noxious" means much the same as "nuisance, injury or damage" (s 14(1)(k)). However, Parliament has used a different expression. It is to be deemed not to have used words unnecessarily. If "noxious" in s 14(2) meant the same as "nuisance, injury or damage" in s 14(1)(k), then s 14(2) could have effect only in the very limited situation where a permit was granted under s 15 or 16 and the animal excaped. This does not seem likely. To allow s 14(2) to have effect it is considered that the subsection should be construed as meaning "a harm which falls short of being legally actionable nuisance, injury or damage". In practice, this suggests that an animal for which a permit is given under s 13(1)(a) for which the risks are seen as significant but not such as to outweigh any benefits is forbidden to be liberated under s 14(2).

(c) ENVIRONMENTAL IMPACT ASSESSMENT

36. The fundamental proposition on this subject is that the Environmental Protection and Enhancement Procedures ("EP & EP") has itself no legal effect. An obligation to consider it as part of the environmental impact of a decision arises only where there is a conjunction of three factors:

(a) Environmental impact is legally relevant to the decision to be made - the situations where that might be said to be so in decisions made under ss 13 and 14 have already been considered in this Opinion.

(b) Environmental impact must be stated in the legislation to be a relevant factor or must be "so obviously material ... that anything short of direct consideration of the matter would be inconsistent with the Act" - CREEDNZ Inc v Governor-General [1981] 1 NZLR 172, 183 (CA); there seems to be a strong argument to the effect that in situations where environmental impact is relevant under ss 13 and 14, then it is so "obviously material".

(c) The actual process and content of the EP & EP are "so obviously material" that environmental impact has legally to be assessed in that way.

It is at element (c) that the argument in favour of making the EP & EP obligatory in the absence of an express legislative requirement falls apart. It is very much doubted that the requirement to consider the environmental impact factor can be enlarged to a legal obligation to consider it in a particular way.

37. The EP & EP are therefore a self-discipline by Government for breach of which no legal remedy exists save where a person has properly relied on a Government commitment to follow that discipline and is prejudiced by the failure to do so - R v Home Secretary, ex parte Khan [1984] 1 WLR 1337 (CA) where the Home Secretary had specified criteria against which an application to bring in a child to the United Kingdom for adoption would be assessed. K constructed his application on the basis of those criteria but was refused because another criterion was applied in addition. The decision was held to be unlawful. One can envisage the Khan holding applying where an application for import or introduction was refused, but it is less likely that environmental organisations (whose standing in the matter is somewhat marginal) could bring themselves within the rule.

38. The answer to question (e) is No.

39. Question (f) is:

> "Can MAF require an importer to prepare an environmental impact assessment together with a disease and environmental profile as contemplated by the policy? Is MAF able to require an importer to construct quarantine facilities before the permit is issued?"

If environmental impact is relevant to a decision and is or has to be considered, then the Ministry of Agriculture and Fisheries has to inform itself properly on the matter and in doing so the rules of natural justice are followed - Daganayasi v Minister of Immigration [1980] 2 NZLR 130 (CA). The Ministry's informing itself could involve doing its own investigations, commissioning an outside assessor to prepare a report, or asking the applicant to provide the relevant evidence. Requiring an applicant to prepare an environmental impact assessment would appear on the face of it to be an appropriate format

for the Ministry to inform itself and prima facie might be required.

40. Whether the Ministry can require an environmental impact assessment with particular form and content as envisaged by the EP & EP is another question. In Wheeler v Leicester City Council [1985] AC 1054 (HL) the Council's requirement that the Leicester Rugby Club respond to four questions, about the decision of four of its players to tour South Africa, in a particular way was held to be unreasonable and substantively unfair. The facts of decisions under the Animals Act ss 13 and 14 are far removed from those in Wheeler and the emotional and political connotations of sporting contacts with South Africa (personal views on which may have been decisive in Wheeler) are absent from the present issue. However, the case warns against requiring and refusing to accept anything but a particular form of environmental impact assessment without legislation requiring a particular form.

41. The answer to question (f) would seem to depend on whether environmental impact is a required or a discretionary factor to be taken into account. If it is required, then there is a reasonably strong argument that the Ministry could require the applicant to provide an environmental impact assessment with enough detail to enable it to decide the matter. It may be that that detail is the detail also set out in the EP & EP, but that would be coincidental and the fact that it was set out in the EP & EP could not be relied upon as justifying the requirement. If, on the other hand, environmental impact is only a discretionary factor, then the issue becomes one of reasonableness and proportionality. The test on that basis would be whether the cost or difficulty of providing an adequate environmental impact assessment is so disproportionate to the benefits sought by the applicant that it is unreasonable to require it to provide the assessment. That could only be determined on the particular facts of the case.

42. The answer to the first part of question (f) is: Only if:

(a) The cost and difficulty of doing so is not so disproportionate to the benefit sought that it is unreasonable to require an assessment, reasonableness being affected by whether environmental impact is a factor expressly or impliedly required to be considered, and

(b) The Ministry is prepared to be flexible on exactly how the environmental impact assessment is to be constructed and presented, the degree of flexibility required again depending on whether environmental impact is an expressly or impliedly required factor.

43. The answer to the second part of question (f) is: Yes, if there is no appropriate quarantine facility available or if the applicant wants the quarantine to be in a particular place where there is none, provided that import or introduction is not instigated by the Government with the applicant only "doing it a favour" (in which situation it would probably be unreasonable to require the applicant to construct the facility).

(d) FRESHWATER FISH FARMING REGULATIONS 1983

44. The Regulations only apply to gazetted fish and any other freshwater fish may be farmed without a licence under the Regulations. It therefore appears that if a permit is granted to introduce marron and marron is not gazetted as a freshwater fish for the purposes of the Regulations, then it may be farmed without a licence under the Regulations.

45. The Regulations are expressly concerned with hygienic and disease-free farming and policing this. There is no express reference to environmental impact save by the requirement that any necessary permits be obtained under other legislation.

46. There is a discretion whether or not to grant a licence and only three considerations are expressly required to be taken into account: written submissions by an acclimatisation society, qualifications, previous training and experience of the applicant or manager, and the situation of the proposed farm and the applicability of principles of good farming practice to it - Reg 8(1). By Reg 8(3) there are compulsory conditions on licences that all rights, licences and authorities required by any enactment to use and discharge water be kept in full force and effect and that water can be supplied to each pond without it having to pass through other ponds on the fish farm and that it cannot be discharged without being treated.

47. While the power is dicretionary, it is necessarily limited to the purposes of the Regulations and relevant parts of the Fisheries Act 1983. This suggests that the ambit of relevant considerations is hygienic and disease-free farming, prevention of pollution and protection of fresh water fishing under acclimatisation societies. The prevention of spread of disease is probably brought in as relevant by the reference to hygienic and disease-free farming and the avoidance of pollution, but there does not seem to be a basis for general environmental issues to be taken into account. This seems unusual and is probably a defect because on current legislation it would only be in permits for introduction of an animal that environmental impact considerations and conditions could be taken into account and it is very much doubted that conditions could extend beyond the applicant who introduced the animal so as to put what are effectively restrictive

covenants on any sale by him after introduction, let alone onsales by that purchaser.

48. The answer to the first sentence in question (g) is hygienic, disease-free and efficient farming, pollution and maintenance of fresh water fishing and probably the spread of disease beyond the farm. The answer to the second sentence is No, and that this appears to be a defect.

(e) THE VALIDITY OF THE PERMIT

49. It can be seen from what has been said above that there is no obvious ground of invalidity applicable to the permit. It must, however, be emphasised that it is a permit only to import to quarantine. Because of the way the matter has been handled, Koru might well now have a legitimate expectation that a permit (albeit on condition) to introduce marron will follow. If the permit is vulnerable, the avenues of attack would seem to be the failure by the Ministry adequately to inform itself on the benefits and detriments, failure to follow the EP & EP where other governmental environmental organisations were relying on the fact that it would be followed, or some fraud by Koru. The facts available to me are very far from establishing any of those matters. There is the question of the Ministry allowing in the marron contrary to a condition of the permit about disease-free certification. While the decision to allow import of the actual animals might be vulnerable on this ground, Koru would seem to have a strong argument of estoppel that the Ministry cannot now take action to destroy the animals because of the lack of certification (though they might be able to do so if actual disease is shown).

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