A copy of the Ombudsman's report on the Icelandic Water Trawlermen Compensation Scheme 2009

MARCH 2012

Parliamentary Commissioner Act 1967

Report by the Parliamentary Commissioner for Administration (the Ombudsman) to

Rt Hon Alan Johnson MP
Mr Austin Mitchell MP

on the results of an investigation into a complaint about the Department for Business Innovation and Skills made by

Mr A
Mr B
Mr C
Mr D
Mr E
Mrs F

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Chapter one

The general complaint

1. This report sets out the results of my investigation into complaints by Mr A, Mr B and Mr C, referred by Rt Hon Alan Johnson MP and Mr D, Mr E and Mrs F (on behalf of her late father), referred by Mr Austin Mitchell MP.

2. These six complaints all concern the way that the Department for Business Innovation and Skills (the Department)[1] measured and calculated the service of Icelandic water trawlermen for the purposes of compensation under the *Icelandic Water Trawlermen compensation scheme 2009* (the 2009 scheme).

The decision

3. For reasons that I will go on to explain, I have found evidence of maladministration by the Department in respect of the consultation conducted in respect of the proposed 2009 scheme, which lead to false expectations of what the 2009 scheme would deliver. This in turn caused injustice when those reasonable expectations were not met. I have therefore upheld the complaint in part.

[1] In June 2007, following a restructure of the Department of Trade and Industry (DTI), the Department for Business, Enterprise and Regulatory Reform (BERR) was formed. BERR comprised of part of the former DTI, the Better Regulation Executive from the Cabinet Office and the Regional Economic Performance Unit from the Department for Communities & Local Government. In June 2009 the Department for Business Innovation and Skills (BIS) was created from the merger of BERR and the Department for Innovation, Universities and Skills. BIS devised the *Icelandic Water Trawlermen Compensation Scheme 2009* (the scheme) and have the ongoing operational responsibility for the scheme. For ease of reference I refer to the BIS as 'the Department' throughout my report.

Chapter two

An introduction

Historical perspective – the Cod Wars

4. The events relevant to the subject matter of this investigation began in the late 1970s and early 1980s. In 1976 the British Government agreed to resolve the third of a series of disputes with the Icelandic authorities over fishing rights, generally known as the Cod Wars,[2] by recognising a 200 mile fishing limit around Iceland. Those British fishermen who fished these waters were known as Icelandic water trawlermen.[3] As a result of the agreement, almost all of the Icelandic water trawlermen were effectively redundant. The British Fishermen's Association (BFA) was formed in the early 1980s to campaign for what the Icelandic water trawlermen believed to be fair compensation for the loss of their industry. This campaign saw the creation of an ex gratia scheme in 1993, followed by a compensation scheme in 2000.

The 1993 ex gratia scheme

5. In 1993 the Court of Appeal decided that Icelandic water trawlermen were not, as previously considered, employed on a casual basis. This meant that they could, under certain circumstances, receive redundancy payments. The Department for Trade and Industry made arrangements to make ex gratia payments to trawlermen meeting certain qualifying criteria. The Icelandic water trawlermen felt that these rules, which were applicable to normal redundancy conditions, contained criteria too difficult for the trawlermen to meet and did not reflect their working practices, which were unique to the Icelandic water fishing industry.

6. One example of this uniqueness was the 'pool system' which operated in some ports. This system was operated by the ship owners and the then Employment Department. Its objective was to ensure that there was an adequate number of qualified trawlermen readily available for all companies participating in the system. For example, when a trawler was in dock, perhaps for a refit, the trawlermen were entitled to unemployment benefit and would remain in the system. However, if the Employment Department decided, in conjunction with a participating company, that it would be appropriate for a trawlerman to cover a vacancy on a trawler that belonged to a different company, irrespective of which waters the trawler fished, the trawlerman was compelled to accept this new position or his benefit was stopped.

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[2] The first dispute began in 1958 when Iceland expanded its territorial waters from 4 nautical miles to 12 nautical miles. The second dispute began in September 1972 when Iceland began enforcing a law that expanded its fishing territory further to 50 nautical miles. On 8 November 1973 Britain and Iceland reached an agreement allowing British trawlers to fish within certain areas of the 50 mile zone. The agreement expired in November 1975 resulting in the third and final dispute which lasted until June 1976 and saw the end of British fishing in Icelandic waters.

[3] They are also commonly referred to as 'deep water trawlermen' or 'distant water trawlermen', but for the purposes of this report, they will be referred to as 'Icelandic water trawlermen' or simply 'trawlermen'.

7. Under the 1993 ex gratia scheme, some trawlermen with long careers at sea received only nominal compensation payments.

The 2000 scheme

8. The campaign for fair compensation by the trawlermen and MPs from those ports most affected by the collapse of the industry (we will refer to these MPs as port MPs),[4] continued until 2000. In response, the Department devised a compensation scheme (the 2000 scheme) for the former trawlermen with the purpose of '*compensat*[ing] *former UK-based Icelandic water trawlermen for the loss of their industry due to the settlement of the "Cod Wars" of the mid-1970s*'.[5] The 2000 scheme ran between October 2000 and October 2002.

9. Under the eligibility criteria for the 2000 scheme, a claim could be made in respect of the last continuous period of work undertaken by the former Icelandic water trawlerman, provided that that period of work lasted for at least two years prior to 1 January 1980 and ended on or after 1 January 1974. Those who left the industry or were made redundant prior to this period were not considered to have lost their jobs due to the Government's action over the Cod Wars. The 2000 scheme defined a continuous period of work as *'work as an Icelandic water trawlerman during which there were no relevant breaks between voyages of more than twelve weeks'*.

10. The 2000 scheme rules provided that a gap between voyages on Icelandic water vessels of more than 12 weeks would break continuity of service if any other work (that is, work other than as an Icelandic water trawlerman) was done for even one day during that gap. If there was a break, the 2000 scheme only paid compensation for continuous service running from the end of that break until the end of service. If the continuous service period was less than two years, no compensation was paid. This 'breaks rule', introduced as a way to differentiate between those trawlermen who demonstrated a continuous commitment to the industry and those who did not, proved contentious in view of the 'pool system' operating in fishing ports. This was because the 'breaks rule' meant that a trawlerman could spend almost the whole of their working life on Icelandic water trawlers, but due to being required by the 'pool system' to spend a relatively brief period on a different type of vessel at a late stage in that career, might then lose the right to be compensated for the majority of that time or indeed to be compensated at all.

11. Under the 2000 scheme payments were made on the basis of £1,000 for each year at sea with a maximum entitlement of £20,000.[6]

Complaints about the 2000 scheme

12. In 2003 my predecessor received a complaint from Mrs A, who complained of maladministration by the Department in devising the 2000 scheme and assessing compensation due to her late husband. The then Ombudsman also

[4] The ports most affected by the collapse of the industry were Hull, Grimsby, Fleetwood and Aberdeen.
[5] As stated within the 2000 scheme rules.
[6] This level of compensation was put forward by a fishermen's group.

received several similar complaints from former trawlermen or their family members about the 2000 scheme with concerns that the 'breaks rule' resulted in unfairly low compensation for some trawlermen despite long careers at sea.

Put together in haste – our investigation of the 2000 scheme

13. My predecessor investigated Mrs A's complaint and in February 2007 published her report *Put together in haste: 'Cod Wars' trawlermen's compensation scheme* (*Put together in haste*), setting out the results of her investigation.

14. In the report the Ombudsman made three findings of maladministration that caused Mrs A to suffer an unremedied injustice. These were:

- that the 2000 scheme was devised and launched before it was appropriate to do so, with the effect that several critical factors were not considered and addressed by those responsible for devising the 2000 scheme rules before its launch;
- that there was a mismatch between what the 2000 scheme was intended to deliver and what it was capable of delivering through the 2000 scheme rules. The rules lacked clear definitions; inconsistent interpretations were possible in respect of several key factors; those operating the 2000 scheme were unable to verify the entitlement of some applicants; there was no flexibility within the eligibility criteria; and administrative simplicity superseded alignment with delivering the policy intention; and
- that the problems identified during the operation of the 2000 scheme, which were added to incrementally, should have led to a comprehensive review of the scheme with the aim of realigning the detailed 2000 scheme eligibility rules with the policy intention behind the 2000 scheme. This did not happen.

15. To put right the unremedied injustice, the Ombudsman recommended that:

- the Department should apologise to and make a consolatory payment to Mrs A, and to the other complainants identified in the report, to reflect the inconvenience and distress caused by the maladministration;
- the Department should review the eligibility criteria and 2000 scheme rules to ensure that they were consistent with the policy intention underlying the 2000 scheme;
- once that was done, the Department should fully reconsider Mrs A's case, and the cases of the other complainants identified in the report, in line with the criteria that it determined were consistent with the policy intention as a result of the above review. In the event of any additional award, interest for loss of use of those funds should also be paid; and
- following the review, the Department should consider the cases of any individuals who claim to have suffered similar injustice as a consequence of the maladministration identified. If that was shown to be the case, the Department should apologise and make consolatory payments to them; should review their cases in line with criteria that it determined were

consistent with the policy intention; and, in the event of any additional award, interest for loss of use of those funds should be paid.

16. The final recommendation related to ex gratia compensation schemes more generally. During the investigation my predecessor recognised that no central guidance existed for public bodies that specifically related to the development and operation of ex gratia compensation schemes. She recommended that such guidance be developed across government.

National Audit Office and Public Accounts Committee

17. In addition to the Ombudsman's investigation, the National Audit Office[7] and the Committee of Public Accounts (PAC)[8] investigated the 2000 scheme. On 29 June 2007 a report by the National Audit Office, *The compensation scheme for former Icelandic water trawlermen*,[9] was issued. On 26 February 2008 PAC published their report, *The compensation scheme for former Icelandic water trawlermen.*

18. In summary, these investigations found that the 2000 scheme had not been properly devised or implemented, some claims had not been properly assessed and the 2000 scheme operation showed a failure to understand the working practices of the industry.

The Department's response to Put together in haste

19. The Department agreed that errors had been made within the 2000 scheme. The Department acknowledged that their failure to consult the trawlermen had led to difficulties, and in particular, they agreed that the 2000 scheme had not properly targeted compensation to those former trawlermen who had directly suffered as a result of the loss of fishing grounds following the Cod Wars.

20. Specifically, the Department said that the 'breaks rule' 'provided an unfair outcome for some claimants' and they 'were not convinced that the continuous service approach was the right one or that the qualifying test had been well targeted'.

21. As a result of the criticisms made in *Put together in haste* and in line with the Ombudsman's recommendations, the Department said that they then set out to design a new scheme in which the eligibility criteria better gave effect to the policy intention. In doing so, the Department said that the policy objective and the purpose of the new scheme would remain the same as the 2000 scheme, which was *'to compensate former UK-based Icelandic trawlermen who lost their livelihoods in the fishing industry as a result of the settlement of the "Cod Wars" with Iceland in the mid 1970s'*.

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[7] The role of the National Audit Office is to audit the accounts of all government departments and agencies, as well as a wide range of other public bodies, and report to Parliament on the economy, efficiency and effectiveness with which these bodies have used public money.

[8] The Committee of Public Accounts is appointed by the House of Commons to examine '*the accounts showing the appropriation of the sums granted by Parliament to meet the public expenditure and of such other accounts laid before Parliament as the committee may think fit*' (Standing Order No 148).

[9] HC 530 session 2006-2007.

The 2009 scheme

22. On 31 July 2009 the Department launched the *Icelandic Water Trawlermen compensation scheme 2009*. This moved away from the previous approach of calculating continuous service and removed the former 'breaks rule', which had attracted substantial criticism. However, the 2009 scheme led to further complaints from port MPs and former trawlermen about its development and operation and concerns that, like the previous schemes, it did not accurately reflect the working practices of Icelandic water trawlermen.

Going forward

23. The criticisms of the administration of the 2000 scheme are part of the backdrop to the subject matter of this investigation. However, the focus of the complaints considered in this investigation is the way that the Department measured and calculated Icelandic service for the purposes of compensation under the 2009 scheme.

24. While the six complainants subject to this report applied for compensation under the 2000 scheme – and were aggrieved at the amounts awarded – their complaints, for the purpose of this investigation, are that they have received no compensation payment, or unfairly low payments under the 2009 scheme.

25. However, the administration of the two schemes cannot wholly be divorced from each other, because the later scheme was established to remedy the effects of maladministration in the operation of the previous one.

26. There are six annexes to this report. Annex A sets out the Ombudsman's role, remit and approach to determining complaints. Annex B is a detailed chronology of the key events leading up to the complaints to this Office. Annex C is the Department's consultation document that invited responses about the proposals for the 2009 scheme. Annex D is a summary of the consultation responses received in writing and online. Annex E contains the 2009 scheme rules including the eligibility criteria for the scheme and the procedure for making claims. Annex F sets out the eligibility criteria for the recommended ex gratia payments.

The specific complaint

27. Following the launch of the scheme, this Office received a number of complaints from former Icelandic water trawlermen, or their surviving relatives, about the 2009 scheme.

28. The complaints had similar issues in common. Specifically, that it was unreasonable for the Department to:

- use days at sea as a measure of the time served as an Icelandic water trawlerman; and
- to interpret a year of service as 365 days of work.[10]

[10] This relates to the scheme's qualifying test, which required a trawlerman to serve two years or 730 days (365 days equalling one year's service) on Icelandic water vessels during a specified four year period. The qualifying test is discussed in detail throughout this report.

29. For some of the complainants there was an additional complaint that the Department failed to exercise appropriate discretion when considering the circumstances of individual cases.

30. The first two issues affected eligibility for the 2009 scheme and the calculation of compensation.[11]

31. In each case brought to this Office, the injustice claimed was either that the complainant should be eligible for compensation, but failed to qualify under the 2009 scheme rules, or that the amount of compensation was less than they had been led to believe they would receive.

32. The Ombudsman received many complaints and accepted six representative complaints for investigation. The scope of the investigation was to determine whether the 2009 scheme, devised and run by the Department, fulfilled the intent of the scheme as originally announced, and delivered a fair outcome to the trawlermen. Particularly:

    - whether it was reasonable for the Department to use days at sea as a measure of time working as a trawlerman;
    - whether it was reasonable for the Department to interpret a working year to be 365 days of such work; and
    - whether the Department exercised their discretion reasonably when considering the circumstances of individual cases.

The investigation

33. I have not included in this report all the information we have considered during the course of the investigation. However, I am satisfied that nothing has been omitted that is of significance to my determination of the complaints made by the six trawlermen.

[11] The scheme rules regarding eligibility (including the qualifying test) and the method of calculating compensation were different to those that applied under the 2000 scheme. These are discussed in detail throughout this report.

Chapter three

Life as an Icelandic water trawlerman

34. From my officers' meetings with the former trawlermen involved in this complaint and their discussions with industry experts and port MPs, it was clear that working as an Icelandic water trawlerman was a demanding and dangerous job. To help us understand what life was actually like for the men, we asked them about their experiences at sea. Below is a summary of what the trawlermen told us.

35. Icelandic water trawlermen were deep sea fishermen. They fished in the North Atlantic and Arctic fishing grounds from ports such as Hull, Grimsby, Fleetwood, and Aberdeen. Hull was purely an Icelandic water port with Grimsby, Fleetwood and Aberdeen being varied fishing ports, meaning they fished both in Icelandic waters and others closer to home. For many trawlermen, fishing was a family tradition. Fathers, brothers and uncles were also trawlermen and their sons sometimes followed after them. Trawlermen often started their careers at sea as young as 16, where they would first work as galley boys or cook's assistants, moving on to become a decky learner (in training to be a deckhand) at age 17 and a deckhand at age 18.

36. Trawlermen also included those working as third hands, mates, skippers and engineers. Some trawlermen worked in one role for their whole careers but those wanting to be promoted had to work their way through the ranks and attend nautical college and study for qualifications. Trawlermen would receive a weekly wage, and when a ship landed and the fish were sold, they would also be paid a percentage of the catch. The higher the position on the boat, the higher the percentage they received. For example, a deckhand would receive £6.60 per £1,000 of catch sold, whereas skippers would receive £120 for the equivalent catch. The former trawlermen told us that this was a reason why some skippers pushed the crew and the ship to the limits to land a large catch of fish.

37. While trawler owners adopted their own work practices and practices varied in different ports, the conditions at sea were the same. Trawlermen worked all year round, including during the harsh Arctic winters. The work was arduous and dangerous with the fatality rate for trawlermen fishing in these waters being 14 times higher than that of coal miners.[12] Since 1853 to the end of the industry in the 1980s around 6,000 men lost their lives at sea.

38. Trawlermen worked every day they were at sea, doing 18 to 20 hour shifts with only 6 hours rest, although for the ship's safety the crew were on call 24 hours a day. Fishing continued despite rain, gales, fog, snow or rough seas. During a shift, the trawlermen spent all their time on deck. Winds would blow up to 65 knots and temperatures could reach as low as minus 40 degrees. In such weather conditions, trawlermen have told us how cups of water would

[12] Rt Hon Alan Johnson *'Trawlermen's Pensions' House of Commons Main Chamber Debate* – 2 March 2011.

freeze almost instantly and there was always the risk of ice developing on the vessel, which threatened to capsize it. No special clothing was worn, only oilskins and wool hats. No safety equipment was used and they had to rely upon their skills, experience and crew mates looking out for each other in order to survive.

39. Each fishing trip would commonly last three weeks. The trawlermen would return to port for between 48 and 72 hours[13] before returning to sea on the next voyage. With the introduction of freezer trawlers (larger vessels that were able to freeze fish onboard) they could stay out at sea for much longer periods, depending on the quality of the fishing. On these trips the trawlermen did not know when they would return to shore and could be away for months at a time.

40. Trawlermen described to us the injuries they sustained performing this work, such as amputated fingers and broken bones. The men often caught pneumonia and now suffer arthritis from years of working in freezing conditions. The danger of being washed overboard was always present. Some of the former trawlermen recounted the times that this had happened to them and how they were lucky to have survived.

41. Trawlermen have told us that they would be pushed to the limit in the battle for the best catch. Some skippers would not give up fishing even in the most dangerous conditions. The trawlermen had to keep working or risk losing their jobs; but the trawlermen told us that being pushed like this was '*the nature of the beast*'. They said that fishermen went to sea to catch fish. If the fishing was good they worked long hours, but knew at the end of the trip there would be good financial gain. In Hull and Grimsby, the trawlermen were called '*three day millionaires*', as they would return home after weeks at sea and have three days to spend their wages and enjoy themselves before returning to work.

42. Many former trawlermen told us similar stories of the poor treatment they received on board and ashore. A transgression could result in being '*spragged*' or given the '*walkabout*'. This was a form of punishment where a trawlerman was blacklisted and his fishing passport[14] was withheld, preventing him from working on a ship until the fishing passport was returned. An example of this would be if a trawlerman did not turn up to leave with a ship and so a replacement crew member had to be found quickly otherwise the ship could not sail on that tide.

43. Despite the harsh conditions, many trawlermen told us of their love for the work. They were born into the life and could not think of doing anything else. The trawlermen formed strong bonds with the men they worked with and these friendships continued for the rest of their lives.

[13] 60 hours was the norm for a 21-day distant water trip.

[14] Fishing passports were also called passbooks, port record books or service books. For clarity I use 'fishing passports' throughout this report.

44. The loss of the Icelandic fishing grounds following the Cod Wars resulted in trawlers being scrapped and sent to the breaker's yard. Compensation in the region of £180 million was paid by the Government to the trawler owners due to the decommissioning of their ships, but the trawlermen received nothing. The trawlermen received no retraining and felt that they had been thrown on the scrapheap. Since then, campaign groups, such as the British Fishermen's Association (BFA) and the Grimsby Association of Fishermen and Trawlermen (GRAFT), and port MPs have fought to get compensation for the trawlermen whose livelihoods were all but destroyed as a result of the outcome of the Cod Wars.

The complainants

45. The six complainants have been aggrieved by the 2009 scheme and want the Department to put in place a scheme that recognises and reflects the working practices of trawlermen and provides the compensation that reflects ministerial agreements about the scheme in 1999 and 2000. The statements made in 1999 and 2000 were about the announcement of a compensation scheme and the criteria which would apply. For example, on 22 June 2000 the Chief Secretary to HM Treasury wrote to the Secretary of State at the Department and said he was prepared to agree to a compensation scheme. This compensation scheme was on the basis of a requirement of two years of continuous service in the industry (not necessarily with the same employer); a payment of £1,000 per year of service at sea;[15] payments under the previous ex gratia scheme were to be offset against the claimant's entitlement under the new scheme; share fishermen were to be included; and there would be payment in full to widows and dependants of deceased trawlermen. The Chief Secretary proposed a limit of £10,000 on individual payments (subsequently increased before the launch of the scheme in October 2000 to £20,000). He also proposed that the scheme be limited to those who left the industry during 1974 to 1979.

46. All of the complaints were referred by two port MPs: Mr Austin Mitchell (Mr Mitchell), member for Great Grimsby, and Rt Hon Alan Johnson (Mr Johnson), member for Kingston upon Hull West and Hessle.[16]

47. Details of the six trawlermen whose complaints were accepted for investigation are outlined below with a summary of the compensation they each received under the 1993 ex gratia, 2000 and 200917 schemes. Details regarding the 2009 scheme rules and eligibility are discussed in detail later in the report.

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[15] The term '*at sea*' was not defined.

[16] Other port MPs who had an involvement or interest in the 2009 scheme were: Dame Anne Begg, Member for Aberdeen South; Rt Hon Malcolm Bruce, Member for Gordon; Frank Doran, Member for Aberdeen North; Joan Humble, former Member for Blackpool North and Fleetwood, Shona McIsaac, former Member for Cleethorpes; and Sir Robert Smith, Member for West Aberdeenshire and Kincardine.

[17] All payments received under the schemes included interest (at a rate of four per cent) and a consolatory payment (£200).

Mr A

48. Mr A worked as a trawlerman from 1962 to 1980 and came from a fishing family. He said that he worked as a spare hand, so did any job that needed doing on a ship.

49. Mr A did not qualify for the 2009 scheme because the Department calculated that he had spent less than the required number of days at sea in the qualifying period. Mr A said he does not dispute this, but points out that during this period his father died and his third child was born with lung problems, resulting in his time off work.

50. With regard to the 2009 scheme, Mr A said '*things should have been done better*'. He said that paying compensation only for days at sea meant that there was no allowance for the times when fishermen were not at sea but still employed as a trawlerman, for example, when a boat was undergoing a major survey for insurance purposes (around ten days per year) or when 'mini surveys' were needed (a couple of times a year typically for around five days).

Mr A's compensation

51. Mr A was paid £2,905.94 under the 1993 ex gratia scheme and received £6,434.36 under the 2000 scheme.

52. For the purposes of the 2009 scheme, the Department accepted that Mr A's fishing career started in August 1962 and ended after December 1979.[18] The Department said that Mr A's fishing records showed gaps in service from October 1970 to August 1971, when he appeared to have been working outside the industry for United Towing (a towing and tugboat company). A second gap in service was from November 1974 to April 1975 when he was looking for a new vessel after his previous vessel sank. A third gap was between July and December 1975 when Mr A was suspended from the industry.

53. The Department said that Mr A failed the qualifying test, largely because of the gaps in service in 1974 to 1975. Mr A appealed to the Department and to the independent adjudicator and these were both turned down. The total compensation received by Mr A under all schemes amounted to £9,340.30.

Mr B

54. Mr B started working as a fisherman around 1964. He started as a decky learner, and then worked as a deck hand.

55. Mr B said there were problems with obtaining records relating to his work in the fishing industry. He said he had tried to get records from North Shields (where he worked between April 1968 and February 1970), but was told that they did not hold any. Also, he understands that his fishing records from Grimsby were destroyed in a fire. Mr B said that according to the Department there was a gap of around two years in his records between 1970 and 1973; but he said he was not working anywhere else at that time, nor receiving unemployment benefits.

[18] Where a trawlermen continued fishing into the 1980s, 31 December 1979 was regarded as the cut off date for compensation purposes.

56. Regarding the Department's qualifying criteria for the 2009 scheme, Mr B said that men did not work 365 days at sea. Trawlers had to return to port to land their catch, to resupply or for maintenance.

Mr B's compensation

57. Mr B was paid £399.06 under the 1993 ex gratia scheme and received £2,274.01 under the 2000 scheme.

58. For the purposes of the 2009 scheme, the Department accepted that Mr B's fishing career started in July 1964 and ended after December 1979. The Department said that there were two gaps in Mr B's fishing records – from October 1970 to May 1973 when he worked for other companies, such as a sanitary ware company, and after returning to the fishing industry in May 1973, he had a gap from December 1975 until December 1977 when he was employed by a timber company and fish wholesalers.

59. Mr B failed the qualifying test because of the gaps in his service records. The Department said they had no record of appeal from Mr B. The total compensation received by Mr B under all the schemes amounted to £2,673.07.

Mr C

60. Mr C began his career as a fisherman in 1955. He came from a fishing family and both his father and brother had been fishermen. Mr C started work as a galley boy, then worked as a decky learner, and then as a deck hand. During his time as a trawlerman, Mr C worked at Hull, Fleetwood and Grimsby.

61. Mr C said that when he submitted his application under the 2009 scheme, he was confident that he would receive the full amount payable as he had worked at least 23 years in the industry. Mr C suspects that the reason that he did not, was because his employment at the port of Fleetwood (where he was sent to work) was not included, but he cannot recall exact details of this work.

62. Mr C said that for the Department to say a trawlerman has to have 365 days at sea for a year of service is impossible. His view was that, even if someone was not on a trawler for some of the time, he was still a fisherman.

Mr C's compensation

63. Mr C did not receive any payment under the 1993 ex gratia scheme and was paid £8,865.38 under the 2000 scheme.

64. The Department accepted that Mr C's fishing career began in November 1955 and ended after December 1979. The Department said that there were gaps in Mr C's service record from June 1959 to June 1961; July 1961 to June 1962; February 1968 to April 1969; and June 1978 to August 1979. As National Insurance records were only available from 1961, they were not able to determine the reason for the first gap in service. However, it appeared from the National Insurance records they held that Mr C may have been working for

small trawling companies, possibly onshore, between 1961 and 1962 and that he was working outside the fishing industry during the last two gaps.[19]

65. Mr C passed the qualifying test for the 2009 scheme and was paid £2,204.84 in April 2010. The Department said that Mr C did not appeal the decision. The Department reviewed Mr C's case in 2011 and paid him a further £55. The total compensation received by Mr C under all the schemes amounted to £11,125.22.

Mr D

66. Mr D's career as a fisherman started in 1953 in Fleetwood. Mr D first started work as a decky learner but then moved to Grimsby and obtained his skipper's ticket (skipper's qualification) in 1962. Mr D said that his father was also a trawlerman and worked as a skipper.

67. Mr D was dissatisfied with the use of days at sea as a measure to calculate compensation. Mr D was also unhappy that he was not compensated for a period in 1969, when he was working as a skipper, because the Department said during this period there was a gap in his records. Mr D said he suspects that this was due to poor record keeping by the trawler owners. Mr D said he is only aware of short breaks in his service due to illness (he recalls one period of three months in hospital) and when his wife had twins and he had time off to help.

Mr D's compensation

68. Mr D was paid £1,988.12 under the 1993 ex gratia scheme and received £8,347.28 under the 2000 scheme.

69. The Department said that under the 2000 scheme Mr D was paid for the period July 1970 to December 1979. Although Mr D's career started in 1954, he only received compensation from 1970 because he was regarded as having a break in service when he served on the Thessalonian (which was not considered an eligible vessel under the 2000 scheme). The Thessalonian was added to the vessels list under the 2009 scheme. Therefore, for the purposes of the 2009 scheme, the Department accepted that Mr D's fishing career began in October 1954 and ended after December 1979. The Department said that there were also two early gaps in Mr D's fishing records, from September 1959 to September 1960 and October 1960 to May 1961.

70. Mr D passed the 2009 scheme's qualifying test. He was paid £3,716.59 in February 2010 and an additional £558.43 was paid on appeal in August 2010. The total compensation received by Mr D under all schemes amounted to £14,610.42.

Mr E

71. Mr E first started work at sea when he was 16 years old. He lived in Grimsby his whole life and worked on trawlers for 40 years. Mr E said his brothers, father and father-in-law were fishermen too. Mr E mainly worked as a deck hand. Deckhands not only helped catch the fish, but did any job needed in the

[19] Craig Stores Aberdeen from 1968 to 1969 and East Coast Fish Sales from 1978 to 1979.

operation and maintenance of the ship, for example, repairing lines, cleaning, painting and repairs, loading and unloading.

72. Mr E said that for the 2009 scheme to make payments based on days at sea suggested that fishermen were not '*on pay*' at other times, but they were. Mr E said they received sick pay, holiday pay, and so on when they were not working on vessels. Mr E said the trawlermen's fight for compensation had been going on for 30 years and it was time to '*draw a line under the matter*'.

Mr E's compensation

73. Mr E did not receive any payment under the 1993 ex gratia scheme. He was paid £7,485.24 under the 2000 scheme, which reflected a break in service in 1969 when he worked on the Ross Heron, which was then regarded as a non-Icelandic water vessel. The Ross Heron was added to the vessels list under the 2009 scheme.

74. Mr E passed the qualifying test for the 2009 scheme and was paid £4,838.90 in March 2010. Mr E appealed and provided additional evidence, which demonstrated that his career started in 1963 rather than 1965 (which was the date shown in the records provided under the 2000 scheme). Mr E was awarded an additional payment of £1,116.88 in August 2010. Total compensation received by Mr E under all the schemes amounted to £13,441.02.

Mrs F

75. Mrs F complained on behalf of her late father[20] who passed away in 2009. Mrs F's father's career as a trawlerman began in 1956. Mrs F's father came from a fishing family where his father and uncle also worked as trawlermen. Mrs F's father worked as a deck hand initially, then as a fireman and also below deck as an engineer.

76. Mrs F said that her father had been heavily involved in the issues surrounding the 2009 scheme and passionate about getting what was '*right and fair for the trawlermen*'. Mrs F said that her father had been upset that the Department had used days at sea as a way of calculating compensation and felt this was unfair. He thought he would be getting around £1,000 per year of service.

Mrs F's father's compensation

77. Mrs F's father was paid £1,438.57 under the 1993 ex gratia scheme but did not receive any payment under the 2000 scheme. This was because he was unable to pass the continuous service qualifying test.

78. For the purposes of the 2009 scheme, the Department said that Mrs F's father's fishing career started in November 1956 and ended in September 1974. The Department said that there were three early gaps in Mrs F's father's fishing records (March 1957 to April 1958; October 1958 to October 1959; November 1959 to December 1961). The Department said that the

[20] Mrs F's father was one of the five complainants whose cases were accepted for our investigation of the 2000 scheme.

reasons for the gaps before 1961 were unclear because National Insurance records were only available after this date.

79. The Department said that Mrs F's father worked for a frozen food processing company from November 1962 to March 1967 and appeared to have worked onshore from April to October 1969 and November 1972 to April 1973.

80. Mrs F's father's records confirmed that he passed the 2009 scheme's qualifying test and Mrs F was paid £6,499.99 in March 2010. Mrs F was also awarded an additional £279.22 on appeal. The total compensation received under all schemes amounted to £8,217.78.

Chapter four

How the Department devised the 2009 scheme[21]

81. Between mid-2007 and mid-2008 the Department consulted with the Minister[22] and legal counsel, and met port MPs to discuss and explore possible ways to address the failings within the 2000 scheme.

82. The Department said that their task was to design a revised scheme that removed the unfairness of the 'breaks rule'; delivered a better fit with the policy objectives; and targeted those trawlermen who had suffered directly as a result of the loss of fishing in Icelandic waters.

83. The Department considered that the key to identifying this target group and rectifying the unfairness was to establish whether a trawlerman depended on Icelandic fishing for his livelihood, as a prerequisite to receiving compensation for the loss of the industry. The Department said it was important to stress that the policy objective was to compensate former Icelandic trawlermen for the loss of the ability to fish in Icelandic waters, not to offer compensation for the decline of the wider fishing industry.

84. In devising the 2009 scheme the Department said that they considered they '*had a free hand, subject to the principles of good administration, in designing the eligibility criteria for a new scheme'.* The Department did not consider themselves to be bound:

- by the arrangements or rules of the 2000 scheme;
- to retain the features of the 2000 scheme;
- to give additional payments to everyone that had been affected by the 'breaks rule'; or
- to deliver a new scheme which paid £1,000 for every year of service.[23]

85. In mid-2008 the Department, with the assistance of internal economists, created a database of 700 claims submitted under the 2000 scheme (around ten per cent of the total) to use to model the effect, impact and costs of different options for rerunning the scheme. The Department said that this approach had not been used when devising the 2000 scheme and this had been perceived as a weakness in its development.[24] The database would be used to predict how many trawlermen would receive additional payments under different options, how many would not, cost projections and whether any new inconsistencies might be created (see Annex B).

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[21] A detailed chronology of key events can be found at Annex A.

[22] The relevant Minister responsible for the Department and the scheme changed several times between 2007 and 2011. These were: Mr Pat McFadden (from June 2007), Lord Young of Norwood Green (from June 2009) and Mr Edward Davey (from May 2010). For ease of reference I refer to 'the Minister' throughout my report.

[23] As paid under the 2000 scheme.

[24] Findings within the PAC report dated 26 February 2008.

86. In deciding upon possible options, the Department again sought the advice of legal counsel and over the next few months provided various submissions to the Minister outlining their plans to rerun the scheme.

87. The Department considered the possibility and practicalities of a limited rerun of the scheme, and various options which retained the 'breaks rule' in some form. However, they eventually decided that a new scheme involving new eligibility criteria could be drawn afresh to achieve the original policy intention more effectively.

88. By late 2008 the Department and the Minister had agreed the proposed key aspects of the new scheme, as detailed below.

Compensation to be calculated and paid on aggregate service

89. The Department decided to move away from the 'breaks rule' completely and proposed to calculate compensation on the basis of aggregate service on Icelandic water vessels. The Department proposed to count the total number of weeks a trawlerman spent on Icelandic water vessels during the 20 years before his last date of service, irrespective of the length, frequency and nature of any breaks between those weeks of service. This would then be multiplied by the previous scheme's payment rate (£19.23 per week). Where the calculation produced a larger payment than that received under the previous 2000 scheme (or the 1993 ex gratia scheme), the Department would pay the difference.

90. The Department considered that the aggregate service model had the following advantages:

- It would directly relate compensation to actual time spent on Icelandic water vessels, which would be consistent with the policy intention of targeting those trawlermen who worked primarily in Icelandic waters and were thus most affected as a result of the Cod Wars.
- It would compensate trawlermen in direct proportion to the time they had spent on Icelandic water vessels over the preceding 20 years of their career. The Department said this was in marked contrast to the 2000 scheme, where fishermen had been compensated for all the time they had spent on any type of vessel so long as they worked on an Icelandic water vessel once every 12 weeks (to avoid the 'breaks rule'). The 2000 scheme, in some cases, had also compensated them for gaps of any length between the voyages.
- Aggregate service would compensate trawlermen for all time spent on an Icelandic water vessel even if that vessel did not sail in Icelandic waters.
- The evidence required for this approach was straightforward as it relied on fishing records, with no dependence on the imprecise National Insurance records.

91. The Department said that by using the aggregate service model the scheme would spread additional payments most evenly between the ports. Aberdeen would be the principal gainer, receiving 17 per cent of additional payments

(compared with six per cent of claims paid under the 2000 scheme). The Department said that they knew that trawlermen from Aberdeen received the lowest payments under the previous scheme but believed that a higher percentage of Aberdeen trawlermen had lengthy Icelandic service over a period of up to 20 years, interspersed by periods of service on non-Icelandic water vessels. This resulted in lower payments under the 2000 scheme because of the 'breaks rule'.

92. It was the Department's opinion – consistent with the legal advice they had received – that the aggregate service approach would present the best fit with the Government's policy intention for the scheme and best addressed the evidential problems they had as a result of the time that had elapsed since the Cod Wars.

Qualifying test to be applied

93. The Department said that they initially considered using the 2000 scheme qualifying test for the 2009 scheme. This was based on a requirement of two years of continuous service and required a trawlerman's last voyage on an Icelandic water vessel to have taken place after 1 January 1974. There was no requirement for the two years of continuous service to have taken place during the period of the Cod Wars, and it could have occurred later in the 1970s on vessels that were classified as Icelandic but no longer fished in Icelandic waters. Compensation was paid for breaks where other work was undertaken as long as that break was no more than 12 weeks and for breaks of longer than 12 weeks where there was no evidence that the trawlerman did other work (the 'breaks rule'). The Department felt that this method of determining qualification to the 2000 scheme was poorly related to a trawlerman's service on Icelandic water vessels at the time of the Cod Wars.

94. The Department said that, as they were proposing to use the aggregate service model to calculate compensation, if they then retained the 2000 scheme qualifying test, which was based on continuous service and the 'breaks rule', this would have been an inconsistent approach. The Department also said that retaining the previous qualifying test would have meant that one case considered by the Parliamentary Ombudsman in *Put together in haste* of a trawlerman who failed the previous qualifying test because of a break in service, would not have been addressed and nor would other comparable cases.

95. Given the above, the Department said that they proposed to move to a qualifying test that would require a successful claimant to have at least two years of aggregate service on vessels during the period of the Cod Wars (defined as the four years from 1 January 1973 to 31 December 1976) on the grounds that this would retain the general principle of the 2000 scheme test – two years of service – while tying additional payments to aggregate service at the time of the Cod Wars and therefore to those most affected by the loss of the specific Icelandic waters. The intention of this qualifying test was to distinguish between those trawlermen who were reliant on the industry for their livelihoods and those who were not. For this reason, the qualifying test had to be linked to the period directly preceding the loss of the industry.

96. In response to any concerns that the new qualifying test was more difficult to meet than the previous one because fewer vessels were going to Iceland, the Department said they were aware that some Icelandic water vessels had been scrapped but that others had switched to fishing in middle waters. As eligibility was dependent not on fishing in Icelandic waters but on fishing on a vessel on the Department's list of Icelandic water vessels, a claimant would not be disadvantaged if the vessels had moved from Icelandic waters to other fishing grounds in this period.

97. The Department said they were also aware that some trawlermen had left the industry between 1974 and 1976 as part of a gradual decline in the industry following the first Cod Wars treaty in 1973. As it would have been difficult for people in this group to meet a test calculated over the period from 1 January 1973 to 31 December 1976, the Department provided that where a trawlerman had left the industry before the end of 1976, the qualifying test would be calculated over his last four years of service.

98. The Department were aware that some applicants who had met the previous test would be unable to meet the new one – and that a similar number of people had been unable to meet the previous test, but would be able to meet the new one. The Department said that the new test was designed not only to ensure that the scheme was better targeted, but also to ensure that the overall effect was comparable to the previous test, rather than being a higher hurdle.

99. While the qualifying test was linked to the period of the Cod Wars, the Department said that they did not propose that compensation be restricted to service during the Cod Wars only. The compensation would stretch back over the last 20 years of a trawlerman's career, ending with his last voyage on an Icelandic water vessel between 1974 and 1979.

Use of fishing passports as evidence of time spent on vessels

100. The Department proposed to calculate service on an Icelandic water vessel by using fishing passports as the primary source of evidence to support a claim. The fishing passports recorded the details of each voyage a trawlerman sailed, showing the date he joined a vessel and the date he left.[25] The Department said this seemed a reliable and reasonable method. Time spent at sea was also consistent with the policy intention of directly linking compensation to a trawlerman's reliance on fishing in Icelandic waters. The Department said that other major benefits of using fishing passports as a source of evidence was that they related directly and exclusively to the trawlerman, who was the subject of the claim and they were widely available, unlike National Insurance records and other types of records.

101. The Department said it would perhaps have been possible to use the 'Running Agreement, List of Crew and Official Log Book' (commonly referred to as the log books) as a source of evidence on which compensation could be

[25] We are aware that some fishing passports included time spent on shore as well as at sea on a vessel. This issue is discussed at paragraph 230.

paid. A vessel's log book would show the details of the ship's crew for each six month period. Every vessel was required to submit their log books to the authorities in June and December each year.

102. The Department said there were disadvantages to using the log books. These were:

- There would have been two log books per year for each of the 730 vessels on the Department's list (a list which subsequently grew to include more vessels). If this was then multiplied by up to 25 years (1954 to 1979, as the time frame in which compensation could be paid) it would have involved some 35,750 documents from which the Department would need to extract crew service details. 35,750 manuscript documents would require significant document administration. The log books were not computerised and would have to be photocopied and dealt with manually.
- The Department could not be sure that a full set of log books for each vessel for all the years would be available.
- The National Archives at Kew held 10 per cent of log book documents from 1951 to 1994. Some log books were deposited with the National Maritime Museum in Greenwich, but the rest of the log books were expected to be at the Maritime History Archive at the University of Newfoundland in Canada, which they believed held around 80 per cent of the log books for 1951 to 1976.[26]

Determining eligible vessels

103. Under the 2000 scheme, any vessel that had fished in Icelandic waters twice in its lifetime was deemed to have been an Icelandic water vessel and therefore considered an eligible vessel for the purposes of the scheme. Under the 2000 scheme, 730 vessels were included on the eligible vessels list. In 2008, during the Department's review of the 2000 scheme, they found evidence at the National Archives at Kew of an agreement between Iceland and Britain which showed that in fact only 200 vessels had fished in Icelandic waters during the Cod Wars. This meant that in many cases, trawlermen who were not dependent on Icelandic water fishing would have received compensation.

104. The Department said that they strongly suspected that their predecessors would – if they had known at the time – have sought to tie compensation payments much more closely to service on the vessels that had actually fished in Icelandic waters at the time of the Cod Wars. On that basis the 2000 scheme appeared to have used an extremely generous definition of an Icelandic water vessel.

105. The Department said it could possibly be argued that only trawlermen who served between 1971 and 1976 on one of the short list of 200 Icelandic water vessels should be entitled to any additional payment under a rerun of the scheme. This would tightly link any additional payment to Icelandic

[26] 90 per cent of log books for years ending in '5' were deposited with the National Maritime Museum in Greenwich, which held 90 per cent of log books for 1955, 1965 and 1975.

service at the time of the Cod Wars. However, the difficulty that would arise from choosing this option would be that it would present a very marked shift from the 2000 scheme. The Minister decided not to pursue this option and the Department proposed to keep the 730 vessels listed as eligible vessels under the 2000 scheme for the 2009 scheme.

106. The Department said that there was one ship, the Thessalonian, which due to an administrative error, appeared to have been excluded from the original list. On that basis the Department proposed to include this vessel in the 2009 scheme.

Determining who could apply to 2009 scheme

107. As the Department felt that the 2000 scheme had been widely publicised and allowed extensive time in which to submit claims (two years), they did not propose to base any rerun of the scheme on new claims, but rather on their existing files.

Agreement on key aspects of the 2009 scheme

108. Upon agreement with the Minister on the above key issues, the Department planned to consult publicly about the 2009 scheme. A public consultation would invite respondents to comment upon the proposals and give the opportunity to say whether they agreed or disagreed with the Department's approach for the 2009 scheme.

The public consultation

109. In February 2009 the Department launched a consultation to seek views from the public on the proposals for the scheme.[27] The consultation period ran for three months until 22 May 2009.

110. In the Department's news release about the consultation, the Minister said;

'We announced our intention to launch a new scheme before Christmas and now are keen to make sure that everyone has the chance to have their say on the details of the new scheme. We are inviting views on our proposals over the next twelve weeks and will consider these carefully before launching the new scheme in the summer.

'Under the new scheme, trawlermen who received less than they expected through the previous scheme will be able to apply for extra payments.

'Around 1,000 trawlermen should benefit, based on their aggregate service on vessels that fished in Icelandic waters. This means they will not have lost out if they took breaks from the industry.'

111. The news release went on to say that the 'breaks rule' in the 2000 scheme was found to be unfair by the Ombudsman. The Government had, therefore, decided to run a new scheme based on aggregate service rather than continuous service as before. The news release said that anyone who

[27] The full consultation paper can be found at Annex B.

wanted to have their say could do so by downloading the consultation document from the Department's website or by contacting the Department.

112. Within the consultation document, the Department said that all comments would be considered carefully in May and June 2009 and all respondents would be notified of the outcome. Responses could be made in writing or online. The Department proposed to formally launch the scheme in the summer of 2009.

113. The consultation sought views on three key aspects of the new scheme, in particular:

- the shift to a system based on aggregate service on Icelandic water vessels;
- the amendments to the qualifying test; and
- the rules surrounding claims under the scheme.

114. The consultation included the background to the proposed new scheme, objectives, analysis of options identified, the assumptions made, costs and benefits. The consultation document included a draft of the proposed scheme rules titled *New Icelandic Trawlermen's Compensation Scheme Rules,* which stated that the purpose of the new scheme was:

'to provide additional compensation to any former Icelandic waters trawlermen … who lost their livelihoods as a result of the "Cod Wars" settlement of the mid 1970s, and whose compensation under the previous Icelandic trawlermen's compensation scheme was unfairly low.'

115. The consultation said that the 2009 scheme rules were a first draft and by no means finalised. They were simply intended to help clarify the Government's proposals.

116. The draft rules were very brief. The only reference to fishing passports was in section 2 ('*Persons eligible for compensation under the new scheme*'), where section (c) said:

'The trawlerman's fishing passport must confirm that he meets the requirements of paragraph (b) above [namely the trawlerman must have completed at least two years aggregate service on Icelandic water vessels in the prescribed period].'

117. Section 2.3 went on to define aggregate service as follows:

'Aggregate service on Icelandic waters' vessels [sic] means the aggregate period of service (excluding breaks in service) on Icelandic vessels during the twenty years ending with the last date of a trawlerman's Icelandic service.'

118. The consultation also referred to the fact that it was proposed to pay simple interest at a rate of four per cent on payments made under the 2009 scheme dating from the point that most payments had been made under the previous scheme (namely October 2001). The document explained that this was because:

'It seems to us that fairness must be the key here. The rate should be set at a level that puts a claimant, that lost out as a result of maladministration in the previous scheme, into the position that he would have been had the maladministration not occurred. In our view it would be wrong either for this claimant to be worse off or to be overcompensated, as that would be unfair to other claimants.'

119. Upon closure of the consultation period, the Department had received nearly 500 responses to the consultation. The Department's proposals for the 2009 scheme, as outlined in the consultation document, and the responses for and against these, are detailed in the following paragraphs.[28]

Proposed basis for calculating payments

120. The Department detailed the 2000 scheme's 'breaks rule' and said that even if they used a variation of this rule, there would still be some people who fell outside the definition. The Department also said that they knew from the 2000 scheme that trying to determine where a trawlerman had worked outside the industry was difficult because National Insurance records did not show precisely when and for how long a person had worked for another employer. Also, the passage of time since the 1960s and 1970s meant it was difficult to establish what a trawlerman had done during any gaps.

121. For the above reasons, the Department said they proposed to depart from the 'breaks rule' completely and calculate whether any additional payment should be made by reference to aggregate service on Icelandic water vessels. The consultation document stated:[29]

'Under this option, we would calculate the total number of weeks served on Icelandic water vessels by each claimant during the last twenty years of their Icelandic fishing career, and multiply this by the current payment rate (£19.23/week, equivalent to £1,000/year).

'We propose to set the last date of Icelandic service – for the purposes of this calculation – as the last date on which the trawlerman served on an Icelandic vessel, ending no later than 31 December 1979.

'Unlike the previous scheme, under which time spent on breaks was included in calculating payment … only time spent on Icelandic water vessels will be counted for the purposes of calculating compensation.'

122. The Department said the aggregate service option presented some clear advantages over the 2000 scheme and provided a better fit with the Government's objective of compensating former trawlermen for the loss of their livelihoods following the Cod Wars. The consultation document stated:

'We believe that the aggregate service option is fair, because it would provide additional payments for claimants whose payments under the last

[28] 389 hard copy responses and 103 online responses were received. A more detailed summary of the responses to each of the consultation questions can be found at Annex C.

[29] Paragraphs 19 to 21 of the consultation document.

scheme did not adequately reflect their amount of service on Iceland vessels. Although no payment would be made for breaks under this option, this should make relatively little difference to the level of individual payments, which would reflect overall Icelandic service. Importantly, the impact of breaks would be sharply reduced and the breaks rule (criticised by the Ombudsman) removed altogether.[30]

'Furthermore, the calculation of payments by reference to aggregate service will make it easier to assess claims by reference to available evidence. Evidence of service is found in the fishing passports, which set out the vessel name and dates for each fishing trip, throughout each trawlerman's career. These passports are reliable and of good quality in almost all cases, enabling the Department readily to assess how long each trawlerman spent on Icelandic waters vessels. It would no longer be necessary to attempt to indentify whether claimants had been working outside the industry in any gaps in their service.'[31]

123. The Department said that they intended to use the same list of 730 Icelandic water vessels as the 2000 scheme with the addition of the Thessalonian.

Responses to the proposed basis for calculating payments

124. The overwhelming majority (over 75 per cent) agreed with the Department's proposal that any additional payment should be calculated on the basis of aggregate service on Icelandic water vessels during the last 20 years of service.[32] There was little comment on the method used to set the last date of service, and a similarly large majority (71.1 per cent) agreed that the Department should rely on evidence from fishing passports when making decisions about payments.[33]

Proposed qualifying test

125. The Department said that it seemed inconsistent to make additional payments on the basis of aggregate service and then retain the existing continuous service entry test, which relied in part on the treatment of breaks. The Department said that taken with the requirement for at least two years of continuous service, the 'breaks rule' also meant that some people with long careers on Icelandic water vessels received no payment at all, because they had breaks in their last two years of service. The Department therefore proposed:[34]

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[30] Paragraphs 23 and 24 of the consultation document.

[31] The proposed method of calculating compensation and the use of fishing passports to support a claim were included within the draft scheme rules.

[32] 373 respondents (75.8 per cent) agreed, 54 respondents (10.9 per cent) disagreed and 65 (13.2 per cent) had no view.

[33] 355 people (72.2 per cent) had no comments on the method used to set the last date of service and 49 people (9.1 per cent) said they had no view. 108 respondents (22 per cent) made further comments. 84 respondents (17.4 per cent) disagreed on the use of fishing passports and 54 respondents (10.9 per cent) had no view.

[34] Paragraph 31 of the consultation document.

'to move to a qualifying test which would require successful claimants to have at least two years aggregate service on Icelandic water vessels during the period of the Cod Wars, which we propose to define as the four years from 1 January 1973 to 31 December 1976. The first "Cod Wars" Treaty between the UK and Iceland, which for the first time restricted the UK vessels allowed to fish within 50 miles of Iceland, was signed in November 1973. Under the terms of the June 1976 Treaty, no UK vessels were allowed to fish within 200 miles of Iceland after 31 December 1976. If someone left the industry before the end of 1976, we would calculate the aggregate over their last four years of service. As in the previous scheme, only those that served on Icelandic water vessels on or after 1 January 1974 would be eligible for any payment.'[35]

126. The Department said that the qualifying test would retain the general sense of the previous test – two years of service – while tying any additional payment to aggregate service at the time of the Cod Wars. The Department said that it seemed reasonable to require successful applicants to have spent half of their time in this period on Icelandic water vessels.

Responses to the proposed qualifying test

127. Over half of the respondents agreed with the Department's proposal to amend the qualifying test, with less than 20 per cent disagreeing.36

Applications under the 2009 scheme

128. The Department proposed to restrict the scheme to existing claims only. The Department intended to advertise the scheme in local newspapers at each of the four principal ports (Hull, Grimsby, Aberdeen and Fleetwood) and ask contacts at BFA and port MPs to pass copies of the announcements on to their lists of interested constituents.

129. Regarding applications, the Department intended to make the application form as short as possible, but said it would need to include the trawlerman's name, National Insurance number and current address. Applicants would not need to resubmit details of their fishing career if they had done so under the 2000 scheme and applicants would be given six months to apply under the 2009 scheme.

Responses to applications under the 2009 scheme

130. Over half of the respondents agreed that claims under the scheme should be restricted to those who applied under the 2000 scheme. A little under one third disagreed.[37]

Other issues outlined in the consultation document

131. The Department intended to make consolatory payments of £200 to all successful applicants under the 2009 scheme, as well as adding interest to

[35] The qualifying criterion was included within the draft scheme rules.
[36] 279 respondents (56.7 per cent) agreed. 97 respondents (19.7 per cent) disagreed and 108 (21.9 per cent) had no view.
[37] 275 respondents (55.8 per cent) agreed. 154 respondents (31.1 per cent) disagreed and 59 (11.9 per cent) had no view.

cover the period since the 2000 scheme. As under the 2000 scheme, an appeals process was put in place to allow applicants to pursue any concerns with Department officials and then an independent adjudicator.[38]

The Department's consultation with port MPs

132. Between October 2007 and July 2009, port MPs were invited to four meetings with the Department and the Minister to discuss the Ombudsman's report, the proposals for the scheme and the public consultation.[39]

133. The first meeting was held on 15 October 2007 and was attended by port MPs, Joan Humble, Frank Doran and Mr Mitchell. The Department said that at this point no firm decisions had been made and they were still deciding whether to rerun the 2009 scheme. The Department said that port MPs' initial preference had been for a tight review of particular constituency cases, rather than a whole new scheme.

134. The second meeting was held on 18 June 2008. Port MPs Shona McIsaac, Frank Doran and Mr Mitchell attended. At the meeting the Minister had apologised for how long it was taking to resolve matters, but said that it was important to get it right this time. The Minister had outlined what the Department was doing in order to decide the best way forward, and explained why that did not include simply picking out individual cases supplied by the port MPs because it would be unfair to those that had not come forward. The Department told the port MPs that if the 2009 scheme was to be rerun, there would be a consultation.

135. The third meeting was held on 11 December 2008. Four port MPs attended: Shona McIsaac, Frank Doran, Rt Hon Malcolm Bruce and Sir Robert Smith. At this meeting the Department said that they talked through the aggregate service approach in detail and showed MPs the fishing passports they intended to use as evidence. The Department told us that they had also confirmed that they would pay the same weekly rate as under the 2000 scheme (£19.23), which would effectively pay at a lower rate than the 2000 scheme (as breaks would not be included under the new scheme). The qualifying test was also discussed and the Department said that it was their view that the port MPs, at that point, understood how the new scheme would operate and how payments would be calculated. The Department felt that the port MPs supported the 2009 scheme.

136. A fourth and final meeting was held on 6 July 2009. Six port MPs attended this meeting: Dame Anne Begg, Frank Doran, Joan Humble, Shona McIsaac, Mr Johnson and Mr Mitchell. Lord Young attended the meeting because he was now the responsible Minister in the Department.

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[38] The Department intended to add simple interest at a rate of four per cent to any additional payments, calculated for eight years, on the assumption that previous payments were made in October 2001 (the middle point for applications) and that most payments under the 2009 scheme would be made in the autumn of 2009. Only 16 per cent of respondents had further comments to make about these issues. Further details of these responses can be found at Annex C.

[39] The Department said that all port MPs were invited to the meetings but not all attended each one.

137. The Department's notes from that meeting state that Mr Johnson proposed that the aggregate calculation should not be capped at 20 calendar years. In response, the Department said that this proposal would cost a further £2.5 million and that they had agreed to accept new claims and look at 25 new vessels, both of which would increase the costs of the scheme.[40]

138. The meeting notes further state that Lord Young told the port MPs that a key consideration was whether the revised scheme should seek to direct additional payments to people with long service – who were likely to have received substantial payments in any event – or towards new applicants who had not received any payments so far.

139. The Department told us that following this meeting they felt that the 2009 scheme had the support of port MPs and that overall they were content with the proposals put to them.

The Department's decisions following the consultation

Aggregate service and qualifying test

140. The Department said that, following analysis of the responses to the consultation, including the responses from port MPs, none of whom they believed had disagreed with the aggregate service model, Ministers agreed to proceed as proposed in respect of compensation on the basis of aggregate service and the aggregate qualifying test.

141. In deciding to take forward the aggregate service option, and relating payments exclusively to time spent on Icelandic water vessels, the Department said that Ministers had deliberately not chosen to make payments for other activities, such as time spent studying for qualifications, whatever the reason for them. This was on the grounds that service on Icelandic water vessels was verifiable by fishing passports. The Department said it was simply not possible (as was confirmed by the National Audit Office report into the 2000 scheme) to substantiate what was being done at other times. In addition, the Department said that they were seeking to compensate former Icelandic trawlermen specifically for the time they served on Icelandic water vessels.

142. After the consultation period closed, Mr Mitchell wrote to the Minister and said that it seemed that the qualifying test was a hurdle that was more difficult to meet and this problem would be eased by making it two years of aggregate service running into the period of the Cod Wars. In response, Lord Young said that he could not accept Mr Mitchell's suggestion for the qualifying test. He said that the proposed calculation was clearly set out in consultation document and this was welcomed by more than 70 per cent of respondents and was the basis on which they agreed the terms of the 2009 scheme at the meeting the previous week (7 July 2009). Lord Young said it may be helpful to reiterate that the cost of running the 2009 scheme with this test was exactly

[40] The changes the Department agreed to make following the consultation are discussed at paragraphs 150 and 151 below.

the same as that with the previous qualifying test based on continuous service, so it was not a device to reduce the costs of the 2009 scheme.

Use of fishing passports as evidence

143. The Department decided to proceed and use fishing passports to support a claim for compensation. The Department considered these to be a reliable source of evidence, readily available in most cases, and their use would avoid the need to try and find evidence 35 years after the event about periods when trawlermen were sick, training or working outside the industry. The Department would use this as the primary source of evidence but could use other forms of reliable evidence if required.

New claims

144. During the consultation period, some respondents and port MPs commented that there might have been some former trawlermen, or more likely their surviving family members, who had not been not aware of the previous scheme and did not apply. Also, during the 2000 scheme, some ports had formed groups or 'boards' to provide advice and support to applicants. Knowing the rules that applied at that time, these groups might have advised applicants not to apply as they knew that the applicant would not have met the 2000 scheme rules. Following these concerns, the Department agreed to accept claims from people who had not applied under the 2000 scheme.

New vessels

145. The Department agreed to include 25 additional vessels (nominated by respondents during the consultation process) to the list of Icelandic water vessels, if those boats met the 'six tests' criteria[41] used under the 2000 scheme. Two months were added to the time permitted to submit applications to allow further time for applicants to provide evidence for these claims. In response to requests, the Department agreed to include vessels that had changed their name and discontinued fishing in Icelandic waters.[42]

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[41] The 'six tests' criteria were the considerations taken into account when deciding whether a proposed vessel fished at least twice in Icelandic waters and should be included as an eligible vessel for the purpose of the 2009 scheme. These six considerations were:

- whether records showed the proposed vessel fished in Faroe Islands (Icelandic) waters;
- the length of the proposed vessel;
- the proposed vessel's tonnage;
- the duration of the proposed vessel's fishing trips;
- the size of the proposed vessel's crew; and
- any other evidence that the proposed vessel fished at least twice in Icelandic waters.

[42] This last issue was raised by a constituent of Joan Humble MP in Fleetwood about whether vessels that had changed their name and discontinued fishing in Icelandic waters would still be eligible vessels (if they had previously fished twice in Icelandic waters as required by the scheme rules). The boat in question was the David Wilson, as it had been previously named the Admiral Hardy. The Department sought counsel's advice on this issue. Counsel said that the definition of an Icelandic waters vessel was wide and a vessel remained an Icelandic waters vessel even if at other times it was used for voyages entirely unconnected with Icelandic water. Counsel considered that all service on that vessel should count toward aggregate service. Counsel advised the Department to take sensible, practical steps to identify any similar cases and add those alternative names to the list.

Opening of the 2009 scheme

146. The new scheme opened on 31 July 2009 and was open to applications from 1 August 2009 to 30 April 2010. A copy of the full 2009 scheme rules, including the eligibility criteria for the scheme and the procedure for making claims, can be found at Annex E.[43] These were more detailed than the draft rules circulated with the consultation document. This time 'aggregate service' was defined as '*the aggregate total period of time spent working at sea on any Icelandic waters vessel during the relevant period*'.

[43] A revised version of the 2009 scheme rules was published in January 2010 to include the additional vessels that had been added to the eligible vessels list.

Chapter five

Operation and closure of the 2009 scheme

Results of claims submitted under the 2009 scheme

147. The 2009 scheme closed to applications on 30 April 2010. The Department received 3,303 applications with the required evidence in support of the claim.[44]

148. Almost 75 per cent of applications were from Hull and Grimsby: 1,394 from Hull, 1,142 from Grimsby, 529 from Aberdeen, 355 from Fleetwood, and 34 from other ports.[45]

- 20 per cent of claims (667) were successful and compensation was awarded.
- 35 per cent of claims (1,147) were technically successful under the 2009 scheme, meaning that the qualifying criteria were met, but no compensation was paid because the amounts paid under the 1993 ex gratia and 2000 scheme exceeded the entitlement under the scheme, or the applicant had already received the maximum payment of £20,000.
- 45 per cent of claims (1,479) failed because the applicant did not pass the qualifying test. This meant that they had either stopped fishing before 1 January 1974 (566 claims) or did not have the required two years of aggregate service (913 claims).

149. To date, the Department say that they have paid just over £4 million under the 2009 scheme, with an average payment of around £6,000 for each successful claimant.[46]

Compensation paid to complainants in Put together in haste

150. The five cases below were the complainants whose complaints we investigated for our report *Put together in Haste*. The compensation each complainant received under the scheme was as follows:

- Mrs A received £7,942.02 (a total of £18,480.04 under all the schemes).
- Mr W received £11,897.80 (a total of £17,169.89 under all the schemes).

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[44] The total number was 3,454, but this included 151 applications where no evidence or partial evidence was provided and these cases were treated separately. Further details about how the Department assessed these claims are discussed later in report.

[45] Others included ports such as Lowestoft, from which the Department received claims because formerly Icelandic water vessels had been transferred there.

[46] Around August 2010, upon a review of cases submitted for appeal, the Department had identified significant errors in three per cent of cases. The errors involved missing fishing trips of up to five to ten trips of around 20 days each. This gave a maximum error of around 200 days (amounting to £550). The Department wrote to affected applicants and made further payments. The Department also conducted an audit to cover all cases where people failed the qualifying test by up to 280 days and all cases where claims were rejected because people had already received greater payments under the previous scheme (up to a margin of £800). The Department also checked the 600 cases where payments had been made under the 2009 scheme.

- Mr X received £6,779.21 (a total of £7,938.56 under all the schemes).
- Mr Y received £5,164.27 (a total of £9,576.21 under all the schemes).
- Mr Z received £1,290.72 (a total of £16,021.49 under all the schemes).

Outstanding claims

151. After the 2009 scheme had closed, the Department said they had around 177 cases (plus 90 probate cases where applications were made on behalf of a deceased trawlerman) outstanding where applicants had not provided the required proof of evidence or only had limited evidence.

152. For the probate cases, the Department said they worked closely with the Probate Office London and Aberdeen's Sheriff Court to gather further information and wrote to the affected applicants with advice on how to obtain information, and what other forms of evidence could be submitted.

153. Of the remaining cases where full evidence to support a claim had not been provided, the Department said they had written to these applicants and asked that they approach representatives at each port for records. The Department said that few of the applicants had done this, therefore, the Department had approached the ports and this had resulted in locating records for around 90 applicants.

154. The Department said that where an applicant had no records or limited records they had also used National Insurance records and pension records to help assess a claim. The Department had also asked the applicants to whom this applied, to contact HM Revenue & Customs for their full National Insurance records from 1961 to 1980 and to ask pension provider Aviva for pension statements. To help the applicants, the Department said they had provided a pro forma letter to which the applicant just needed to add brief, personal details before passing it to HM Revenue & Customs or Aviva.

155. The Department said that they also sought the assistance of those with direct experience of the industry (individuals from BFA Hull and Grimsby Vessel Owners Association) to assist with information that would help interpret National Insurance and pension records.

Use of log books to assist in assessing claims

156. The Department also used log books to assist in assessing claims where the applicants were unable to provide evidence. These were archived either in Canada, Kew or Greenwich.

157. The Department said that as the log books were stored according to vessel names and years, if the applicant could provide these details, the Department could source the relevant boxes of log books and use this as the starting point to document an applicant's career at sea. The Department said they would start at the Canadian records, then Kew, and then Greenwich.

158. The Department explained that this was a complex and time-consuming task. As of April 2011 they had around 50 cases outstanding in which they were using the log books in this way. However, it could take two staff several

days at the National Archives at Kew to locate only a couple of years' records for a few men.

The Department's use of discretion

159. The Department said that fishing passports were obtained for around 95 per cent of claims to the scheme. In most cases this showed a continuous list of vessels and the voyage dates were clearly shown. However, where there had been doubt, the Department have consistently interpreted any doubt to the benefit of the claimant.

160. For example, if a voyage was missing a start day, the Department deemed this trip to have commenced on the day after the previous voyage. Where an end date was missing, the Department deemed this trip to have ended on the day before the next recorded voyage. If in any case this resulted in a voyage length being over 180 days, the Department recorded the voyage as 30 days (which the Department understood to be the longer type of an average voyage to Iceland).

161. Also, if the start and finish dates of a voyage in a fishing passport appeared to be significantly longer than a voyage would normally be, and it seemed likely that one or more trips had been added together, the dates shown on the passport had been accepted.

162. The Department also said that where the name of a vessel was unreadable or appeared to be similar to, but different from, an Icelandic water vessel, the name of an Icelandic water vessel had been substituted where it was reasonable to do so. And, in relation to probate cases, the Department said they allowed probate documentation to be sent in after the 30 April 2010 closing date.

Chapter six

Comments from port MPs

Mr Mitchell's comments about the 2009 scheme

163. Mr Mitchell first raised issues with my Office about the 2009 scheme in April 2010. He felt that the recommendations we had made in our report *Put together in haste* were not being addressed by the Department. Mr Mitchell said that we had recommended that applicants who had been disadvantaged by the previous 'breaks rule' should be compensated. He said that compensation under the 2009 scheme should be payable at the rates applying to the 2000 scheme (£1,000 per year for up to 20 years) but that this was not happening.

164. Mr Mitchell said that in several cases, people who had been penalised by the 'breaks rule' did not receive compensation under the 2009 scheme because the entry conditions (the qualifying test) had been changed. Originally, fisherman had been required to have fished into the period of the Cod Wars to qualify for compensation. This was defined as fishing after December 1973 and up to 1979. However, the 2009 scheme brought the first date forward by requiring trawlermen to have fished in Icelandic waters after December 1972 and up to December 1976, and to have done two years of service in that period. Mr Mitchell said he raised his concerns about this change with the Department, when they initially proposed it because the period of the Cod Wars was one of heavily reduced fishing effort, with fewer vessels going to Iceland, trips being cancelled and general unsettlement. Mr Mitchell said that this made it very difficult for people to put in the two years of service in the specified four years.

165. Mr Mitchell said the second problem was that no one from the Department or the Minister told them that that service was to be measured exclusively as days at sea. Mr Mitchell said that it had not been explained before the 2009 scheme began that aggregate service meant days at sea. Certainly no one in the fishing community or amongst the port MPs had known at the time of the consultation that time spent on shore, which was still part of a trawlerman's paid service, such as holidays, sickness and training, would not be included. If this had been mentioned during the consultation alarm bells would have rung loudly. Using only days at sea made it even more difficult for men to put in two years of service in the four years defined as the Cod Wars period, and reduced the amount owing to others. Mr Mitchell said that, in the view of the port MPs, this was wrong. It was neither fair nor reasonable to define a fisherman's employment as only the days they spent at sea. It was about as reasonable as defining the employment of miners as hours spent down the pit. Mr Mitchell said it was easy to add up the days at sea set out in the fishing passports, but this system disregarded any paid holidays, training or sickness, which popular understanding would recognise as part of a person's service. He also pointed out that calculating service in this way did not reflect any usual rules surrounding redundancy payments.

166. Mr Mitchell also said that the fishing passports were a faulty record as some books were missing or damaged, several were not filled in properly with trips not being recorded, or in some cases trips not made were added to increase entitlement. Mr Mitchell said that the passports were filled in by a variety of people – by the runners who booked the men for a trip, the office, the skippers, sometimes by the men themselves – and sometimes these were not filled in at all. Mr Mitchell said that sometimes the dates did mean date of departure and return on a vessel, but other times it included shore leave after a trip. On other occasions the fishing passports recorded no breaks at all but had people serving on the same ship for a year or two. The result was that the columns in the fishing passports did not mean what the Department had taken them to mean, and there was now no way of imposing a consistent meaning. The fishing passports could, therefore, be used as evidence that a trawlermen was in service on a vessel, but not as a means to calculate service.

167. Mr Mitchell said that the Department had never told them this was how the passports were to be used, or that they were to be relied upon exclusively. Mr Mitchell said that the log books, not the fishing passports, were the most accurate and reliable method of calculating service, as these were the true record of service. Mr Mitchell said that fishermen were employed from the time they signed on to the log book until the time they signed off six months later and onto the new log book.

168. Mr Mitchell also said that 'there has been a certain amount of deviousness in smuggling the days at sea requirement into the scheme'. The consultation document said that compensation would be based on 'aggregate service on vessels that fished in Icelandic waters'. Mr Mitchell said that the definition later smuggled into the 2009 scheme rules was 'the aggregate total period of time spent working at sea on any Icelandic vessel'. He asked when the Department had first decided to use days at sea to calculate service, and therefore compensation.

169. Mr Mitchell said that the only fair basis for payment was the £1,000 per year under the 2000 scheme. He said he did not have a problem with aggregate service but that service before and after a break should be included. Also any break which was related to fishing (North Sea work, walkabouts, illness, qualifications, and so on) should be paid.

Mr Johnson's comments about the 2009 scheme

170. Mr Johnson also complained to this Office that the 2009 scheme did not comply with the recommendation in *Put together in haste*, that any scheme changes should be consistent with the policy intention. Mr Johnson said that the policy intention was that Icelandic water trawlermen (who lost their jobs as a result of the agreement reached between the UK and Iceland Governments to put a 200 mile fishing limit about the coast of Iceland following the Cod Wars) should receive compensation of £1,000 a year for every year of service up to a limit of 20 years.

171. Mr Johnson said that because the Department chose, against the advice of all the trawlermen's representatives, and their port MPs, to set new

aggregate qualifying criteria, one injustice has been substituted for another in order to prevent the first injustice being rectified. Regarding the new qualifying criteria that applied to the beginning of 1973 to the end of 1976, Mr Johnson said this was a period in which the fleet was being run down and fewer Icelandic trips were available. He said that this made the qualifying test into an excessive hurdle and asked why the two years had to be served during the period of the Cod Wars.

172. Mr Johnson also said that under the 2000 scheme, the definition of 'service at sea ' meant employment as an Icelandic water trawlerman. A trawlerman was employed when the ship was in port landing a catch, between trips, laid up or when he was sick or on leave. He said this was accepted, quite sensibly, in the 2000 scheme; but under the arrangements for the 2009 scheme, the men who managed to get through the revised qualifying criteria then found themselves facing a new calculation, which insisted that, for them to get the £1,000 a year, they had to have spent 365 days at sea. Mr Johnson said the Department did not discuss the formula they were going to use with port MPs or the trawlermen's representatives. They failed to notify anyone of the method of calculation until after the 2009 scheme had commenced. Mr Johnson said this could not be fair to the trawlermen, who had found that rather than the compensation being £1,000 a year for each year of service, it was more like £1,000 for every two years of service.

173. Mr Johnson said that he did not think there was any deliberate attempt by the Department to mislead them about the way the 2009 scheme would operate, but they had not been made aware of the way the compensation would be calculated until the 2009 scheme commenced and the method of calculation did not accord with the underlying principle of the scheme. Mr Johnson also said that this was what trawlermen should receive, £1,000 for each year in service. All service should be added together – this would include time on shore as well as off, when fishermen were still employed – with breaks in service discounted.

Further comments from Mr Mitchell and Mr Johnson

174. During the course of the investigation both MPs continued to make further representations and also met with my predecessor to discuss their comments in more detail. They particularly stressed the following points:

- At no time during the consultation were they made aware that only days at sea would be included in the compensation calculation. Not only did this make the qualifying test an excessively high hurdle, but it also led to unfairly low compensation payments (which explained why the costs of the 2009 scheme had been less than first estimated by the Department).
- Compensation of £1,000 for each year of service up to a maximum of £20,000 had been campaign objectives, which the Government had agreed to when they had agreed to set up the 2000 scheme. The trawlermen therefore had a legitimate expectation that the 2009 scheme would continue to deliver on that agreement unless explicitly told to the contrary. The fact that the consultation document referred to

compensation of £1,000 a year based on service during the last 20 years of their Icelandic fishing career supported that expectation.

- Most fishermen, and indeed port MPs, would never have seen a fishing passport and were unlikely to have understood the implications of this being used to provide evidence of service for the compensation calculation.
- Further, it had never been specified that, for the most part, fishing passports were to be the exclusive source of evidence for the calculation. Mr Mitchell said that he had thought they would provide a convenient basis to start from, providing evidence that a trawlerman had been in service on a particular vessel, and therefore be a guide as to on which vessels, and for which employers, a man had worked. But he had had no idea that the intention was that they would be an exclusive measure.
- The consultation had not been clear and transparent. The fact that no one had known that 'days at sea' were to form the basis of the calculation, or that £20,000 compensation could not be achieved under this scheme, until payments began to be made, clearly demonstrated that these proposals had never been made explicit.
- If they had been, the MPs would have rejected the 2009 scheme outright and would have encouraged the trawlermen to do the same.
- The majority agreement with the consultation proposals was therefore based on a false understanding of the proposals, supported by the false assertion in the consultation document that *'Although no payment would be made for breaks under this* [aggregate service] *option, this should make relatively little difference to the level of individual payments, which would reflect overall Icelandic service*'.

Comments from other port MPs

175. We interviewed several port MPs involved and affected by the 2000 and 2009 compensation schemes. These were: Dame Anne Begg, Rt Hon Malcolm Bruce, Frank Doran and Joan Humble. All of the port MPs attended at least one of the meetings with the Department and the Minister prior to the launch of the new scheme in July 2009.

176. We asked each of the port MPs about their recollection of the meetings they attended, but given the passage of time since these meetings were held, the port MPs did not have a precise recollection of what was discussed. However, they did recall their concerns at the time, which were specific to their own ports and constituents. These included whether renamed vessels would be included within the 2009 scheme, whether new claims would be accepted, and how evidential problems would be addressed for trawlermen who had lost records. Also, at least one of the port MPs recalled the Department bringing fishing passports to a meeting to show how these would be used as evidence to support a claim.

177. Some of the port MPs we spoke to felt that the 2009 scheme was an improvement on the 2000 scheme, which contained the unfair 'breaks rule',

and that it would be difficult for a scheme to take account of the nuances between each of the ports because they all operated differently from one another. Other port MPs felt that perhaps the impact of using aggregate service (time spent on vessels) to calculate compensation had been underestimated at the time and if they had known days at sea would be used, they would not have agreed to it.

Comments from the Department

Developing a scheme in line with the policy intention

178. In exploring the options for rerunning the 2000 scheme, the Department said they considered that it was open to them to devise an option that they believed was consistent with the policy objective. Officials did not consider themselves constrained in that regard to following the model that had been used in the 2000 scheme where, once entitlement of two years of continuous service had been established (the qualifying test), compensation was paid on a continuous basis except for breaks from Icelandic fishing, which exceeded 12 weeks, and where other work was done.

179. The question that the Department said they asked themselves, at the time the decision to use aggregate service was adopted and again on receipt of the Ombudsman's notice that there may be an investigation into the 2009 scheme, was: is paying compensation to former Icelandic trawlermen for the loss of their industry on the basis of days at sea consistent with the Department's policy objective of compensating former Icelandic trawlermen for the loss of their industry? The Department said that their view at the time of the consultation, and in the light of the responses to the consultation was, and remains, that the aggregate model is consistent with the policy intention. The Department said that it may not be the only method of compensation that delivers the Government's objective, but that it must be right that a trawlerman with, for example, eight years of service on Icelandic water vessels receives more compensation than someone who over the same period may have had only one year of service on Icelandic water vessels and the remainder on other vessels or doing wholly unrelated work.

180. The Department said that the aggregate service model, using time spent on Icelandic water vessels, directly links the compensation each person received to the level they depended economically on the Icelandic fishing industry. In the Department's view, the aggregate service model was an entirely fair basis on which to pay compensation and was consistent with the policy intention of compensating former Icelandic trawlermen for the loss of their industry due to the Cod Wars.

Use of fishing passports as evidence of time spent on Icelandic water vessels

181. The Department said they chose to use fishing passports as the primary source of evidence, and as these recorded dates of voyages, it seemed a reliable and reasonable method of calculating service. The Department also said that this was consistent with the policy intention of directly linking compensation to a trawlerman's reliance on fishing in Icelandic waters. The

Department said that they also consulted with industry experts from Hull and Grimsby, who confirmed that the fishing passports were reliable and the best records available.

182. The Department were aware that the fishing passports were not always perfectly accurate, but considered it was the best source of evidence available to them. They said it was clear that some dates in the fishing passports overstated the length of a trip by merging two or three trips into one date range but wherever this occurred the applicant was given the benefit of the doubt and the dates as written were accepted. Also, where names of vessels were unclear, the applicant was again given the benefit of the doubt and where a ship's name looked similar to an Icelandic water vessel, the eligible vessel's name was substituted.

183. The Department said that as the consultation document stated fishing passports (which recorded the start and end dates of voyages) were the primary source of evidence to support a claim, it would have been plain to those with any knowledge of the industry that days at sea were what mattered for compensation purposes.

Calculating service

184. The Department said that the very nature of the aggregate service method excluded the possibility of paying for any activity other than days at sea on Icelandic water vessels. Consequently, it did not take into account time off for weekends, leave, sickness, domestic arrangements or training. These activities were not recorded in the fishing passports and did not qualify for compensation. The Department said that only days at sea counted, in keeping with the Department's conviction that this delivered the policy intention of compensating former Icelandic water trawlermen for the loss of their industry.

185. The Department said that Mr Johnson made the point that, under the 2009 scheme, a former trawlerman would have to work 365 days a year for 20 years to qualify for the maximum payment of £20,000. The Department said that Mr Johnson was correct in his observation and the Department were fully aware that the new criteria would not in practice allow applicants to receive £20,000 (although some applicants under the scheme had received more than £20,000 after interest had been added). However, the Department did not regard themselves to be bound to deliver a scheme that paid £1,000 for every year of service simply on the grounds that the 2000 scheme had done so.

186. The Department said it was unfortunate that the 2009 scheme may have been misunderstood by some people but they did not accept that as a result the scheme was flawed. They considered that there was no obligation to maintain the maximum payment of £20,000 of the 2000 scheme and that they had been entitled to develop a new scheme with new benefits and rules that were consistent with the Government's policy objective for the scheme, including framing the new scheme around the concept of aggregate service.

187. The Department said they believed that they had set out their intentions and the basis of the 2009 scheme clearly in the consultation

document. They said that a payment system based on aggregate service, using the weekly rate drawn from the 2000 scheme, could obviously not pay out at the same rate of £1,000 per year as paid under the 2000 scheme. The Department said they recognised that they did not state explicitly in the consultation document that a claimant would not be able to achieve £1,000 a year, nor the £20,000 that had been the maximum payment under the 2000 scheme, and said that they can see why this may have led to some misinterpretation. The Department said that there was an expectation by some applicants who had received reduced payments in the 2000 scheme as a result of the 'breaks rule' that they would receive up to £20,000 for the 2009 scheme. They had not achieved this under the current rules because the basis of the compensation was paid against aggregate service on Icelandic water vessels, not against all activity that was not deemed a 'relevant break', as under the 2000 scheme.

188. The Department said that with hindsight, and for the avoidance of doubt and confusion, it would have been better if they had stated explicitly in the consultation document that the sums of £1,000 per year and the £20,000 in total would not be paid; and they accepted that the consultation document was capable of being read in the way that some beneficiaries of the 2000 scheme had read it. The Department also accepted that it would have been helpful if they had stated explicitly in the consultation document that a week's service on Icelandic water vessels meant seven days.

Use of discretion

189. For some of the complainants, there was an additional issue that the Department failed to exercise appropriate discretion when considering the circumstances of individual cases. In response, the Department said that the question of whether to establish clear-cut rules of eligibility or allow some discretion at the margins was a difficult one for the operation of a scheme where decisions needed to be taken on a large number of cases; where decisions were taken at a junior level (even though appeals were considered by a senior person); and where they needed to be completely consistent in their handling of thousands of claims.

190. The Department said that the 2009 scheme's clear-cut rules made the administration of the scheme more straightforward and, against the background of poor records and the passage of time, it was important to establish clarity in the provision and consideration of evidence. Clarity had been an important consideration for the Department. However, they said that rules of any sort were bound to give rise to '*hard cases*' where, for example, a claimant was disqualified from compensation for the want of a single day's additional service.

191. The Department wanted to ensure that everyone received the compensation due and recognised that allowing discretion could enable unsuccessful but '*worthy*' cases to be addressed. They said that their instinct was to be sympathetic to such cases, but in a scheme which sought equity between applicants, the use of discretion brought with it an additional problem – for example, if the qualifying test was reduced for one person to

720 days instead of 730, what should be done about the claimant who had 710 days? Overall, the Department said it was felt that discretion here would create its own set of hard cases.

192. The Department considered that calculating aggregate service using the fishing passports reduced the need to apply the rules in a discretionary way. With the exception of applicants not in possession of their fishing passports (who were being dealt with separately) the fishing passports had provided a good basis for the Department to make the compensation payments in a way that they considered best targeted the aggregate service of trawlermen they wished to compensate, that is, those trawlermen who were reliant on Icelandic fishing for their livelihoods in the period running up to the Cod Wars and who were deprived of that livelihood as a result of the UK Government's political settlement with Iceland.

Chapter seven

Findings

193. It is clear that the Department faced a difficult task in devising a compensation scheme that applied to an industry unlike any other, where practices appeared to differ between ports and where the scheme's beneficiaries and their representatives had differing opinions about how the scheme should operate. The trawlermen did not work normal working patterns. They were often at sea for weeks at a time, returning home for only a few days. While at sea they worked up to 20 hours per day. The type of vessel a trawlerman worked on could affect the time he spent at sea. For example, on the larger freezer boats fish could be frozen on board, resulting in boats staying at sea for longer periods. Although some trawlermen stayed with the same crew and worked for the same vessel owner for years, others changed boats more often or were forced to work elsewhere under the 'pool system', or when being disciplined and their fishing passports withheld.

194. Given this background, it was never going to be possible for the Department to create a scheme that addressed the working patterns of each individual trawlerman, nor the preferences of all those who would be affected by the 2009 scheme. It is clear, therefore, that no matter what decisions the Department made about the revised scheme, it would have been likely to result in disappointment for some people.

195. It is also evident that the Department were anxious to avoid the criticisms made of the 2000 scheme in *Put together in haste,* namely that it had been launched before it was appropriate to do so and had taken no account of advice and information from relevant industry sources. The Department accordingly spent over 18 months devising the 2009 scheme, which included researching and analysing possible options and carrying out a public consultation with port MPs, former trawlermen and their family members, and campaign groups made up of recognised industry experts. From as early as 2007 work began on testing how different proposed options would affect the trawlermen (see Annex B). The Department also sought legal advice on the strengths and weaknesses of the proposals.

196. I note also that the Department acted upon several issues raised during the public consultation to widen the criteria for claims that could be made under the 2009 scheme. They agreed, for example, to use other forms of reliable evidence in cases where the passports were incomplete or not available; to open the 2009 scheme to applicants who had not previously applied under the 1993 ex gratia or 2000 schemes; and to add further vessels to the eligible vessel list following consultation responses, including those that appeared to have changed names. I note further that the Department were not ungenerous in their operation of the 2009 scheme, in that they advised those assessing claims that if any voyage in a trawlerman's fishing passport was unclear, the applicant should be given any benefit of the doubt.

197. Yet despite all the Department's efforts to devise and operate a fair and appropriate scheme, evidently supported by a large majority of those who responded to the consultation, shortly after it was implemented and the first payments made, complaints began to be made that the scheme did not fulfill its intention as originally announced or deliver a fair outcome to the trawlermen. The complainants contended in particular that:

- it was unreasonable for the Department to use days at sea as a measure of time working as a trawlerman;
- it was unreasonable for the Department to interpret a working year to be 365 days of such work; and
- the Department had not in some instances exercised their discretion reasonably when considering the circumstances of individual cases.

A key issue for my investigation was therefore to look at why it was that, despite all the Department's preparatory work in devising the scheme, the reality of the scheme's rules and operation should have taken the trawlermen and their representatives by surprise and been greeted with such protests as to its fairness.

198. I shall deal first with the specific complaints put to the Ombudsman. As the first two both relate to the 2009 scheme rules, I propose to deal with those together.

It was unreasonable for the Department to a) use days at sea as a measure of time working as a trawlerman; and b) interpret a working year to be 365 days of such work.

199. It is clear from the Department's papers that it was always their intention from the outset to interpret 'service' for the purposes of the 2009 scheme as days at sea on Icelandic vessels, as evidenced by the voyages shown in the fishing passports. A key consideration for them was clearly to find an approach which was as simple and clear cut as possible, and which would depend on supporting evidence that was generally readily available and relatively easy to assess (paragraph 189). Although the proposed definitions of service and of a working year were undoubtedly counter-intuitive, and the most restrictive way of measuring and compensating service in the industry, I have absolutely no doubt that the Department believed their intended approach to be clear and coherent. I would also have to agree with them that the approach they chose meant that there was less chance of mistakes being made in the calculation of the compensation due, or of inequity of outcome between individual trawlermen with similar records.

200. I am also satisfied that the Department believed that the 2009 scheme rules best targeted those trawlermen they wished to compensate, namely those who had been reliant on Icelandic fishing for their livelihoods in the period running up to the Cod Wars and who had been deprived of that livelihood as a result of the UK Government's political settlement with Iceland; and also that the new rules directly linked the amount of compensation each person received to the level they had depended economically on the Icelandic fishing grounds. The Department therefore

considered the 2009 scheme rules to be fully in line with the policy intention for the scheme. Again, I see no grounds to disagree with those assertions.

201. I also take the view that there was no requirement for the Department to be in any way bound by the previous schemes. They were fully entitled to put forward an entirely different scheme, which had different rules and definitions, as they did. Further, the 2009 scheme was not a redundancy scheme, and the Department were not, therefore, required to devise a scheme based on the normal expectations of such a scheme, nor to define 'service' in standard employment terms.

202. The 2009 scheme rules also undoubtedly avoided many of problems associated with the previous two schemes, and the Department clearly felt from the responses to the consultation and their meetings with the trawlermen's representatives that this had been recognised, and that they had the necessary support for their proposals. And indeed, if that were so, there could have been no grounds for complaint about the new scheme and its rules.

203. But this is, of course, where the difficulty here lies. Because whilst the Department strongly believe that they set out their intentions and the basis of the scheme clearly in the consultation document (paragraph 187), the trawlermen and their representatives contend that the Department's intentions only became clear after the introduction of the 2009 scheme when the first payments were made. They accordingly take the view that they were significantly misled during the consultation as to what they could expect the proposed scheme to deliver.

204. I have, therefore, looked very closely, not just at the consultation document itself, but also at the responses to it, at other written exchanges between the Department and their Ministers and the relevant MPs, and at the notes of the meetings between the Department and the trawlermen's representatives.

205. It seems to me that anyone reading the consultation document, or indeed any of the other exchanges with the trawlermen's representatives, knowing beforehand what the Department's intentions were and understanding that the Department saw this as an opportunity to devise a completely fresh scheme (paragraph 183) with new rules and definitions, might consider that there was little room for misunderstanding. Further, I have no doubt that the Department genuinely believed at the time that their intentions were clear and transparent.

206. However, the consultation was not, of course, being conducted in a vacuum and was in fact a further stage in a long and contentious attempt to find a fair way to compensate Icelandic trawlermen for the loss of their industry. There was accordingly a history of events that understandably influenced how those individuals involved in that history read and understood what was being proposed.

207. A clear example of this was that the consultation made significant use of the term 'service' which, as I have already indicated above, when used in relation to employment matters has an established common understanding (hence Mr Mitchell's comments in paragraph 165). Not only that, but it was applying a different definition of the term 'service' than had been used in the previous schemes, when service had been regarded as time spent in paid employment as an Icelandic waters trawlerman (and therefore included time spent on shore on paid holiday or sick leave, training and so on). I note that the definition of '*aggregated service on Icelandic waters' vessels*' in the draft scheme rules attached to the consultation document did not specify (as the subsequent final rules did) that service was now being defined solely as days at sea, but instead said that it meant *'the aggregate period of service (excluding breaks in service) on Icelandic vessels during the twenty years ending with the last date of a trawlerman's Icelandic service'*. I do not consider that that definition was sufficiently explicit to clarify the Department's proposal for measuring service. I also consider that the reference to '*breaks in service*' would only have served to confuse matters further, as that phrase had a very particular meaning under the 2000 scheme (namely a period of more than 12 weeks not fishing in Icelandic waters, or a period doing other work outside the industry), whereas the 2009 scheme effectively referred to any day not at sea on an Icelandic vessel as a 'break'.

208. Further, there were other statements made in, and omissions from, the consultation document, which in my view will have misled readers in their understanding of what the 2009 scheme proposals could be expected to deliver. I note, for example, that the consultation document did not expressly state that the previous maximum of £20,000 would **not** apply under the 2009 scheme. Regarding the rate at which compensation would be calculated, the consultation document said:

'… we would calculate the total number of weeks served on Icelandic water vessels by each claimant during the last twenty years of their Icelandic fishing career, and multiply this by the current payment rate (£19.23/week, equivalent to £1,000/year).'

209. As this was the same compensation rate that applied to the 2000 scheme, I can understand why applicants should have thought that the 2009 scheme would also pay a maximum of £20,000. In reality, of course, as Mr Johnson indicated, under the 2009 scheme a trawlerman would have had to work 365 days a year for 20 years to achieve that, which was simply not realistic. I am glad to note that the Department have already accepted that, with the benefit of hindsight, it would have been helpful if they had included an explicit statement to this effect within the consultation document (paragraph 188). I would go further than that. I would suggest that, as the £20,000 maximum had previously been agreed by the Government following a specific campaign, if it was known that the new scheme would not deliver that sum, then there was a legitimate expectation that the Department would make such a significant change explicit from the outset.

210. I note that the Department have also acknowledged (paragraph 188) that the consultation document was capable of being read differently to how they had intended, and that, for the avoidance of confusion, it would have been better if they had set out certain other aspects of the proposals (such as that a week's service meant seven days at sea) much more explicitly. I fully agree. It seems to me that it would have been most helpful if, for example, the Department had included at least one worked example to demonstrate how 'aggregate service' was to be assessed and how the compensation would then be calculated. That would have ensured absolute clarity.

211. There were also other statements made in relation to the 2009 scheme that I believe will have misled potential applicants as to what they might expect the scheme to deliver. For example, various comments were made that suggested that the proposed scheme rules were not as restrictive as they were in reality. I note that the news release announcing the consultation (paragraph 111) said that the Government had decided to run a new scheme *'based on aggregate service rather than continuous service as before'*. That did not in any way suggest that 'service' would be defined differently, or the effect of that revised definition. Further, the Department repeatedly asserted that the new two years of service qualifying test retained the '*general principle'* of the 2000 scheme qualifying test (paragraphs 95 and 98) and was comparable with it, rather than being a higher hurdle. Given the difference in the way 'service' was being defined, that was clearly not the case.

212. I am, of course, aware that the Department's Ministers had meetings with the port MPs at which the proposed 2009 scheme was discussed and that at the meeting on 11 December 2008, examples of fishing passports had been looked at to show how these would support applications. It is most unfortunate that neither Mr Mitchell nor Mr Johnson were present at that meeting, as they might have asked for further clarification of the intended use of the fishing passports. They might also have queried the statement (paragraph 135) that the Department said they made at that meeting that, although the same weekly rate as the 2000 scheme was to be used, payment would effectively be at a lower rate. I note also that the other port MPs have said (paragraph 176) that their chief concerns in those meetings were issues specific to their own ports and constituents. It seems, therefore, that the port MPs may have missed an opportunity at that specific meeting to probe the Department's intentions and gain a full understanding of how the proposed 2009 scheme would work.

213. Nevertheless, I take the view that the chief onus was not on the MPs to ask the right questions, but on the Department to ensure, in line with Principles of Good Administration, that the information they provided throughout the consultation was clear, accurate and complete. Neither the notes of the meeting on 11 December 2008, nor of that on 6 July 2009 (paragraphs 132 to 138), suggest that the Department at any point specifically clarified their new definitions of the terms '*aggregate service'* and '*breaks*', presumably because they believed that their intentions in that regard had

already been explained. Without such clarification, however, it seems to me perfectly possible for all the parties involved to have been talking at cross purposes throughout those meetings.

214. Similarly, I note that, despite the fact that a number of the MPs' letters implied that they had not fully understood how the scheme would work, the responses they received did not point out the apparent misunderstandings. One such example was Mr Johnson's letter of 19 May 2009 (see Annex B) in response to the consultation. In his letter Mr Johnson said that, unless he had misunderstood the proposal, a man who had fished for 40 years but with one break in service for six months in the final 20 years would receive compensation based on 19 and a half years. That was clearly not an accurate reflection of how the 2009 scheme would work, yet there is no indication that anyone pointed that out to Mr Johnson. As a result of such omissions, not only were the port MPs themselves not enlightened as to how compensation would be calculated, but based on their false understanding of the 2009 scheme proposals, they encouraged their constituents to welcome the scheme.

215. On balance, therefore, I am satisfied that the Department failed to ensure that the new and very distinctive rules proposed for the 2009 scheme were set out sufficiently clearly in the consultation document, or clarified in other meetings and exchanges during the consultation period. As a result, there was a mismatch between what those being consulted understood the 2009 scheme was going to deliver, and what it actually delivered. That mismatch meant that the consultation was not sound, and the responses to it could not be relied upon as showing majority support for the Department's proposals. This is an important and significant point, because I note that in his letter to Mr Johnson of 25 June 2009, the Minister said that it was intended to launch the 2009 scheme before the summer recess, but that this was '*dependent on reaching an agreement on the way forward'*. Mr Johnson and Mr Mitchell (paragraph 174) and other port MPs (paragraph 177) have made it clear (and I do not doubt them) that if they had understood the basis of how it was intended to calculate the compensation, they would have rejected the proposals. Further I note that the Department did listen to concerns raised during the consultation and changed their position on some critical points. It seems highly unlikely to me, therefore, that had the Department clearly articulated their proposals for the 2009 scheme rules in the consultation document or otherwise and received strong opposition to the proposed method of calculation, the Department would have pressed ahead regardless and introduced the 2009 scheme rules unchanged.

216. I should at this point make it clear that I do not find that the Department's failure to articulate the 2009 scheme proposals clearly during the consultation was in any way a deliberate attempt to deceive respondents, as has been suggested. I do, however, find that that failure was so serious in its nature and consequences as to amount to maladministration. I therefore uphold these aspects of the complaint. Before I go on to consider what injustice that failing might have led to, and what might be an appropriate

remedy for that injustice, I shall address the third aspect of the complaints put to me.

Complaint that the Department failed to exercise their discretion reasonably when considering the circumstances of individual cases

217. The final aspect of the complaints that we agreed to investigate relates to the Department's approach when operating the 2009 scheme. It seems to me that there will always be some individuals who strongly believe that they should be entitled to compensation but who will unfortunately fall outside the set parameters of the scheme. As a consequence they may well take the view that the 2009 scheme is unfair.

218. In this case, it is inevitable that some trawlermen will have fallen outside the two years of service qualifying requirement and therefore received no compensation under the 2009 scheme. In some instances there may be good reason for them having been away from work in the qualifying period, such as injury, or the illness of a family member. I can understand why those affected trawlermen feel aggrieved and believe that the Department should make an exception for their individual circumstances. However, it also seems very clear to me that any scheme that includes a qualifying criterion based on time served, requires clear lines to be drawn if applicants are to be dealt with fairly and consistently.

219. If the Department were to allow its claims assessors some discretion in this matter, they could not simply allow them to use their own judgment as that would inevitably lead to unfairness and inequality in the way that claims were treated. They would therefore have to provide the assessors with some form of guidance as to which circumstances would be deemed worthy of the exercise of discretion and which not (including clear rules as to matters such as, in the case of caring for a sick relative, how close that relative would have to have been to the applicant, or how sick, and so on), and what sort of evidence would be required (which would no doubt be difficult, if not impossible, to provide well over 30 years after the event). Falling short of accepting every applicant who applied to the scheme, it seems to me that the exercise of such discretion would in itself no doubt lead to complaints and appeals on grounds of unfairness, and to trawlermen being treated inequitably.

220. Our investigation has, however, shown that where there was scope for the Department to exercise discretion in individual cases, namely in the interpretation of evidence of service, they did so and always to the benefit of the applicant. For example, the Department accepted the dates of voyages as recorded in the fishing passports, even though this may have been significantly longer than an average voyage and so suggest that not all of that time would have been at sea. Where evidence was missing, the Department also substituted start dates, end dates and vessel names where they could, to allow a voyage to be included in the calculation of compensation. As a result of the Department applying these measures, a trawlerman's service would

have increased. This would have helped him to meet the qualifying test and if met, increased the compensation he received under the 2009 scheme.

221. It is also important to recognise that for applicants who did not have fishing passports, the Department invited other forms of evidence (pension records and National Insurance reports to establish likely eligibility, and log books as evidence of time at sea) and even helped to locate these. This included contacting representatives in the affected ports to locate missing records and issuing pro forma letters to applicants to assist them in obtaining pension and National Insurance records. The Department also agreed to source log books from archives in the UK and Canada for the final group of applicants with no fishing records (but where National Insurance and/or pension records indicated the applicant was likely to be able to meet the qualifying conditions), a task that we have seen is both lengthy and resource intensive.

222. Overall, therefore, we have found that the Department exercised their discretion in several ways to ensure that the 2009 scheme was as inclusive as possible, within the parameters that must apply to any scheme involving qualifying criteria. I am consequently satisfied that I have seen no evidence that the Department failed to exercise their discretion reasonably when considering the circumstances of individual cases, and I do not uphold this aspect of the complaint.

Injustice and redress

223. In summary, I have found that the Department were maladministrative in that they failed clearly to articulate the 2009 scheme's proposals during the consultation. As a result, the trawlermen and their representatives had not understood exactly how service was going to be assessed for the purposes of the 2009 scheme. There were two consequences flowing from that. The first was that their responses to the consultation (which were largely in support of the scheme) were based on a misconception as to how the 2009 scheme would operate. The second was that they were given false expectations as to what the 2009 scheme would deliver. Indeed I note that the injustice specified by the complainants involved in this report (paragraph 31) is either that they should have been eligible for compensation, but failed to qualify under the 2009 scheme rules, or that the compensation they received was less than they had been led to believe they would receive.

224. That brings us to the question of how we can assess the impact of, and identify an appropriate remedy for, those injustices? The Ombudsman's underlying principle,[47] when considering how bodies can 'put things right', is to recommend that the body restores the complainant (and anyone else similarly affected) to the position they would have been in if the maladministration had not occurred. But what does that mean in this context?

[47] See Principles for Remedy.

225. I have already indicated (paragraph 215) that I do not believe that, had the Department consulted properly, the arrangements for calculating compensation under the 2009 scheme would have remained the same. What I cannot say is how the scheme might have differed. I note that the Department considered a number of options when devising the 2009 scheme, but believed that the option they chose best delivered the policy intention of the scheme. I also note that, when complaints started to be made about the low amounts following receipt of the first payments under the 2009 scheme, the Department asked the Minister whether further changes should be made, such as defining a week's service as five working days, rather than seven. The Minister declined to make any further changes. Again, the Minister might have taken a different stance on the options put to him had the 2009 scheme not already been underway. However, it is now impossible to say what decision the Minister might have made. Further, it is not for me to say what changes might best have been made, nor what the 2009 scheme rules should have been. That also means, of course, that I also cannot say which individuals might have lost out financially, and by how much.

226. As I am unable to identify individual financial loss, I then have to consider what other type of remedy might provide appropriate and proportionate redress for the injustice I have identified. This case presents significant challenges in this respect and I have therefore considered a number of options very carefully. Exceptionally in this instance, I think it might be helpful to set these out in this report. I hope that this will set my final recommendations in context, and enable the trawlermen and their representatives to understand why I have reached the conclusions I have on remedy.

Option 1: Re-run the consultation and a revised scheme

227. The most obvious and optimal remedy that presents itself is that the Department should go back to where things first went wrong and re-run both the consultation and the scheme, but this time following the Principle of '*Getting it right*'[48] and clearly articulating their proposals. I do not, however, consider that to be an appropriate remedy in these particular circumstances for the reasons I shall go on to explain.

228. First, I have no doubt that the administrative costs of conducting a further consultation, and of setting up and running a new or revised compensation scheme, would be likely to be greater than the total of further sums paid out. That would not be an appropriate use of public funds. But in any event, I also believe that to do so would only serve to raise many trawlermen's expectations inappropriately as to what such a scheme might be expected to deliver, and thereby cause significant disappointment to them and in particular to those who once again fail to come within any new scheme's parameters (paragraph 194).

229. That point is also clearly demonstrated when the individual circumstances of the specific complainants involved in this report are

[48] See Principles of Good Administration.

considered. Mr A said that he failed to qualify for the 2009 scheme because he spent time away from fishing on Icelandic waters vessels during the qualifying period due to the death of his father and his child's illness (paragraph 49). As I have indicated (paragraphs 218 and 219), however, a scheme that allowed assessors discretion to allow individuals not to have to meet the qualifying criteria in such circumstances would be likely to lead to unfairness and inequity. I do not therefore consider it likely that any scheme introduced would have been likely to have taken account of individual circumstances such as those experienced by Mr A. In Mr B's case, he failed to qualify because of gaps in his records. Again, that was likely to remain a problem whatever new scheme was introduced. The other complainants involved (Mr C, Mr D, Mr E and Mrs F) all received additional sums under the 2009 scheme which were not insignificant. They would therefore be unlikely to receive further significant sums under any revised scheme rules. I also consider that it is important, given the length of time that has passed since the events for which these schemes were meant to compensate, that a much more speedy remedy is provided. Overall, therefore, I do not consider a re-run of the consultation and scheme to be a valid option.

Option 2: Reassess the claims of specific groups of applicants to the 2009 scheme using different criteria

230. The port MPs have strongly advocated that the most appropriate remedy would be a partial re-run of the scheme for specific groups, but applying a different definition of service (in other words, allowing for a specific number of days ashore each year to be counted as service). They have suggested that the Department should reassess on that revised basis all those applicants for the 2009 scheme who either:

- applied successfully and their claims were recalculated, or
- failed to meet the qualifying criteria for the 2009 scheme but whose payment under the 2000 scheme had been affected by the 12 week rule; or
- who were new applicants in 2009.

They contend that this would deliver what the revised scheme had been intended to deliver, namely to provide additional compensation for those whose compensation under the 2000 scheme had been unfairly low because of the effect of the breaks rule.

231. I should first say that I can appreciate why the trawlermen's representatives support this proposal so strongly, and see it as a way of trying to ensure that the failings identified in the 2000 scheme have been fully remedied. I have therefore considered this option most carefully. Once again, however, I do not believe that this approach would provide an appropriate remedy in this instance for the reasons set out below.

232. First, as I have already said (paragraph 225) it is not for me to say what the criteria for the 2009 scheme should have been. I cannot therefore make a recommendation which would, in effect, involve me recommending a specific

and different definition of 'service' for the purposes of the scheme. This option would require me to do that.

233. Secondly, given the number of applicants to the 2009 scheme who would fall to be individually reassessed, this option would effectively amount to re-running the scheme with all the associated administrative costs, and the possibility of errors and appeals. It seems to me that this would run the risk not just of grievances continuing, but of new ones being created. It would again also take a considerable amount of time to complete.

234. Finally, the injustice for which I am seeking to identify an appropriate remedy is that of a flawed consultation leading to false expectations as to what the 2009 scheme would deliver, and not for the failings of the 2000 scheme. I am not, therefore, persuaded that this option would be an appropriate remedy.

Other considerations

235. Clearly, though, it is not sufficient, given the injustice that I have identified, simply to ask the Department to offer the Icelandic waters trawlermen community an apology. That community has had to fight long and hard to try to ensure that they received fair compensation for the loss of their industry. It is therefore particularly unfortunate that this last attempt by the Department, although undoubtedly well-meaning, should have served to be yet a further source of contention and disappointment for the trawlermen, due to the Department's failure to communicate effectively their intentions to them during the consultation.

236. It is, therefore, clear to me that something more is required if those individuals are not to remain aggrieved about the treatment they have received at the hands of the Department. I am also aware of the desire of all parties involved that this matter should finally be resolved and that it is now time, in Mr E's words (paragraph 72), to finally '*draw a line under the matter*'. Equally, however, it is important that whatever redress is provided, so far as possible, does not create further unfairness and grievances.

Option 3: A community remedy in the form of a charitable donation

237. I have therefore considered very carefully whether it would be possible to recommend an alternative to individual redress, which would deliver a just and appropriate remedy for that community as a whole. It seemed to me that, again exceptionally in this case, a clear possibility might be to propose that the Department make a significant one-off donation to a seamen's charity or charities that worked in the local port communities with former trawlermen and their families. That donation could be distributed proportionately according to the size of the former local Icelandic trawlermen communities. It would then be for the charity concerned to determine how best to use those funds for the benefit of the local fishing community. I considered that, in the highly unusual circumstances being addressed here, such a remedy would be both in keeping with the Ombudsman's Principles for

Remedy and fully in line with HM Treasury's published guidance on *Managing Public Money.*[49]

238. A remedy of that nature would also have a number of distinct advantages, in that it would be simple administratively, could be achieved speedily and would provide tangible recognition of the impact of the Department's mishandling of the consultation on the community. It would also mean that funds could then be directed to those individuals and families most in need, which would mean that there would be no grounds for former trawlermen to feel aggrieved on the grounds of unfairness or inequity.

239. Despite its obvious attractions, however, I have reluctantly come to the conclusion that this option would also not provide an appropriate remedy for the injustice identified in this report. Whilst it would undoubtedly help to alleviate need in the community, it would not address individuals' sense of injustice, and indeed very few of those whose expectations were first inappropriately raised by the consultation, then dashed by the 2009 scheme, might ultimately benefit from the donation.

240. I also acknowledge that it would be difficult to identify charities willing and able to take this forward, given the sort of expectations they might subsequently encounter. It seems to me that some trawlermen, given the background to the donation, might see it as the charities' role to distribute funds according to the trawlermen's perceived 'losses' under the 2000 or 2009 schemes. That is not, of course, what such a donation would be intended for, but I can see that there might be significant pressure brought to bear on the charities to at least try to distribute funds to those who felt aggrieved about the compensation payments they had received. In the circumstances, therefore, I do not consider this to be a workable or suitable remedy.

Summary of the options so far considered

241. In summary, I have considered and rejected a range of forms of remedy for the injustice arising from the failings I have identified in this report. I have set out above why I am unable to identify actual individual financial loss; why I do not consider that it would be appropriate or proportionate to recommend that the Department re-runs the consultation and the scheme, and why I am unable to recommend that they reassess or recalculate individuals' compensation using different criteria. I have also addressed the question of whether a slightly more unusual approach to remedy, in the form of a charitable donation, might provide fitting redress in the particular circumstances of this case (and have concluded that it would not). As I see it, that leaves only one further option for consideration.

Option 4: A fixed ex gratia consolatory payment

242. The Ombudsman's usual approach to remedy where it is not possible to put complainants back in the position they would have been but for the maladministration identified, is to expect the body concerned to offer an

[49] HM Treasury, *Managing Public Money*, October 2007, London TSO.

appropriate fixed amount consolatory payment to the individuals who have suffered injustice. The question here, however, is how do we identify those individuals in this instance, and how do we determine what level of payment would be appropriate?

243. It seems to me that the trawlermen who have suffered injustice are those who applied to the 2009 scheme with a reasonable expectation that the revised scheme, based on aggregate rather than continuous service, would provide them with at least some, or greater levels of, compensation. That would **not** include those applications where:

- new claimants to the 2009 scheme did not provide information relating to Icelandic waters fishing when the Department requested that they do so; or
- where fishing in Icelandic waters had finished before 1 January 1974; or
- the £20,000 maximum had been paid under earlier schemes; or
- claimants were personal representatives or executors of a deceased former trawlermen who did not provide evidence required by the Department of their status (for example, a Letter of Administration or a Grant of Probate).

I take the view that those groups of applicants would not have had a legitimate expectation of receiving any compensation under the 2009 scheme.

244. I do, however, believe that the remainder of applicants will have had their expectations of the 2009 scheme falsely raised and then dashed. I therefore consider that **all of the other applicants** to the 2009 scheme should receive an ex gratia payment.

245. That brings me to the question of what sum would be appropriate. In most cases where an individual has suffered significant disappointment due to having been given false expectations I would be inclined to recommend a payment of up to £500. However, there is no doubt in my mind that in this instance the disappointment suffered by these trawlermen, who were led to believe that this scheme would finally deliver the level of compensation for which they had been fighting for so many years, merits a higher payment.

246. I am also aware of the fact that the complainants cited in my predecessor's report *Put together in haste*, were awarded consolatory payments of £1,000 in recognition of the distress caused by the maladministration that we had identified in that report. In the light of those considerations, I consider that consolatory payments of an equivalent amount would be a fair and appropriate outcome in this instance.

Recommendations

247. I accordingly recommend that the Department:

- make consolatory ex gratia payments of £1,000 to those applicants to the 2009 scheme set out in paragraph 243. Those individuals will be identified

and contacted by the Department directly. In the interests of absolute clarity, I have set out in Annex F which applicants these are in terms of the scheme rules (and other issues such as probate matters);

- apologise for the failings identified in this report as follows:
  - offer an individual apology to those receiving ex gratia payments in the letters sent to them telling them of the payment;
  - place an apology on the department's website;
  - place apologies in local port newspapers and in Fishing News.

Conclusion

248. It is particularly unfortunate that the Department's attempt to consult on, and then introduce, a third scheme to compensate Icelandic waters trawlermen for the loss of their industry following the resolution of the 'Cod Wars' of the 1970s, should have served to be yet a further source of contention and disappointment for those trawlermen. Whilst I am satisfied that the Department's failings in this regard were completely unintentional and well-meaning, there can be no doubt that their failure to communicate effectively their intentions to the trawlermen during the consultation caused considerable aggravation and disappointment.

249. It is a long time since the events for which the scheme was meant to compensate. Given this and my findings, I can see no point at this stage in the Department seeking to rerun the scheme again. As I see it, therefore, this report effectively brings the issue of Icelandic waters trawlermen's compensation to an end. I recognise that there will still be those who consider that they have not been adequately compensated for their service. Nevertheless, I very much hope that the apologies offered by the Department, together with the ex gratia payments of £1,000 to those who will have had their reasonable expectations of the 2009 scheme disappointed, will be seen by most of those affected as a fair outcome to this complaint and bring an acceptable end to this longstanding and contentious matter.

Julie Mellor

Parliamentary and Health Service Ombudsman
March 2012

Annex A

The Parliamentary Ombudsman's role and remit

1. My role is determined by the *Parliamentary Commissioner Act 1967*, which enables me to investigate action taken by or on behalf of bodies within my jurisdiction in the exercise of their administrative functions. Complaints are referred to me by a Member of the House of Commons on behalf of a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the actions taken.
2. My approach when conducting an investigation is to determine whether maladministration has occurred that has led to an injustice that has yet to be remedied.
3. If there is an unremedied injustice, I will recommend that the public body in question provides the complainant with an appropriate remedy. These recommendations may take a number of forms, such as asking the body to issue an apology, or to consider making an award for any financial loss, inconvenience or worry caused. I may also make recommendations that the body in question review their practice to ensure that similar failings do not occur.

Basis for my determination of the complaint

My approach

4. In simple terms, when determining complaints that injustice has been sustained in consequence of maladministration, I generally begin by comparing what actually happened with what should have happened.
5. So, in addition to establishing the facts that are relevant to the complaint, I also need to establish a clear understanding of the standards, both of general application and those that are specific to the circumstances of the case, which applied at the time the events complained about occurred, and which governed the exercise of the administrative functions of those bodies and individuals whose actions are the subject of complaint. I call this establishing the overall standard.
6. The overall standard has two components: the general standard, which is derived from general principles of good administration and, where applicable, of public law; and the specific standards, which are derived from the legal, policy and administrative framework relevant to the events in question.
7. Having established the overall standard, I then assess the facts in accordance with that standard. Specifically, I assess whether or not an act or omission on the part of the body or individual complained about constitutes a departure from the applicable standard. If so, I then assess whether, in all the circumstances, that act or omission falls so far short of the applicable standard as to constitute maladministration. The overall standard which I have applied to this investigation is set out below – which, in this case, is wholly derived from the *Ombudsman's Principles.*

The Ombudsman's Principles

8. The Principles of Good Administration, Principles of Good Complaint Handling and Principles for Remedy[50] are broad statements of what I consider public bodies should do to deliver good administration and customer service, and how to respond when things go wrong. The same six key Principles apply to each of the three documents. These six Principles are:

    - Getting it right
    - Being customer focused
    - Being open and accountable
    - Acting fairly and proportionately
    - Putting things right, and
    - Seeking continuous improvement.

[50] The *Ombudsman's Principles* is available at www.ombudsman.org.uk.

Annex B

Icelandic water trawlermen scheme 2009
Chronology of key events

2007

February 2007
On **17 February 2007** the Ombudsman published her report *Put together in haste: 'Cod Wars' trawlermen's compensation scheme* (Put together in haste). The report contained the results of the investigation conducted following a number of complaints received about the administration of the compensation scheme for Icelandic water trawlermen affected by the Cod Wars, which was operated by the Department between October 2000 and October 2002.

June 2007
On **29 June 2007** a report by the National Audit Office *The compensation scheme for former Icelandic water trawlermen* was issued.

The report's findings were:

- The Department did not develop a robust plan to implement the 2000 scheme. They should have set out targets, and the resources needed to meet those targets, with an assessment of the risks to achieving their objectives.
- The 2000 scheme cost £18 million more than the initial estimate of £25 million, primarily because the Department had to address additional issues affecting the scope of the scheme as claims came in. While an accurate initial budget would have been difficult to estimate, given the uncertainty involved, presentation of a range of estimates based on sensitivity analysis of key variables would have made the Department's decision making more robust.
- Some claims took a long time to process, due to problems with the quality and availability of evidence, and uncertainties about the interpretation of the 2000 scheme rules. But the Department did allocate additional staff once the volume of applications became clear.
- There was no evidence that, in designing or interpreting the 2000 scheme rules, the Department sought to discriminate in favour of some groups of claimants or against others. Under the 2000 scheme rules claims from Hull were more likely to be paid, and with higher amounts, than claims from other ports. The Department ascribed this to the greater dependence of Hull on distant water fishing in general. But the Department did not anticipate the likely impact of the rules on the different ports and therefore was not in a position to explain their position effectively when the 2000 scheme was launched, exacerbating the sense of grievance in the ports. Although this effect of the 2000 scheme rules was not fully anticipated, it could have been so, with better understanding of the industry.

- A sample of 100 claims revealed 11 cases where former trawlermen were overpaid or underpaid by reference to the 2000 scheme rules. This was due, in some cases, to operational errors, but in most cases because the Department lacked the evidence they needed to assess accurately whether claims were eligible for payment under the scheme rules. A further 25 cases were found where there was insufficient evidence to conclude with certainty that the claim decisions were correct.

August 2007

On **8 August 2007** the Minister responsible for the Department (the Minister), wrote to Austin Mitchell MP (Mr Mitchell). The Minister said that he intended to arrange a meeting to discuss the Ombudsman's report on the 2000 scheme after the summer recess.

October 2007

On **15 October 2007** a meeting was held between the Minister, and several port MPs. The Department said that the port MPs who attended were: Joan Humble (Mrs Humble), Frank Doran (Mr Doran) and Mr Mitchell. At this point Ministers had still to decide whether to rerun the 2000 scheme. In a subsequent submission to the Minister,[51] the Department said that at this meeting, port MPs were seeking an investigation of outstanding constituency cases rather than a complete rerun of the 2000 scheme. Two areas where port MPs thought the 2000 scheme might usefully be amended were:

- To look again at the position of trawlermen who had been sick, or who had family members who had been seriously ill, preventing them from working.
- To look again at the position of trawlermen who had been instructed by the fishing companies to serve on middle water vessels, and refusing to do so would have meant a loss of benefits.

The Department said that all port MPs commented that the 2000 scheme had been generous. However, they each had a small number of outstanding constituency cases where they felt justice had not been done.

November 2007

On **5 November 2007** the Department provided a submission to the Minister following his request to scope out the possibility and practicalities of a limited rerun of the 2000 scheme.

They identified three possible options:

- A review of the outstanding constituency cases against the existing 2000 scheme rules. However, this was likely to deliver a disappointing outcome for most outstanding claimants.
- Ministers could use their discretion to allow additional payments in some or all of the outstanding cases. This brought a significant legal risk that other claimants in similar circumstances – whose cases had not been reconsidered –

[51] Submission dated 5 November 2007.

could argue that Ministers had behaved unfairly and that their cases should be reviewed on the same basis.

- The Government could decide that the 2000 scheme rules should be amended in the way sought by port MPs. If so, making new definitions and finding supporting evidence would be difficult. The Department's legal advice was that it would not be fair only to reconsider outstanding cases that rested with the port MPs and not other existing claimants who might well receive increased payments under a new set of rules. Therefore, a rerun would have to apply to the 3,400 successful claims[52] made under the 2000 scheme where the maximum payment was not made, and also for the 2,600 claims that had been rejected under the 2000 scheme – as they might qualify under the new rules.

2008

February 2008

On **20 February 2008** the Department instructed counsel to advise on the Department's response to the Ombudsman's report Put together in haste bearing in mind the recent ruling of the Court of Appeal in *R (Bradley and others) v Secretary of State for Work and Pension* (the Bradley case).[53]

Counsel suggested that the Department could revise the 2000 scheme rules on breaks in service (or 'breaks rule') if this could be done without creating as much or greater injustice.

- One option was to limit the extension to circumstances where Icelandic water trawlermen were directed to take other work during periods where Icelandic fishing was not available. This option could be impractical given the passage of time, but would address the Ombudsman's concerns.
- Another option was to allow 'working' breaks in service of longer than 12 weeks, if the work done was sufficiently related to Icelandic water trawling (for example, trawling in other waters or shore-based work on fishing vessels). This could be limited to breaks of six months or less and/or a rule that allowed only one such 'working' break in any five years of service.
- A further option could be to introduce a discretionary element into the 'breaks rule' along the lines that a 'working' break of more than 12 weeks might count towards continuity of service in exceptional circumstances.

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[52] The submission stated that there were 3,500 successful claims, but the Department confirmed that the correct figure was 3,400.

[53] *R (Bradley and others) v Secretary of State for Work and Pensions* [2008] WLR (D) 38. The principal issues in this case were whether the Ombudsman's findings were binding on the Secretary of State, and whether the Secretary of State had acted rationally in rejecting her report.

On **26 February 2008** the House of Commons Committee of Public Accounts (PAC) published their report *The compensation scheme for former Icelandic water trawlermen.*

On the basis of the report by the National Audit Office, which was conducted in parallel with the Ombudsman's inquiry, PAC took evidence from the Department on their administration of the 2000 scheme.

The report's conclusions and recommendations were:

- By November 2007, the Department had paid over £42 million in compensation to 4,400 former Icelandic water trawlermen and their dependents. The 2000 scheme was complex to administer, and the Department made many of the same mistakes that they made in managing their coal health compensation scheme.[54] The Department should set out the lessons in PAC's reports on these schemes and secure a marked improvement in future schemes of this kind.
- The Department did not properly consider how they would obtain and assess the evidence needed to support claims that were more than 20 years after the end of the Cod Wars. The Department should test the availability of evidence on real cases before launching new compensation schemes.
- The Department did not understand the working practices of the fishing industry when designing the 2000 scheme. As a result, they set complex rules that were difficult to implement. The Department should establish whether they have the appropriate industry knowledge before setting the terms of grant schemes, and seek relevant external advice if they do not.
- The Department did not test the impact of the 2000 scheme's rules on different types of applicant before launching the 2000 scheme. The Department should pilot the proposed rules using a cross section of different types of applicant. It should use the results of this pilot to determine what changes are needed to enable delivery of the scheme's objectives.
- In 25 of 100 cases there was insufficient evidence to say whether payments made by the Department accorded with the 2000 scheme's rules. The Department needed to put explicit criteria and procedures in place to help officials to exercise discretion in cases where the evidence may be incomplete. Decisions and their justification should be fully recorded.
- The Department did not employ proper project planning and risk management arrangements at the start of the 2000 scheme. They needed to improve the project delivery skills and experience of their managers and policy staff by, for example, giving officials practical operational experience; participating in the Professional Skills for Government programme; and seconding staff into operational posts in the commercial sector.

[54] A compensation scheme administered by the Department (then the Department of Trade and Industry) to compensate miners for damage to their health.

May 2008
The PAC report was presented to Parliament where the six conclusions were accepted and agreed with by the Department. The Department said they welcomed the report and that in light of the concerns expressed by the Ombudsman, they were investigating further the 'breaks rule' in the 2000 scheme.

The Department said that this would involve further examination of the 2000 scheme eligibility criteria, including the list of eligible vessels, and whether there might be scenarios where changes to the 2000 scheme rules would better fulfil the policy intention of the scheme. Following this, the Department said they should be in a position to decide whether to rerun the scheme or not.

June 2008
The Department began collating details of a sample of around 10 per cent of previous claims to create a records database, to enable them to predict how many trawlermen would receive additional payments under different options, how many would not, what the cost might be and whether any new inconsistencies might be created. The Department appointed a team of around ten agency staff to carry out this task.

On **18 June 2008** the Minister met with port MPs, Shona McIsaac (Ms McIsaac), Mr Doran and Mr Mitchell.

Notes from that meeting were taken by a member of the Minister's office. The main points from the notes were:

- The Minister outlined the background of the Bradley case and the judgment of the Ombudsman.
- The Minister outlined what the Department were doing, that is, a team of extra staff to create a database.
- The Minister explained why they could not pick out individual cases supplied by the MPs as it would be unfair to those that had not come forward.
- The Department said that if the scheme was rerun, there would be a consultation.

July 2008
On **17 July 2008** the Department updated the Minister. The Department identified three possible options for rerunning the 2000 scheme. These were:

- **Option one** – allow one longer break, of up to six months, on non-Icelandic water vessels every five years, to count towards continuous service. However, breaks where people had worked outside the fishing industry would not be allowed. This would address the concerns of port MPs and the Ombudsman that under the scheme rules one trip on a non-Icelandic water vessel during a gap of more than 12 weeks – possibly at the instruction of the port authorities – would be regarded as a break in continuous service. They proposed to add any earlier period of service on Icelandic water vessels to the payment calculation for people in this category. The period of continuous service would therefore be calculated back until the next break in service

within the preceding five years. The Department confirmed that this option arose from discussions with counsel.

- **Option two** – allow previous periods of continuous service to count towards the payment calculation. They would probably pay for these periods at half rate, to allow for the fact that these blocks of service occurred further in the past. Although this option contained a higher 'entry' threshold than option one – the need for further blocks of two years service – it may produce a higher payment for those trawlermen with longer and less broken Icelandic service.
- **Option three** – calculate payments on the basis of aggregate service on Icelandic water vessels. Only time served on Icelandic water vessels would be counted and therefore the negative impact of any breaks in service would be smaller than options one and two. There would be no need to search for records of service outside the industry and additional payments would be directed to those with long service on Icelandic water vessels, but who had received lower payments under the 2000 scheme due to the timing of their breaks.

The Department identified a problem with the first and second options in that these required checks on whether trawlermen worked outside the industry during all twelve week breaks. They were checking with HM Revenue & Customs whether the National Insurance records were still available, as periods of service would be 30 years old, and whether the gateways between departments were still in operation. The Department said that they knew from the 2000 scheme that this work was extremely time-consuming and also produced an uncertain result, as the National Insurance records did not show precisely when the person worked for another employer. They said that this aspect of the scheme was criticised by the National Audit Office in their report.

The Department said that they could rerun the 2009 scheme under options one or two but tighten the 'breaks rule' for the additional qualifying period, so that all gaps in Icelandic service of more than twelve weeks would be regarded as a break in service. This was the original formulation of the 2000 scheme (before its launch) and would make the administration of a rerun more straightforward.

The Department's initial findings were that options one and two seemed likely to help fewer trawlermen than option three, and may pay smaller average payments.

The Department also advised the Minister that under the scheme they had evidence of 730 vessels that had sailed in Icelandic waters twice in their lifetime. But new evidence strongly suggested that, of these, only around 200 vessels fished in Icelandic waters during the Cod Wars.[55]

[55] The Department said they had found at the National Archives at Kew a list of vessels which the Foreign and Commonwealth Office and the Icelandic Government had agreed could continue to fish in the disputed waters. This was an unpublished annex to the treaty agreement reached between Britain and Iceland in 1973. A list of those vessels that had fished in the disputed waters in 1971

August 2008

On **21 August 2008** the Department instructed counsel to advise on the legal risks attached to the various options identified in rerunning the 2000 scheme. They said that they were not seeking to rerun the scheme from scratch or to recover any payments from trawlermen, who had arguably received over-generous payments under the 2000 scheme. Instead they were looking to design a limited rerun of the scheme with the aim of directing additional payments only to the subset of claimants that were disadvantaged under the 2000 scheme, in the light of the concerns expressed by the Ombudsman. They said that if the scheme was rerun they should conduct a public consultation on the favoured option.

The Department detailed three options they were considering (each of which amended the 'breaks rule' in different ways) as well as a fourth option that moved away from the 'breaks rule' altogether and calculated the total amount of time that each trawlerman served on Icelandic water vessels throughout his career. They said that under this option, the total number of weeks a claimant spent on Icelandic water vessels during the twenty years before his last date of service would be calculated, irrespective of length, frequency and nature of any breaks between those weeks of service. The number of weeks would be multiplied by the existing compensation rate (£19.23) to produce a notional compensation figure for the claimant. The Department said that if compensation under the 2000 scheme was less than the notional figure, the claimant would be paid the difference.

The Department considered that option four's advantages were that there would be no dependence on National Insurance records and that it directly related compensation to actual time spent on Icelandic water vessels. Therefore, anyone that had spent a large amount of time on non-Icelandic water vessels or had lengthy gaps within their career would be less likely to receive additional payments under this option, while those with long Icelandic service (who had received a payment based on short service under the 2000 scheme due to the 'breaks rule') would receive additional payments. But the Department said that, as with option three, they disregarded even very long breaks in service where other work may have been done, a factor which was arguably relevant to dependence on the industry.

The Department said that if any of the options were adopted, they would need to consider their position regarding the 2,600 applications that received no payment under the 2000 scheme, most of which could not satisfy rule 3.1(a) requiring a minimum two years' service.[56] A relevant break two years before service ended could wholly disqualify a claim. The Department told counsel that the question whether this should impact on the two year qualifying period then arose. They considered that an option could be to reassess the qualifying period in relation to each of the options. The Department also sought counsel's advice on the following issues:

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was also agreed between the UK and Icelandic Governments at the time, as a reference document to the treaty.

[56] Rule 3.1 (a) of the 2000 scheme stated: '*a claim may be made in respect of the last continuous period of work undertaken by the former Icelandic-water trawlermen, provided that period; lasted at least two years prior to 1 January 1980; and ended on or after 1 January 1974*'.

Eligible vessels: The Department highlighted to counsel that, in light of new evidence regarding eligible vessels, they were aware that only around 200 vessels, not the originally listed 730, fished in Icelandic waters during the Cod Wars. They said that they strongly suspected that their predecessors would – if they had known at the time – have sought to tie compensation payments much more closely to service on the vessels that had actually fished in Icelandic waters at the time of the Cod Wars. On that basis, the 2000 scheme appeared to have used an extremely generous definition of an Icelandic water vessel.

The Department said that it could possibly be argued that only trawlermen that served between 1971 and 1976 on one of the 'short list' of 200 Icelandic water vessels should be entitled to any additional payment under a rerun of the scheme. This would tightly link any additional payment to Icelandic service at the time of the Cod Wars.

New claims: As the 2000 scheme had been widely published and allowed extensive time in which to submit claims (two years), the Department did not propose to base any rerun of the scheme on new claims, but rather on their existing database of claims to see whether any individuals should receive more. The Department said they did propose to look again at failed claims.

Use of discretion: The Department asked counsel's advice on using discretion in compassionate and deserving cases.

September 2008

On **5 September 2008** the Department met counsel to discuss the proposed options for rerunning the 2000 scheme. Counsel advised that:

- A decision not to rerun the scheme, given that suitable options had been presented, would be difficult to defend.
- All of the proposed options were better than the 2000 scheme.
- Option four appeared to present much the best fit with the Government's policy objectives, and best reflected evidential problems and the time elapsed since the Cod Wars. Under this option, all current payments would stand and additional payments would be directed to those with long Icelandic service and low payments.
- Regarding the issue of eligible vessels, if the Department now had better evidence about the vessels that actually fished in Icelandic waters during the Cod Wars then this should be used. This could be as part of a new entry test and as the basis for any additional payments.
- Regarding the qualifying period, it would be difficult to justify an inconsistent approach where gaps in service were treated differently if they occurred in the first two years of service or after several years. This would be relevant to options one to three. Under option four, it was equally possible to retain the existing qualifying period or to recast this in terms of Icelandic service.

On **10 September 2008** the Department provided an update to the Minister, including the advice they had received from counsel.[57] They said that counsel had recommended a rerun of the scheme following options four or five (using the short list of vessels). The decision on whether to use option four or option five was finely balanced.

Option four – aggregate service option
This option would calculate the total number of weeks served on Icelandic water vessels in the last 20 years of service, and multiply this by the current payment rate (£19.23 per week, equivalent to £1,000 per year). Where the calculation produced a larger payment than that received under the 2000 scheme, the Department would pay the difference. The Department estimated that around 1,120 claimants would receive an average of £3,930 each under this option, giving a total cost of around £4.4 million.

The Department considered that using this option had the following advantages:

- There was a strong fairness argument because it would direct additional payments only to claimants who had lengthy Icelandic service, but received payments commensurate with short service.
- No payments would be made for breaks and other gaps in service. This should make relatively little difference to the level of individual payments, which would reflect overall Icelandic service.
- Evidence for service could be found directly from fishing passports. It would no longer be necessary to attempt to identify whether claimants had been working outside the industry in any gaps in their service.
- This option would be relatively straightforward to administer as the fishing passports were likely to be accurate despite the time that has passed since these were used.

Option five – short list of vessels
The Department said that the fifth option related to using a shorter list of vessels and payment for the five year period of the Cod Wars (with the payment rate increased by a factor of four to compensate). The difficulties that would arise from choosing this option would be that it would present a very marked shift from the 2000 scheme and there was an expectation among claimants and port MPs that compensation should be for the last 20 years of service rather than five. Therefore, the focus would be different to that of the 2000 scheme. The Department said they would run through this option using the computer model.

The Department recommended that the Government consult publicly in the autumn and rerun the scheme for existing claimants only. The Department also said they suspected that some claims had failed incorrectly under the 2000 scheme, but that failed claimants would be able to apply under the scheme. The Department

[57] In the Department's submission to the Minister, and a later submission dated 16 September 2008, they provided an analysis of each of the options proposed, outlining arguments for and against the options and estimated costs and beneficiaries. This can be found at the end of this Annex.

confirmed that they had completed loading a 10 per cent sample of claims onto the database in early August, but had not yet tested option five using the computer model.

The Department said that the Minister should reconsider the qualifying requirement of two years minimum service after deciding which option to use for the rerun.

On **15 September 2008** the Minister indicated to the Department that he preferred option four, but wanted to wait for the costing of option five before making a decision. The Minister asked the Department which of the two options was the closest to the original purpose of the 2000 scheme.

On **16 September 2008** the Department provided a submission to the Minister with further details of option five. The Department said they had analysed this option using their computer model. Under this option the Department would pay £4,000 for each year of service on Icelandic water vessels during the period of the Cod Wars (defined as 1 January 1973 to 31 December 1976). Only the 200 vessels or so that they now knew fished in Icelandic waters during this period would be accepted as 'Icelandic water vessels'.

The Department said that there was not a large difference in overall costs of the two options (£4.6 million for option four and £5.0 million for option five) but there would be quite a different impact on the four main fishing ports. These were:

Option four would spread additional payments most evenly between the ports. Aberdeen would be the principal gainer, receiving 17 per cent of additional payments (compared with six per cent of claims paid under 2000 scheme). The Department said that they knew that trawlermen from Aberdeen received the lowest payments under the 2000 scheme but a higher percentage of Aberdeen trawlermen must have had lengthy Icelandic service over a period of up to 20 years, interspersed by periods of service on non-Icelandic water vessels. The Department said that trawlermen who worked this pattern of service had been most disadvantaged by the 'breaks rule'.

Option five would direct additional payments more strongly towards Hull and Grimsby. Fleetwood would also benefit, receiving 20 per cent of additional payments (compared with 10 per cent paid under the 2000 scheme). This suggested that Hull, Grimsby and Fleetwood were overwhelmingly the ports from which Icelandic fishing was conducted during the period of the Cod Wars, and that Aberdeen must have focused more on Icelandic fishing during the 1960s.

The Department believed that a good case could be made that either option four or five would help the Government move closer to the original purpose of the scheme. Option four would remove the adverse effects of the 'breaks rule', because it would calculate any additional payments due on the basis of aggregate Icelandic service over 20 years. The Department said that this option arguably delivered the fairest outcome, because it reflected the overall situation of trawlermen across their career, as envisaged by the 2000 scheme.

The Department said that option five would link payments tightly to service on Icelandic water vessels during the period of the Cod Wars. They said that arguably the trawlermen fishing in Icelandic waters during this period were the ones most

affected by the loss of those fishing rights, so that in this respect option five could be said to be the closest to the original purpose of the 2009 scheme. However, this option would completely change the basis of the scheme and disappoint many claimants, who would be expecting compensation to be related to the last 20 years of their service, rather than just the period of the Cod Wars.

The Department said they were discussing appropriate legislative cover for the 2009 scheme with HM Treasury and that this issue must be resolved before the rerun announcement was made.

Regarding failed claims, the Department said they had conducted a sample of 229 failed claims using their computer model. This suggested that between 5 per cent and 30 per cent of failed claims under the 2000 scheme should have been successful. The Department proposed allowing increasing payments for failed claims from £2 million to £3 million.[58]

On **26 September 2008** the Minister confirmed to the Department that he wanted to proceed in accordance with option four and meet port MPs as soon as possible.

October 2008

On **7 October 2008** the Department provided a further submission to the Minister. They said that before finalising a way forward, there were a number of additional issues to consider. Most important and urgent was the need to find legislative cover for the payments to be made under the 2009 scheme. The other issues were: whether to consult; the definition of qualifying service; whether to pay interest on payments; and the position of the Thessalonian.[59]

In respect of these additional issues the Department made the following recommendations:

Legislative cover

The option of a specific Bill should be pursued with the appropriate committee as a matter of urgency. The Department said they had been working in recent months to establish the legal position of any scheme rerun. They also set out alternative legislative options to allow further payments to be made to trawlermen.

Consultation

The Department said they felt strongly that a consultation should take place, given the criticisms of the Ombudsman, PAC and the National Audit Office. However, a shortened consultation period of eight weeks was suggested because: the 2009 scheme was not completely new; it would be a limited rerun; claimants had been waiting a long time for the issue to be resolved; various actions could be taken to make the consultation process run as quickly as possible; and the issues were widely known. The Department said they should be able to establish a team by March 2009, and make payments by early 2010.

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[58] The Department subsequently concluded that the level of mistakenly failed claims under the 2000 scheme had been below five per cent and that it would be sufficient to consider these under the 2009 scheme.

[59] The Thessalonian was a ship not originally included as an eligible vessel under the 2000 scheme. It appeared that this ship had been excluded from the list in error.

Qualifying period

Under the 2000 scheme, claims were only successful if the applicant was able to show that they had two years of **continuous** service on Icelandic water vessels (as defined by 2000 scheme rules, including the provisions for breaks) ending on or after 1 January 1974 (on the basis that if they had left the industry before that date, they had not been adversely affected by the Cod Wars). Counsel's advice was that the Department should consider whether it was appropriate to retain the existing requirement for two years of continuous service. An alternative might be to move to an entry test which used aggregate service in some way. The Department said they had considered this point and believed that it would make sense to change the continuous service requirement. They recommended that the qualifying test for the rerun be amended to require successful claimants to have had at least two years of aggregate service on Icelandic water vessels during the period of the Cod Wars. They said there was, first, an obvious inconsistency in stating that they would now make additional payments on the basis of aggregate Icelandic service – implicitly accepting that the 'breaks rule' created inconsistencies and unfairness – and then retain the existing continuous service entry test, which relied to a large extent on provisions relating to the treatment of breaks. In addition, the Department said that they had looked at the cases of the five individuals who had complained to the Ombudsman, and on whose cases her conclusions had been formed. They believed that if the existing continuous service requirement were to be retained, only three of the five claimants would receive additional payments.

Therefore, the Department proposed moving to a qualifying test which would require successful claimants to have at least two years of aggregate service on Icelandic water vessels during the period of the Cod Wars (deemed to be from 1 January 1973 to 31 December 1976). They said this would retain the general sense of the current test – two years of service – while neatly tying any additional payments to aggregate service during the time of the Cod Wars. This should ensure that four out of five of those claimants who had complained to the Ombudsman received additional payments.

The Department's computer model showed that the total cost of additional payments under the rerun with these amendments would remain unchanged at £4.6 million.

Interest

9. The Department recommended that interest be added to payments made under the 2009 scheme. (No recommendation on the level of interest was actually made in the submission. The figure of eight per cent was mentioned as having been used under the 1993 ex gratia scheme.)

The Thessalonian

The Department recommended that one vessel, the Thessalonian, be added to the vessels list for the purpose of the rerun. The Department said that due to an administrative error, this boat was missed from the list in the 2000 scheme.

On **8 October 2008** the Minister advised the Department that he agreed to most of the suggestions put forward. The Minister agreed to the change to the qualifying test

and to include the Thessalonian. The Minister wished to discuss interest payments further.

On **16 October 2008** the Permanent Secretary wrote to the Ombudsman with the latest position on the 2009 scheme. He said that the Department had been making good progress and were close to an announcement about the way forward. He advised the Ombudsman of the decisions reached to date, namely on the consultation process, the qualifying test, the Thessalonian and on legislative cover.

December 2008

On **11 December 2008** the Permanent Secretary wrote again to the Ombudsman. He advised that Ministers would be announcing a new trawlermen scheme that day, which would be run along the lines set out in his letter of 16 October 2008 with a consultation document issued early in the new year. Similar letters were sent from the Minister to port MPs Dame Anne Begg (Dame Anne), Rt Hon Alan Johnson (Mr Johnson), Mr Mitchell, Ms McIsaac, Rt Hon Malcolm Bruce (Mr Bruce), Mrs Humble and Mr Doran, attaching copies of the Government's statement to Parliament and the press release.

Also on **11 December 2008** a meeting was held between the Minister, the Department and port MPs, Ms McIsaac, Mr Doran, Mr Bruce and Sir Robert Smith.

The Department have said that at this meeting they informed the MPs of their initial proposals to rerun the scheme, talked them through the aggregate service approach in detail, told them the results of the research they had conducted, and explained how fishing passports could be used as evidence. The Department said that they brought an example of a fishing passport to the meeting that showed start and end dates of voyages. The Department added that they had confirmed that they would be paying the same weekly rate as under the 2000 scheme (£19.23)and that this would effectively pay at a lower rate than the 2000 scheme, as breaks would not be included under the new scheme.

The Department's notes from this meeting recorded:

- The Minister said that the Ombudsman had criticised the 'breaks rule'. They would run a scheme with no 'breaks rule'.
- The Minister said that the cost would be £10 million[60] and 1,000 people would benefit.
- The port MPs welcomed the 2009 scheme.
- Mr Doran noted concerns about the application form and wanted these to be simple. The Department assured port MPs that the form would be as simple as possible.

That same day Mr Mitchell wrote to the Minister. Mr Mitchell said that he did not think that the decision to require two years of Cod Wars service was right or reasonable because:

[60] The Department said it was always their line that the scheme cost was '*up to £10 million*'. The press release that was sent to port MPs on the same day stated that the expected cost would be '*less than £10 million*'.

- It was an entirely new condition, not in the 2000 scheme, and therefore, wrong to impose now on only one section of applicants.
- Two years of aggregated service was being demanded but breaks of 12 weeks or more of all kinds would be more common in that period as the industry was running down.
- The change looked mean after a generous gesture.

Mr Mitchell asked the Minister to clarify what was meant by Cod Wars as there had been three, and possibly four, of these.

2009

January 2009

On **13 January 2009** the Minister replied to Mr Mitchell's letter of 11 December 2008. The Minister said that the decision to change the qualifying test stemmed from the desire to address the Ombudsman's concerns about the 'breaks rule', and to make the new scheme legally robust. It had nothing to do with a lack of generosity and did not change the projected costs of the scheme.

The Minister said that the Ombudsman found that some trawlermen had received smaller payments than expected (or none at all) because of the 'breaks rule'. They had, therefore, decided to remove the 'breaks rule' and make additional payment to claimants on the basis of their aggregate service on Icelandic water vessels. There would be an obvious inconsistency in making additional payments on the basis of aggregate service and then retaining the existing continuous service test, which relied to a large extent on provisions relating to the treatment of breaks.

Regarding the timing of the four year period, the proposal was that successful claimants should have at least two years of aggregate service on Icelandic water vessels during the period of the Cod Wars (which they were defining as the four years from 1 January 1973 to 31 December 1976). However, if someone left the industry slightly earlier, for example in December 1974, then they would calculate the aggregate service over the last four years of service (that is, in this case, December 1970 to December 1974). This period (1973 to 1976) covered the extension of the fishing limits to the first 50 miles and then 200 miles. The Minister said it struck him as completely reasonable to require successful claimants to have served for half of this period on Icelandic water vessels and would remove the unfairness concerned with the 'breaks rule'.

Mr Mitchell responded on **27 January 2009** and said that the Minister's comments about service during the Cod Wars looked entirely acceptable in the way it had been defined since it would cover both the 50 mile extension war and the 200 mile. Mr Mitchell said that his earlier comments therefore became irrelevant.

Mr Mitchell went on to say that the period of the Cod Wars omitted the period up to 1979. Mr Mitchell said that although this was not a period of the Cod Wars, it was in the original definition and it would be wrong to change it at this stage.

The Minister responded to Mr Mitchell on 23 February 2009, replying to his letters of 27 and 28 January, and enclosing the consultation document setting out the proposals in more detail.

The Minister said that they needed to be careful to separate the qualifying test from the period for which payments would be made. He said that they were proposing that the qualifying test should be calculated on the basis of service on Icelandic water vessels between 1973 and 1976 – and proposing to calculate, for each trawlerman, whether any additional payments were due to him, after looking at aggregate Icelandic service over his last 20 years of service. The Minister said that there was no intention on their part to disregard service between 1976 and 1979 in determining the period for which payments were made.

The Minister said that he would be happy to meet and talk through the issues during the consultation process.

February 2009

On **23 February 2009** the scheme consultation period commenced. The Department published a consultation document which sought views from interested persons on the scheme rerun. Responses were due within 12 weeks, that is, by 22 May 2009. Within the consultation document, the Department said that all comments would be considered carefully in May and June 2009 and all respondents would be notified of the outcome. The Department proposed to formally launch the scheme in the summer of 2009. Responses could be made in writing or online.

The consultation sought views on three key aspects of the 2009 scheme, in particular:

- the shift to a system based on aggregate service on Icelandic water vessels;
- the amendments to the qualifying rule; and
- the rules surrounding claims under the scheme.

On **24 February 2009** the Department said they intended to advertise the scheme's relaunch the following day in the *Hull Daily Mail*, *The Aberdeen Press and Journal*, *Grimsby Telegraph* and the *Blackpool Gazette*.

April 2009

On **22 April 2009** the Department submitted to the Minister a summary of the consultation responses received to date. They noted that:

- 163 responses had been received and they were two thirds of the way through the consultation process. General responses had been favourable with strong support for the general structure of the new scheme, including the aggregate service approach and their proposals on the claims process and publicity.
- 75 per cent of respondents agreed with the proposal to calculate payments on the basis of aggregate Icelandic service.
- 70 per cent of respondents agreed with the proposal that service on Icelandic water vessels should continue to be defined by reference to the list of vessels previously agreed with industry representatives (with the addition of the Thessalonian). Those disagreeing largely thought the existing list was too

generous, and so far no one had suggested adding any specific vessels to the list.

- 65 per cent of respondents supported the proposal to amend the qualifying test so that it ran on the basis of aggregate rather than continuous service. The Department said that the few negative comments received on this point were based on misunderstandings.
- 80 per cent of respondents agreed that six months should be sufficient for people to submit their claims under the 2009 scheme.
- 75 per cent of respondents had no view on how the scheme should be publicised and the application process.
- Only 15 per cent of respondents expressed any view on other issues (interest payments, consolatory payments and the appeals process). The Department considered that the views put forward were general and no one had so far argued that the interest rate should be set higher than the four per cent proposed.

On **24 April 2009** the Minister's office provided an update to the Department. This confirmed that the Minister agreed that the 2009 scheme should probably be limited to previous applicants, however, he had concerns about the possible legal implications of this. The Minister was content for other evidence to be taken into account (in addition to fishing passports) as long as it was reliable and could be applied consistently.

May 2009

On **19 May 2009** Mr Johnson wrote to the Minister. He enclosed a response to the consultation document drawn up by the former chairman of BFA Hull branch. Mr Johnson said that the former chairman's views reflected his own, except that he did not believe that it was reasonable to refuse new applications.

Mr Johnson said that the most important points raised by the former chairman and by Mr Mitchell in Grimsby, with which he agreed, were:

- The requirement to change the original requirement of two years of continuous service on Icelandic water vessels ending on or after 1 January 1974 was wrong. The Ombudsman did not criticise this aspect of the 2009 scheme. Mr Johnson said this had worked well and there was no reason to change it.
- The Department's intention to take the last 20 years of a trawlermen's fishing career to calculate the total number of weeks qualifying for the scheme excludes periods where there was a break in service. Mr Johnson asked why was it not possible for the Department to pay for these periods, or in order to maintain the full integrity of the scheme, take the full 20 years of a man's Icelandic fishing career, excluding the period of breaks.

Mr Johnson said that unless he had misunderstood the proposal, a man who had fished for 40 years but with one break in service for six months in the final 20 years would receive compensation based on 19 and a half years. Mr Johnson said that the men fought long and hard for a scheme that gave them £1,000 for every year of

service, capped at £20,000. There was no reason to dilute this payment through the system that the Department were now proposing. Mr Johnson said he believed this would contradict the Ombudsman's ruling.

On **22 May 2009** the consultation period for the 2009 scheme closed. Upon closure, the Department had received 492 responses; 389 hard copy responses and 103 online responses.[61]

June 2009

On **2 June 2009** Mr Mitchell wrote to the Minister. He said that there was a disagreement between Hull and Grimsby. Hull had argued for no change to the previous qualifying test, which required two years of continuous service. GRAFT considered this to be unacceptable in light of the move to an aggregate service approach, and Mr Mitchell agreed with them.

On **12 June 2009** Mr Mitchell wrote to the Department regarding Icelandic water vessels to be included on the official list. Mr Mitchell said that there were difficulties in demonstrating which vessels fished in Icelandic waters as the records in the form of the Board of Trade log books had been sent or sold to the Maritime Museum in Nova Scotia. Mr Mitchell said that instead of the Department consulting these, the onus was put back on the fisherman to provide evidence in the form of port record books (fishing passports) but that these were inaccurate and in many cases lost or destroyed.

Mr Mitchell criticised the current list of vessels as it included non-Icelandic fishing boats such as fishery research vessels. Mr Mitchell provided a list of boats (the list included the Hector Gull and Atlantic Seal and Ross bird boats such as the Eagle, the Heron, and the Tern) and said that these should be included in the list.

On **25 June 2009** the Department put a submission to the Minister confirming that the consultation period for the 2009 scheme had closed and a number of issues had been raised by the port MPs. The Department recommended that the Minister meet port MPs to discuss. The Department's recommendations were:

Breaks in service

The Department said that the Ombudsman had criticised the 'breaks rule' and found that this had meant that some trawlermen received unfairly low payments. They proposed moving to an aggregate service model under which (subject to meeting the qualifying test) the length of time served on Icelandic water vessels by each trawlerman during the last 20 years of his career would count towards the calculation of compensation payments. Where this approach produced a higher figure than that already paid under the previous schemes (1993 and 2000), the difference would be paid. The Department said that the aggregate service option presented the least risk of successful challenge and took account of the fairness argument and the need to link the level of payments to overall Icelandic service.

[61] Relevant points to note from the consultation responses were that respondents had suggested adding further boats to the vessels list and allowing applications from people who had not claimed previously.

The Department said that some MPs had argued that it would be unreasonable for the Government to exclude time served on non-Icelandic water vessels, time spent pursuing fishing qualifications, or time spent looking after sick family members. The Department said that this approach would pay for all or almost all of every trawlermen's fishing career, between his first and last Icelandic fishing trip. Additional payments would be paid for any break periods that occurred under the 2000 scheme – which would address the Ombudsman's concerns – but this approach would make additional payments to almost all trawlermen, regardless of the amount of time spent on non-Icelandic water vessels. The Department said that the approach would result in additional payments only where aggregate service on Icelandic water vessels was longer than the period in respect of which payment had already been made. They felt that this approach provided a much better fit with their central objective: to compensate people for the loss of the ability to fish in Icelandic waters.

Qualifying test

The Department recommended that the qualifying test be a minimum of two years of aggregate Icelandic service during the period of the Cod Wars, or the last four years of a trawlerman's career. This would address cases that had occurred under the 2000 scheme whereby some trawlermen with long careers at sea had breaks in the last two years of their careers and had therefore received no payments at all. Counsel had advised the Department that any qualifying test should be consistent with the new payment approach. The estimated costs of the 2009 scheme were the same for the new test as the old one. Around 150 people who had been successful under the 2000 scheme would not now qualify. However, around 150 trawlermen who submitted failed claims under the previous scheme (because of the break in service rule) would now qualify under the new test.

New claims

The Department recommended widening the coverage of the scheme beyond that proposed in the consultation document to allow claims to be submitted by anyone who applied under the 1993 ex gratia scheme, the 2000 scheme and anyone that did not apply under either of the previous schemes, but could provide supporting evidence for a claim.

New vessels

The Department recommended that they consider adding 25 additional vessels (nominated by respondents during the consultation process) to the list of Icelandic water vessels, depending on whether they met the 'six tests' criteria used under the 2000 scheme. They should also allow two months for evidence to be given on whether or not any of the 25 nominated boats met the criteria.

The Department also recommended that they should allow eight months for trawlermen to make an application for compensation (adding a further two months to the six month period originally anticipated to permit responses to the call for evidence). No additional payments would be calculated or paid until the end of September (after the vessels list had been finalised through the process described above).

Also on **25 June 2009** the Minister wrote to Mr Johnson following a recent telephone discussion. The Minister said that he would meet with port MPs shortly to talk through the issues. The Minister said it was their intention to launch the 2009 scheme before the summer recess but that this was dependent on reaching an agreement on the way forward.

The Minister said that they wanted to move to a system whereby they calculated the aggregate time served by each trawlerman on Icelandic water vessels during the last 20 years and make additional payments whenever this figure exceeded the payments already made under 2000 schemes. He said that this would direct additional payments to the group of trawlermen that were disadvantaged under the 2000 scheme, namely those that had long Icelandic careers, but received reduced payments or no payment at all as a consequence of the 'breaks rule'.

The Minister said that if the Department were to pay for all break periods, this would result in additional payments to almost all trawlermen regardless of the length of the breaks or whether this time was spent on Icelandic water vessels or in other ways. This would be disproportionately costly and, in the Department's view, inherently unfair when the purpose of the 2009 scheme was to compensate people for the loss of the ability to fish in Icelandic waters.

July 2009

On **2 July 2009** the Minister wrote to Mr Mitchell setting out the way forward before their meeting the following week. This letter was copied to all port MPs.

New claims

The scheme rules would be changed to accept claims from anyone who applied under the 1993 ex gratia scheme and anyone who did not apply under either of the previous schemes. Claims had to be supported by evidence.

New vessels

In response to the consultation, the possible addition of 25 new vessels to the list of Icelandic water vessels would be considered. Ten other vessels had already been rejected under the 'six tests' criteria established from the 2000 scheme. The Department proposed to write to everyone who replied to the consultation exercise asking them to submit, within two months, any further evidence they held supporting the case for adding any of the 25 vessels to the list.

The Department would still keep to the original timetable of launching the 2009 scheme in mid-July, but would allow a total of eight months for people to submit their applications under the scheme. No payments would be calculated or made until October, after the vessels list had been finalised.

Aggregate service approach

The Department wanted to remove the 'breaks rule' altogether and move to a system where they calculated aggregate time served by each trawlermen on Icelandic water vessels during the last 20 years. This approach would direct additional payments of £5 to 10 million to around 1,000 trawlermen who were disadvantaged under the 2000 scheme and who had long Icelandic careers, but received reduced payments or no payments as a consequence of the 'breaks rule'.

The Minister said that if they were to pay for all break periods (as had been suggested) this would result in additional payments to almost all trawlermen regardless of the length of breaks or whether this time was spent on non-Iceland vessels or in other ways. This approach would be costly – it would add another £5 to £10 million to the cost of the scheme – and would be inherently unfair when the underlying purpose of the scheme was to compensate people for the loss of the ability to fish in Icelandic waters. The Minister said that they were convinced that the aggregate model was the way forward and that legal opinion had confirmed the fairness of this approach.

Qualifying period

The Minister said that if the Department only removed the 'breaks rule' from the payment calculation, but not from the qualifying test, that would not only be inconsistent, it would also mean that they were doing nothing to address the unfairness that occurred under the 2000 scheme. That was why they proposed that the previous qualifying test be amended to a test which required two years of aggregate service on Icelandic water vessels during the four years of the Cod Wars, or the last four years of a trawlermen's career if he left the industry before 1976.

The Minister said there may have been some misunderstanding of their motivation for proposing this formula. He said that this was not a device to reduce the costs of the 2009 scheme. The costs were exactly the same whether they used the new qualifying test or the old one. The difference was that the new test would be fairer and consistent and would enable 150 trawlerman who were unfairly excluded from the 2000 scheme to benefit, while excluding a similar number of trawlermen who had already benefited under the previous scheme.

On **6 July 2009** a meeting was held between the Minister, the Department and port MPs.[62] The Department's notes from that meeting stated:

- The Minister summarised the package offered by the Government, as set out in his letter of 2 July 2009.
- Mr Mitchell said that he was content with the approach set out for new claims and new vessels. He asked if the Thessalonian had been added to the list and the Department confirmed that it had.
- Mr Johnson said that he was content that the aggregate service approach should also be applied to the qualifying test. He proposed that the aggregate calculation should not be capped at 20 calendar years. The Department said that this would cost £2.5 million and that they had agreed to accept new claims and look at 25 new vessels, both of which would increase the costs of the scheme.
- The Minister said that they needed to consider whether to direct additional payments to people with long service – who were likely to have received substantial payments in any event – or towards new claimants who had not received any payments so far.

[62] The Department noted that the port MPs present at this meeting were: Dame Anne Begg, Mr Doran, Mrs Humble, Mr Johnson, Ms McIsaac and Mr Mitchell.

- The Minister concluded that the overall package had been agreed and they would aim to launch the 2009 scheme before the recess.

On **13 July 2009** Mr Mitchell wrote to the Minister saying that he had met with GRAFT and like him they were essentially happy with the terms and conditions as set out in the scheme. He said that GRAFT did have one point of reservation about the scheme which he had mentioned earlier. This was that the new rules required two years of aggregate service during the four years of the Cod Wars and that this was a period of change and uncertainty in the fishing industry. There were fewer vessels fishing during that time and trips were difficult to find. Mr Mitchell said that it seemed that the two year hurdle was more difficult to meet and this problem would be eased by making it two years of aggregate service running into the period of the Cod Wars.

The Minister responded on **17 July 2009**. The Minister said that could not accept Mr Mitchell's suggestion for the qualifying test. He said that the proposed calculation was clearly set out in the consultation document and this was welcomed by more than 70 per cent of respondents and was the basis on which they agreed the terms of the scheme at the meeting the previous week. The Minister said it may be helpful to reiterate that the cost of running the scheme with this test was exactly the same as that with the previous qualifying test based on continuous service – so it was not a device to reduce the costs of the scheme, as some had suggested.

On **20 July 2009** a written statement was issued to Parliament to announce the opening of the new scheme. The statement said that compensation would be calculated on aggregate time served by each trawlerman during the last 20 years of his career. Claimants would only be eligible for payments where they met a qualifying test which required two years of aggregate service. The statement confirmed that the Department would accept claims from anyone who applied under the previous scheme or who had not applied under any scheme, provided they submitted good and reliable documentary evidence supporting their claim.

On **31 July 2009** the 2009 scheme was formally launched.

November 2009

On **3 November 2009** Mr Mitchell wrote to the Minister after being contacted by an applicant who had applied under the scheme. The applicant's concerns were that his compensation was to be calculated on a 52-week year with no account taken of holidays, breaks, and so on.[63]

On **24 November 2009** the Department emailed port MPs with an update on the 2009 scheme. The Department said they would be writing to all the people who had made a claim to advise them that they would begin processing applications later that week and that they expected to have processed about 1,500 claims (out of 3,000 received to date) by Christmas.

The Department also said that the Secretary of State would be visiting Hull that week and whilst they would likely announce the first payments under the 2009

[63] The Minister replied to Mr Mitchell on 16 December. The applicant subsequently wrote to the Minister on 5 January 2010 and the Minister replied on 15 January stating that '*a week's service is calculated as seven days served on an Icelandic vessel*'.

scheme. The Department said they would be issuing a press notice about this and publishing it in the four ports.

A letter outlining the above points about the processing of claims was issued to all claimants the following day. The letter included a list of 34 nominated vessels and the Department said that they expected to finalise the list around the middle of December.

On **25 November 2009** the Minister wrote to Mr Mitchell. The Minister said that the Department had requested the log books (located in Newfoundland) on the 34 vessels nominated for addition to the vessel list. The Minister said they were considering the case for each vessel using the relevant criteria and would take into account all other evidence submitted. The Minister said he would write to all port MPs the following month as soon as the vessels list had been finalised.

December 2009
On **23 December 2009** the Department wrote to Mr Mitchell and other port MPs. The Department provided details of the boats that had been accepted to the list of vessels that fished in Icelandic waters. The Department advised that the Atlantic Seal had not been added to the list as they had not found any evidence that this vessel fished in the exclusion zone and that the log books from Newfoundland indicated that it intended to fish regularly in the North Sea.

2010

January 2010
On **19 January 2010** the Minister wrote to Mr Mitchell and other port MPs. The Minister provided an update on the 2009 scheme:

- 19 vessels had been added to the list just before Christmas. These additions were announced the previous week through local newspapers in the ports concerned.
- The Department had been processing claims since the end of November 2009. Where claims had been processed, they had to date sent letters to claimants summarising how their compensation was calculated or why they were not due compensation under the 2009 scheme. They had now decided to make some adjustments to these letters. Going forward, these letters would also set out the first and last recorded dates of service on an Icelandic water vessel and the total number of days spent on Icelandic water vessels in the periods starting and ending on those dates. The Minister said that this should help claimants better understand the decisions they had made.
- When requested, copies of the trawlermen's fishing records would be provided to them and these were always sent when replying to any appeal submitted to the Department. This ensured that claimants always had access to their records and a period of 90 days to decide whether to and how to appeal to the independent adjudicator.

On **26 January 2010** Mr Mitchell wrote to the Minister again about the way in which the Department were calculating the trawlermen's service. Mr Mitchell said that seven days should be service for a ship, not time spent at sea. Mr Mitchell said that a trawlerman would sign on to a ship's log when they began work and did not sign off until they left the ship or a new log book was required. Thus, while onshore between trips, they were still serving and still in the employment of the same firm.

Also in **January 2010** a meeting was held between Mrs Humble, a local councillor and the Department to discuss whether a boat called the David Wilson should be added to the list of qualifying vessels. The local councillor said that this boat fished in Icelandic waters in the 1960s when it was named the Admiral Hardy.

February 2010

On **10 February 2010** a meeting was held between the Minister, the Department and Mr Johnson. The Department's notes from the meeting indicate that the purpose of the meeting was to discuss concerns about the 2009 scheme and the way in which the compensation was being calculated. Specifically, the view that the 2009 scheme was not directing payments to people who had been adversely affected by the 'breaks rule' under the 2000 scheme. These fell into two areas:

1. Some claimants who had met the qualifying test under the 2000 scheme were unable to meet the new qualifying test. This meant that they would not receive payments under the 2009 scheme, even if they had been adversely affected by the 'breaks rule' under the 2000 scheme. In the view of Mr Johnson (and Mr Mitchell) the injustice therefore continued. Mr Johnson said that anyone who passed the previous test should qualify under the scheme.

2. The second concern was the way in which aggregate service was calculated. Mr Johnson said that the only way, under current rules, for anyone to receive the full £20,000 compensation would be to fish at sea every day for 20 years. Mr Johnson believed this to be unreasonable.

The Department said that the previous test used the 'breaks rule' which had been strongly criticised by the Ombudsman. They had, therefore, removed the 'breaks rule' from both the payment calculations and the qualifying test. The 2009 scheme had been carefully constructed after taking internal and external legal advice and after extensive consultation. The Department said it was their view that the scheme was meeting its fundamental objective of directing payments to people who had received substantially reduced amounts under the 2000 scheme as a consequence of the 'breaks rule'. But they accepted that the scheme did not always direct additional payments to people with long service who had already received substantial amounts under the previous scheme.

The Department said that other aspects of the 2009 scheme were generous. For example, they were counting service on every trip made by an Icelandic water vessel, even though many trips were not to Iceland. Also, they were aware that the fishing passports often aggregated several trips into one lengthy trip, which increased the number of days at sea. On balance the Department thought the current calculation was reasonable.

On **12 February 2010** Mr Mitchell wrote to the Minister about his constituent, Mr D. Mr Mitchell said that Mr D had received £8,347 under the previous scheme for fishing from 1970 to 1979. Mr D's career was actually from 1959 but he had been cut off from the earlier period because of a break in service (as it was classified under the previous scheme). Mr D's vessel, the Thessalonian, had now been added to the list and his compensation recalculated, but he had only received an extra £3,716 (£2,664 plus interest and a £200 consolatory payment) as money from the last period had been deducted. Mr Mitchell said that this money had to be treated as given and not taken back from anyone who had not achieved the two years of aggregate service and could not be reduced from those cases that have. Mr Mitchell said that Mr D's case was being assessed on a different basis to conform to the new rules, effectively reducing a payment he had already received.

Mr Mitchell said that a second problem was that Hays (the company contracted to assess applications under the new scheme) appeared to be calculating compensation on the basis of departure and return dates as recorded in the fishing passports. Mr Mitchell said that this assumed that a fisherman was not employed from the minute he landed to the start of his next trip, that he had no entitlement to holidays, sickness or training. Mr Mitchell said all these assumptions were wrong and that such time had to be included in the totality of a trawlerman's employment.

Mr Mitchell said that if this continued he would have to take the matter up again with the Ombudsman because it demonstrated total ignorance of the conditions of employment of fishermen.

On **15 February 2010** Mr Johnson wrote to the Minister following the meeting on 10 February 2010. Mr Johnson said that his main issues about the 2009 scheme were:

- **Eligibility criteria** – Mr Johnson referred to previous letters between the Minister and himself about four of his constituents[64] who had received reduced payments under the 2000 scheme, but who had not had their claims recalculated because they failed to meet the revised eligibility criteria.
- **Aggregate calculations** – Mr Johnson said that in order for a fisherman to qualify for the £1,000 a year for each year of service (which he said was the original intention of the 2009 scheme) he would have to have been at sea for all 52 weeks in a year, which was impossible.

On **16 February 2010**, following concerns raised about the 2009 scheme, the Department sought counsel's advice on three points:

- Whether service on the vessel, the David Wilson (previously named the Admiral Hardy) was service on an Icelandic water vessel.
- Whether the threshold criterion at section 4.3 of the scheme rules[65] (the qualifying test) should be changed.

[64] This included Mr A and Mr B who are complainants in this investigation.

[65] Requiring a trawlerman to have spent an aggregate total of two years on an Icelandic water vessel in either the years 1973 to 1976 or (where the trawlerman left the industry between January 1974 and December 1976) the four years ending on the last day the trawlerman worked on an Icelandic water vessel.

- Whether it was correct, for the purposes of section 5.3 of the scheme (aggregate service) to calculate compensation on the basis that a week comprised seven days, or whether a week should be regarded as comprising five days.

March 2010
On **10 March 2010** after receiving counsel's advice, the Department put a submission to the Minister regarding the issues raised by the port MPs.

The David Wilson
It was counsel's view that the ship the David Wilson should be accepted as an Icelandic water vessel. Counsel said that under the 2009 scheme, the definition of an Icelandic water vessel was wide and a vessel remained an Icelandic water vessel even if at other times it was used for voyages entirely unconnected with Icelandic waters. All service on that vessel counted toward aggregate service. Counsel considered any name change to be immaterial for the purposes of the scheme.

Counsel's advice was for the Department to take sensible, practical steps to identify any similar cases, that is, cases where a vessel already on the list was known by a different name during the 20 years up to 31 December 1979, and add those alternative names to the list. A revised version of the list should be published and give a fair opportunity for any applications to be made before 30 April 2010.

Regarding renamed vessels, the Department recommended adding all of the remaining alternative names of vessels to the list. Letters would be sent to claimants and advertisements placed in the local newspapers as soon as possible. The estimated costs of adding renamed vessels would increase the costs of the 2009 scheme by around £250,000 to £750,000.

Qualifying test
Counsel advised the Department that the new qualifying test was legally defensible and would withstand challenge by judicial review. In counsel's view, the new test was reasonably and sensibly related to the object of the 2009 scheme as identified by the Ombudsman. The fact that the Department consulted extensively in 2009 was also helpful and would make it much more difficult to demonstrate that they had taken an ill-informed decision.

The Department said that lowering the aggregate threshold from the current 50 per cent test (two years of aggregate service out of four) to 40 per cent would increase the costs of the 2009 scheme by up to £1.6 million and only help some (but not all) of Mr Johnson's constituents.

Payments calculation
Counsel and the Department's legal team had advised the Department that there did not appear to be any substance in the point argued by port MPs that a week should be taken as five days instead of seven. Counsel commented that as a matter of ordinary language, a week is a period of seven days and that there was nothing in the context of the 2009 scheme to indicate that a week should be understood as anything other than a period of seven days.

The Department said they had made it clear to counsel that the 2009 scheme effectively meant that anyone paid around £15,000 under the previous schemes would not qualify for an additional payment under the 2009 scheme. Although counsel saw the force of the point made by Mr Johnson, his advice was that there was no good reason for saying that a 'week' meant anything other than seven days.

Mr Johnson's proposal would mean that payments under the 2009 scheme would increase significantly. Payments under the 2009 scheme were currently expected to total around £5.7 million. Amending the rules to provide for a five day week would increase the costs of the scheme to around £12.6 million.

On **15 March 2010** the Minister wrote to Mr Johnson (copied to Mr Mitchell) confirming that the 2009 scheme rules would stand and the renamed vessels would be included.

The Minister said that counsel's advice had been taken, and he could not agree to change either the qualifying test or the payments calculation. The Minister said they designed the scheme carefully to remove the 'breaks rule' as required by the Ombudsman. They consulted extensively in 2009 and agreed the way forward with all port MPs in June 2009. The Minister said that they believed that the 2009 scheme delivered a fair and reasonable outcome for trawlermen, which met the concerns expressed by the Ombudsman, and their legal advice firmly supported this.

The Minister said that the 2009 scheme was generous in many respects. The Department had not only removed the 'breaks rule', they had retained the list of 730 vessels used under the 2000 scheme (even though many of those seldom fished in Icelandic water); they were paying for all trips on these vessels (even though many trips will not have been to Icelandic waters); they added a further 19 vessels to the list before Christmas; and they had agreed to consider new claims from people who did not apply under the previous schemes. The Minister said they had taken a fair and reasonable approach when interpreting the fishing records, and given claimants the benefit of the doubt where boat names were unclear. All of this was in addition to the £60 million paid under the two previous schemes.

In his letter of **22 March 2010** Mr Mitchell said that it was not legitimate for the Department to count days at sea as the basis for compensation. When the aggregate service proposal had been included in the consultation, no one had ever indicated it was to be based only on actual days at sea and not on period of employment. Mr Mitchell said that they did not consent to that.

Mr Mitchell also said that the requirement for two years of service in the Cod Wars was difficult to achieve if only days at sea were counted and when fishing was shrinking and disrupted in that period. Mr Mitchell said that they were happy that a year had been added to the beginning and this increased eligibility, but they could not accept that the result would be that 730 days at sea in four years was necessary. Mr Mitchell referred to two former trawlermen who had been affected;

- One trawlerman started fishing in 1954 and had been paid compensation for the years 1963 to 1977, but had not been paid for earlier due to a break in service under the old rules. He did not qualify under the 2009 scheme.

- Another trawlerman was eligible for compensation as his service on the Thessalonian was now on the list of Icelandic water vessels but he had received inadequate compensation because his fishing passport was incomplete.

On **24 March 2010** the Department released a list of alternative names for boats that had already qualified for the scheme. The announcement asked anyone who believed that a qualifying vessel used any other name not shown on the full list to write to them with the details. The announcement confirmed that claims would be reassessed against the extended list.

10.

On **31 March 2010** Mr Johnson wrote to the Minister. He said that he had raised concerns previously about the problems that would occur as result of changing the qualifying test. He also said that for a trawlermen to qualify for £1,000 per year for every year of service, he would have to have served every single day with no rest time, no breaks, no holidays and no changeovers.

On **31 March 2010** the Minister responded to Mr Johnson saying that he believed the Government's approach remained fair and reasonable and that they should proceed on the basis of the current scheme rules. The Minister said he had discussed this with the previous Minister, who was in agreement.

In a response the same day to Mr Mitchell, the Minister made the following points:

- Mr Mitchell seemed to be reading the Ombudsman's report as requiring the Government to make additional payments to everyone that was affected by the 'breaks rule' under the 2000 scheme, and this was not what she had said. The Ombudsman had recommended that the Government review the 2009 scheme to ensure it met the policy objectives and, depending on the outcome of the review, make additional payments where this was required under the terms of the scheme.
- The Department had devised a scheme which looked at each trawlerman's career on the basis of aggregate Icelandic service (which ensured that payments were linked to the level of service in Icelandic water vessels) and paid the balance (plus interest and a compensatory payment), whenever this method produced a higher payment than that already received. This approach meant that people with long Icelandic careers who received substantially reduced payments under the 2000 scheme should receive additional payments under the new one. They had consulted widely on the scheme in 2009, and the aggregate service approach had generally been welcomed.
- Regarding the calculation of compensation, the Government had taken the view throughout the process that aggregate service should only count as days at sea. A major benefit of this approach was that it used the one source of evidence regarded as reliable (the fishing passports, with departure and return dates for each voyage) and avoided the need to try and find evidence (35 years after the event) about periods when trawlermen were sick, training or working outside the industry.

- The consultation document stated in paragraphs 19, 23 and 24 that 'we would calculate the total number of weeks served on Icelandic vessels by each claimant during the last twenty years of their Icelandic fishing career'; that the aggregate service option 'relates the level of payment more directly to the time actually spent on Icelandic vessels'; that 'no payment would be made for breaks under this option'; and that 'Evidence of service is found in the fishing passport, which set out the vessel name and dates for each fishing trip, throughout each trawlerman's career'. The Minister said that he believed this explanation was clear and did not in any way suggest that they had in mind a system along the lines that Mr Mitchell was proposing. They had described the proposal consistently at all meetings with port MPs and could not recall a single instance when anyone on either side of the table suggested that the 2009 scheme referred in some way to 'blocks of service' on vessels.

April 2010

Mr Mitchell wrote further letters to the Minister (14 April 2010 – two letters and one on 26 April 2010) reiterating that port MPs and the trawlermen had, in his view, been deceived; and that the 2009 scheme was not what had been agreed during the consultation phase.

The Minister responded in letters dated 27 April (two letters) and 30 April 2010. The Minister said that they believed the 2009 scheme met the objectives, addressed the Ombudsman's concerns and ensured that additional compensation was paid to those trawlermen who were treated unfairly under the 2000 scheme. The Minister reiterated that in his view port MPs and the fishing industry had not been deceived and that the proposals on both the qualifying test and aggregate service were set out very clearly in the consultation document.

On **26 April 2010** Mr Mitchell provided the Department with samples of National Insurance records of former trawlermen. Mr Mitchell said that the entire period for which a fisherman was employed should be used in calculating compensation.

On **30 April 2010** applications for compensation under the 2009 scheme closed.

May 2010

On **14 May 2010** Mr Mitchell wrote to the Secretary of State about the 2009 scheme. Mr Mitchell said that there were two problems with the scheme:

1. The 2009 scheme was based on two years of service in the period of the Cod Wars and this was different to the 2000 scheme, which was a longer period. The two years was difficult to achieve in a period when there was great uncertainty in the industry, trips to Iceland were irregular and less frequent, and men were waiting around in hope without being told that they were in fact finished.
2. The 2009 scheme was based on aggregate service in order to allow service before breaks to be added to service after them. While this sounded sensible, no one was told until the scheme began that aggregate service would be counted as days at sea, not days employed. This was unfair as fisherman were employed from the moment they signed on to the log book to when they signed off and that included time on shore before and after trips, holidays and time on training courses.

Mr Johnson also wrote to the Secretary of State on **18 May 2010** associating himself with Mr Mitchell's comments. Mr Johnson added that the substantial failures in the 2009 scheme meant that the very cases which the Ombudsman used as her reference point, and which she specifically said should be addressed by the scheme, would remain unresolved. This was because of the change in the qualifying criteria and the way compensation was calculated, which would require a man to be at sea for 365 days a year in order to qualify for £1,000 per year of service, which was the basis of the 2009 scheme that the Ombudsman sought to protect.

On **28 May 2010** Mr Mitchell wrote to the Ombudsman. Mr Mitchell said that the 2009 scheme based on aggregate service was accepted by both port MPs and by a consultation process, but when the new scheme began to pay out, port MPs discovered two problems:

1. Several people who had been penalised by the 'breaks rule' could not receive compensation under the 2009 scheme because of the qualifying test conditions.
2. The consultation document had not said that service was to be measured exclusively by days at sea. This made it more difficult to put in two years of service in the four years defined as the Cod Wars and reduced the amount owing to others on the aggregate service assessment. Mr Mitchell said that this was wrong in the view of the port MPs and was as unreasonable as defining the employment of miners as hours spent down the pit. Days at sea took no account of time in port when trawlermen were still paid and employed, holidays or time spent getting qualifications or on walkabout, or when vessels were laid up or being repaired. Mr Mitchell said that technically fisherman were employed from the time they signed on the log book to the time they signed off, usually six months later when the log books were changed.

June 2010

On **3 June 2010** the Minister replied to Mr Mitchell and Mr Johnson. The Minister said that he understood that the 2009 scheme had been contentious with some port MPs but he was satisfied that the scheme fully addressed the concerns identified by the Ombudsman and he did not propose to amend the 2009 scheme as suggested.

The Minister said that the 2009 scheme closed to applications on 30 April and they had received around 3,400 applications. Around 2,900 had been processed to date and around £3.7 million had been identified so far for 600 successful claimants. They were now focusing on outstanding claims and a group of around 150 claimants who had not been able to provide fishing passports and on handling appeals.

In responding to Mr Mitchell and Mr Johnson's points, the Minister said:

- The new qualifying test had been chosen for reason of principle. It removed the 'breaks rule' which had been criticised by the Ombudsman and switched to a test based on aggregate service which the Department believed to be a fairer approach.
- He accepted that some individuals who had passed the previous test had been unable to pass the new one, and that some of these individuals might also have received reduced payments under the 2000 scheme because of the 'breaks rule'.

- However, the Ombudsman had not instructed the Government to make additional payments to everyone in this category, as Mr Mitchell and Mr Johnson seemed to believe. Instead she had recommended (in summary) that they review the scheme to ensure it was consistent with the underlying policy intention; review individual cases in line with criteria the Department determined was consistent with the policy intention; and then make additional payments where they were due. That was exactly what the Department had done, following extensive consultation.
- The consultation document had made it clear that the aggregate service approach would only count days at sea.
- In his view the 2009 scheme was the right response to the Ombudsman's findings, and the overall outcome was fair and reasonable.

In **June 2010** the Department issued an announcement regarding the operation and closure of the 2009 scheme. In addition to summarising the number of claims paid under this scheme and previous schemes, the Department provided a summary of the responses to the questions posed in the consultation along with a list of respondents.

August 2010

On **11 August 2010** the Minister wrote to Mr Johnson and other port MPs. The Minister advised that some of their constituents may be contacted by the Department over the next few weeks to inform them that they would be receiving additional payments. This was because officials had identified significant errors in three per cent of cases which had gone to appeal.

The errors involved missing fishing trips, of up to five to ten trips of around 20 days each. This gave a maximum error of around 200 days (amounting to £550). They would be conducting an audit to cover all cases where people failed the qualifying test by up to 280 days, and all cases where claims were rejected because people had already received greater payments under the 2000 scheme (up to a margin of £800). The Department would also check the 600 cases where payments had been made under the 2009 scheme.

The Minister said he would write again with the result of the audit once completed.

On **16 August 2010** Mr Johnson replied to the Minister. Mr Johnson said that he was not surprised by the number of errors identified because the 2009 scheme had been deeply flawed and badly administered.

Mr Johnson said that the fundamental problem the Department faced was that they had based the 2009 scheme on the number of days spent at sea whereas the 2000 scheme accepted that compensation should be based on service as a distant water trawlermen, which included time spent in port between trips as well as holidays, training and all aspects of a trawlerman's occupation.

Mr Johnson said that the problem with the previous 'breaks rule' could have been resolved by inviting people who qualified under the 2000 scheme but whose payments had been adversely affected by the rule to reapply without any alteration in the qualifying criteria. The next step should have been a recalculation with the

'breaks rule' removed so that the time spent fishing prior to that break was included in the calculation in the way the Ombudsman recommended.

On **24 August 2010** the Minister wrote to all port MPs with an update on the 2009 scheme. The Minister noted:

- 3,140 of the 3,400 claims received had been processed.
- The total compensation paid under all schemes was around £60 million.

- Around 90 probate payments were outstanding as claimants had not provided required proof of evidence. The Department were working closely with the Probate Office, London and Aberdeen's Sheriff Court and had written to the affected claimants with advice on how to get probate or what other forms of evidence could be submitted.
- There were around 170 claims outstanding where the applicants had not been able to provide any fishing records or only limited records. The Department had written to many of these applicants several months before to ask that they approach representatives at each port for records, but few had done so. The Department therefore approached the ports and have been told that records have been found for about 90 of these claimants.
- They intended to make payments wherever possible and to use National Insurance records and summary pension records to help assess claims.
- The Department had written to everyone in this group setting out the way forward and asked those whose records had been found to contact their port officials for copies.
- The Department had also asked all claimants to apply to HM Revenue & Customs for their full National Insurance records from 1961 to 1980 and to ask pension provider Aviva for pension statements. To help the claimants they had provided a pro forma to which they just needed to add brief personal details before passing it to HM Revenue & Customs or Aviva.
- There were a number of appeal cases where claimants argued that their records did not cover their whole career, and these had been added to this group as well.

The Minister said that as part of this process, they were asking the assistance of those with direct experience of the industry, including individuals from BFA Hull and GRAFT, to assist with information that would help interpret National Insurance and pension records. The Minister asked each of the port MPs to let his office know if they considered that any other industry representatives would be of assistance.

Also, on **24 August 2010**[66] Mr Mitchell wrote to the Minister with his ongoing concerns about the scheme. These were that:

[66] Mr Mitchell also sent a letter to the Adjudicator for the scheme on 1 September 2010 outlining these concerns.

- Payment on the basis of days at sea was never mentioned in the consultation documents. If it had been, they would have immediately objected. They had repeatedly emphasised that fisherman were employed from the moment they signed on the log book to signing off, usually six months later when the log book was changed.
- The second problem was the decision to change the requirement for service in the Cod Wars. The requirement for two years of days at sea created '*a hurdle which was more difficult to leap*' because service in the period of the Cod Wars was often more intermittent, broken by vessels being laid up, taken out of service or prevented from going by limits set by the Government.
  Mr Mitchell said he was, therefore, grateful that they had eased the problem by looking at claims where the qualifying test failed by up to 280 days. This was sensible and he suggested that the same relaxation in years be applied where fisherman failed to make the requisite total because of a 12 week break.

October 2010

On **14 October 2010** the Minister replied to Mr Mitchell. He said that Mr Mitchell had misunderstood his letter of 14 August. The Minister confirmed that they were not looking to modify the scheme or relax the rules, but were auditing all claims to ensure they had been correctly assessed under the scheme rules.

The Minister said that he had discussed the aggregate service approach for the qualifying test and the payment calculation previously. The Government continued to believe that the scheme delivered the objective of compensating former trawlermen for the loss of their livelihoods following the Cod War treaties of the 1970s and that they had met in full the recommendations made by the Ombudsman in her report.

Options for rerunning the 2000 scheme (the Department's submission to the Minister on 10 and 16 September 2008)

Option	Description	Arguments for	Arguments against	Estimated beneficiaries	Estimated. average payout	Estimated. cost
1	Allow one break of between 12 and 26 weeks, without affecting continuity of service, provided that work may only be done on non-Icelandic water vessels in this break. (Shore-based fishing work would not be permitted.) Compensation to be paid at the rate under existing scheme rules (£19.23 per week) for the additional period.	Addresses injustice identified by the Ombudsman in relation to the pool system. Reduces impact of 'cliff edge' created by original 'breaks rule'.	Requires the Department to ascertain what work was done during the breaks. Claimants' consent would be needed to access National Insurance records. National Insurance records do not conclusively show when and how long a claimant worked for a given employer. Scheme administrators will have difficulties verifying entitlement, a weakness criticised by the National Audit Office. Created new 'cliff edge' for claimants with breaks of more than 26 weeks. Existing 'breaks rule' still applies so arguably 'injustice' is merely moved further back in time. Does not help claimants who were moved by the pool onto shore work. Also does not help those who have spent fairly short periods of time working outside the fishing industry altogether, in the middle of lengthy Icelandic service.	200	£2,980	£500,000

2	As with option one, allow one break of between 12 and 26 weeks, without affecting continuity of service, provided that work may only be done on non-Icelandic water vessels in this break. (Again, as with option one, shore-based fishing work would not be covered). If the break in service meets the above conditions, the claim is reassessed on the basis that continuity in service is deemed (irrespective of whether non-Icelandic work was done during the gap) to be broken by either: (a) the fourth gap in service of 12 weeks or more, reckoned back from final date of service; or (b) the first gap of more than 26 weeks – reckoned back from the existing break (whichever results in the shorter period of continuous service).	Addresses injustice identified by the Ombudsman in relation to the pool system. Reduces impact of 'cliff edge' created by original 'breaks rule'. Avoids reliance on inconclusive National Insurance records, as entitlement is determined purely by the length and frequency of breaks from service on Icelandic water vessels. May reasonably be argued that a claimant who has a large number of gaps of more than 12 weeks is less dependent on the Icelandic industry. Maximum number of four gaps of twelve weeks or more set on basis of evidence that an average claimant had three to four gaps in service of more than 12 weeks without affecting his continuity of service (indicating that the fourth such break was a 'relevant break' under existing scheme rules, that is, one in which other work was done).	Disallowing any gaps of more than 26 weeks that occur prior to the existing break, even if claimant did no work in that time, would be a change from the existing scheme rules. May be seen as unfair in setting a maximum number of gaps of 12 weeks or more, without checking whether work was done outside the Icelandic water trawling industry in each gap. Would help some claimants but not others. Does not help claimants who may have spent fairly short periods of time working outside industry altogether, in middle of lengthy Icelandic service.	200	£2,980	£500,000

	Compensation to be paid at the rate under existing scheme rules (£19.23 per week) for any additional period.					
3	Pay compensation for service before a 'relevant break' (as currently defined), and any earlier relevant breaks; but (a) no compensation for the period covered by any relevant breaks; and (b) all service before the last relevant break to be compensated at half the rate under the existing rule (that is, £9.62 per week); and (c) no compensation for any service more than 20 years before the date at which service ended. Alternatively, any gaps of more than 12 weeks in service in the additional period could be regarded as breaks (irrespective of whether work was done outside the industry).	Diminishes the injustice identified by the Ombudsman in relation to the pool system. More directly links compensation to actual periods of service on Icelandic water vessels, but takes account of the fact that breaks in service, (even breaks of more than 12 weeks) were taken by those who spent a lot of time on Icelandic water vessels. Claimants who worked briefly outside the fishing industry would receive payments for their previous service under this option.	Has the same problems in terms of dependence on National Insurance records as option 1 above (but see alternative mention in first column), Does not distinguish between 'deserving' and 'undeserving' cases. All claimants with any Icelandic service prior to a break will receive additional payments. This would include those who had arguably already received generous payments. But people with later Icelandic service received no additional payments.	1970 (estimate based on all gaps of 12 weeks or more being treated as breaks).	£2,900	£5.3 million

	But payment would then be made for extra periods of Icelandic service, however short.					
4	Calculate total number of weeks of service on Icelandic water vessels in 20 years ending with last day of service (as defined in scheme rules), multiply by weekly compensation rate (£19.23). Disregard any breaks in service, irrespective of length or type of work done.	Greatly reduces the impact of breaks (and the pool system) on the level of payments. Most directly links compensation to actual periods of service on Icelandic water vessels. Only claimants that had 'long' Icelandic service and an existing payment commensurate with 'short' Icelandic service would receive additional payments under this option. No need to check National Insurance records so straightforward to administer.	Disregards even very long breaks from service on Icelandic water vessels (and even if a significant amount of unrelated work is done in such a break). This is also true for option three above. But claimants would not be paid for these breaks and someone with a very long break would be unlikely to receive substantial additional payments under either option.	1,225 Aberdeen 17 per cent Fleetwood 14 per cent Grimsby 39 per cent Hull 30 per cent Other one per cent	£3,770	£4.6 million
5	Calculate additional payment on the basis of service on Icelandic water vessels (shortened list). Payment rate £4,000 per year, calculated over a five-year period of Cod Wars only.			1,290 Aberdeen seven per cent Fleetwood 20 per cent Grimsby 43 per cent Hull 33 per cent Other	£3,830	£5 million

				one per cent		

Annex D

Consultation responses

Listed below are the questions detailed in the consultation paper and the responses the Department received for each. The respondents to the consultation included port MPs, former trawlermen and their families, and campaign groups.

'Q1. Do you agree that any additional payments should be calculated on the basis of aggregate service on Icelandic vessels, during the last twenty years of Icelandic service? If not, please say which system you would prefer, and why this would provide a fairer outcome.'

373 people answered yes to this question. 65 had no view and 54 disagreed to the proposed basis for calculating payments. Some of the responses for a fairer way of calculating compensation were:

- to include North Sea and middle waters vessels;
- to extend payment beyond 20 years of service;
- to make payments based on the whole industry collapsing; and
- to include all trawlermen.

Specific comments from port MPs

Mr Mitchell said that basing payments on aggregate service was a fair and sensible way of changing the conditions and avoiding the very unfair 'cut off' of Iceland service before any break.1 But he said it was not reasonable to then exclude payment for any breaks, such as pursuing qualifications, illness, recovery from injury or other personal problems. Mr Mitchell said that it would also be unfair to exclude relevant breaks where fishermen may have been required as a condition of their employment to go to the North Sea if an Icelandic trip was not available.[2]

Mr Johnson asked why it was not possible for the Department to pay for breaks in service, in order to maintain the full integrity of what they were seeking to do. This was to take the last full 20 years of a man's Icelandic fishing career excluding the period of breaks. Mr Johnson said that unless he misunderstood the proposal, a man who had fished for 40 years but with one break in service of six months in the final 20 years, would received compensation based on nineteen and a half years.

Mr Johnson said that the fisherman had fought long and hard for a scheme that gave them £1,000 for every year of service, capped at £20,000. He said there was no reason to dilute this payment through the system the Department was now proposing.

[1] This refers to the 'breaks rule' under the 2000 scheme.
[2] The 'pool system'.

'Q2. Do you have any views on the method to be used to set the last date[3] of Icelandic service?'

355 people answered no to this question and 49 had no view. 88 respondents answered yes with some making the following comments:

- cut off date should be 31 December 1980;
- cut off date to be 1 January 1973;
- cut off date should be last date fished in Icelandic waters;
- cut off date should be last day of regular service irrespective of start date;
- there should be no cut off date;
- cut off date did not reflect shrinking industry;
- payments should be made for time working ashore and at sea; and
- use the same dates as the 2000 scheme.

Specific comments from port MPs

Mr Mitchell said that the last trip to Iceland may be the best way of defining the end of Icelandic service, but that the Department needed to be aware that the run-down of the industry, which began with the Cod Wars, was a period of great uncertainty when men were being told that their next trip was being delayed, being asked to wait for a trip, sent to the North Sea to fill in the time, and generally not being given any form of dismissal or warning that their jobs were at an end. Gaps between trips became longer but there was no definitive mention of redundancy because they were still effectively Icelandic fishermen.

'Q3. Do you agree that the Government should rely on evidence from the fishing passports when making decisions about payments? If not, please say which other evidence you would prefer and why this would provide a fairer outcome.'

350 people answered yes to this question. 56 had no view and 84 disagreed with using fishing passports, saying that the following evidence should be used:

- National Insurance records;
- Hull Fisherman's Pool records;
- Sworn statements;
- Holiday pay cards.

Specific comments from port MPs

Mr Mitchell said that the Department could not rely exclusively on fishing passports because in Grimsby many were destroyed by vandals and the fire brigade, while others had been lost by relatives, and the passports themselves were often not accurate, being filled in by runners who were not the most literate or best organised or educated of men. Mr Mitchell said that the fishing passports needed to be supplemented by National Insurance records and log books, which were filled in and returned at six-monthly intervals by each vessel. These listed the entire crew and the areas fished.

[3] This was the last date on which the trawlermen served on an Icelandic water vessel, ending no later than 31 December 1979.

'Q4. Do you agree that service on Icelandic waters vessels should continue to be defined by reference to the list of vessels previously agreed with industry representatives (with the addition of the Thessalonian)?'

349 people agreed and 73 had no view. 66 respondents disagreed and gave the following reasons:

- should include North Sea and middle waters vessels;
- may have been more boats fishing from Aberdeen;
- many vessels on the list had never entered Icelandic fishing grounds; and
- there were ships missing from the list.

Specific comments from port MPs

Mr Mitchell agreed that the Thessalonian should be added to the list but so should a small number of other vessels that fished primarily in Faroese water but also did occasional trips to Iceland in the summer.4

'Q5. Do you have any other comments about the basis on which the new scheme will be run?'

342 people had no other comments to make and 62 people expressed no view. 84 respondents had further comments which included:

- should include allowance for sickness;
- compensation should be for total employment;
- compensation should be for days at sea on trawlers;
- all fishing grounds should be covered;
- time spent at nautical college should be included;
- ensure awareness of the scheme and make sure people who can claim do;
- include new claimants;
- payments should be made for walkabout, divorce, death; and
- use the database set up from the 2000 scheme and apply the same rules as the 2000 scheme with the removal of the 12 week rule.

'Q6. Do you agree that the qualifying test should be amended in this way? If not, please say how you believe the test should be framed and why you believe this would provide a fairer outcome?'

279 people answered yes to this question. 108 had no view and 97 disagreed. Of those who disagreed, these were some of their comments:

- use date when territorial issues date first arose;
- should include all work at sea and ashore;
- include all trawlermen no matter their length of service;
- minimum requirement should be two years of continuous service between 13 November 1971 and 31 December 1976;
- should be flexibility in dates;
- there should be no time bar;

[4] Mr Mitchell listed the vessels which he believed should be included on the eligible vessels list.

- use previous scheme dates;
- calculate total years as in redundancy packages, no qualifying test;
- anyone who sailed in waters should be entitled;
- service after 1 January 1974 is all that should be required;
- January 1972 to December 1976 should be used;
- some trawlermen were forced during this time to work in other waters; and
- test should span one year.

Specific comments from port MPs

Mr Mitchell said that he did not agree that the 2009 scheme should require at least two years of aggregate service in the period of the Cod Wars. He said this was a new condition, not present in the 2000 scheme, and it was not legitimate to introduce it now.

Mr Mitchell said it would be more difficult to establish two years of aggregate service in this period than at any other stage in the industry's history. With the start of the Cod Wars, few vessels went to Iceland, the Government required the effort to be restricted so that the fishing vessels could be protected. Icelandic trips were more difficult to get and more and more fishermen were kept hanging around.

Mr Mitchell said that as long as service extended into the Cod Wars, it should count for compensation.

Mr Johnson said that the proposed requirement for two years of aggregate service within the period of the Cod Wars, was wrong. He said it was wrong to change the original requirement of two years of continuous service. He said that the Ombudsman did not criticise this aspect of the 2000 scheme and that it worked perfectly well. It risked opening up another set of complications and he strongly advised the Department to leave this aspect as it was.

'Q7. Do you agree that claims under the scheme should be restricted to those that applied under the 2000 scheme?'

275 respondents agreed and 154 disagreed. 59 people had no view.

Several respondents, including port MPs, said that the 2009 scheme should be open to new applications and that some people did not apply because they knew they would not be eligible under the 2000 scheme due to the 'breaks rule'.

'Q8. Do you agree that six months should be sufficient for people to submit under the new scheme?'

401 respondents agreed and 58 people disagreed. 33 respondents had no view.

Some respondents said that more time should be given, with some people considering that six months was too long.

'Q9. Do you have any comments on the way in which the scheme is to be publicised or on the application process?'

386 people had no comments and 29 people had no view.

75 respondents had further comments to make on this question with some suggesting that the scheme should be advertised nationally and on television and radio.

'Q10. Do you have any comments on these other issues – interest payments, consolatory payments and the appeal process?'

242 respondents had no comments to make and 161 people had no view. 79 people had further comments to make, suggesting that higher interest and higher consolatory payments should be made.

'Q11. Do you have any other comments on issues raised in this consultation papers?'

409 respondents had no further comments about the issues raised and 34 people had no view. 48 respondents raised further points which reiterated issues about qualifying dates, new claims and vessels.

'Q12. Do you have any comments on the draft[5] scheme rules?'

392 people had no comments on the draft scheme rules and 98 respondents had no view. 60 respondents had further comments which reiterated points about qualifying dates and that a trawlerman's reason for leaving the industry should be taken into account.

[5] The consultation papers included a draft of the scheme rules – Annex B.

Annex F

Applicants to the 2009 scheme who would receive ex gratia payments

The Department should make reasonable efforts[1] to make consolatory payments to those former trawlermen under the 2009 scheme where a claim by or on behalf of the trawlerman was made in accordance with the rules of that scheme and that claim was either:

(a) a claim which had not been submitted before under either of the previous compensation schemes where:

(i) any further information requested in respect of the claim was provided in accordance with rule 4.5; and

(ii) rule 4.4 of the scheme did not apply to the claim (because the last working day did not occur before 1 January 1974);

or:

(b) a claim which had been submitted before under either of the previous compensation schemes where-

(i) rule 4.4 of the scheme did not apply to the claim (because the last working day did not occur before 1 January 1974); and

(ii) any additional information requested in respect of the claim under rule 4.5 in relation to the claimant's status as personal representative or executor of a deceased former trawlerman was provided in accordance with rule 4.5 of the 2009 scheme; and

(iii) the amount of compensation paid under the previous compensation schemes to be deducted under rule 5.4 was less than £20,000.

[1] This acknowledges that the Department may be unable to locate some applicants, or that there may be difficulties in respect of probate matters where evidence of the status of recipients of consolatory payments on behalf of deceased former trawlermen is to be provided as under the 2009 scheme rules.

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