RESPONSE TO

YOUR FISHERIES – YOUR SAY

Fisheries Inshore New Zealand Ltd

Deepwater Group Ltd

15 March 2019

INTRODUCTION AND MANDATE

1. On 4 February 2019, the Ministry for Primary Industries (*MPI*)[1] released its consultation "Your fisheries – your say". The matters in that consultation relate to:
   a. The landings and return to the sea policy and practices for the commercial sector;
   b. The offences and penalties for commercial fisheries applying to this policy;
   c. The introduction of agile decision-making practices; and
   d. Sundry changes of a technical nature.
2. While not explicitly stated in this consultation, we have presumed the landings and returns proposals apply only to species in the Quota Management System (*QMS*) and do not in any way apply to non-QMS stocks. If that presumption is not correct, we reserve the right to submit an amended submission. Please advise us immediately on reading this submission if our presumption is not correct. On the basis that the proposals only address QMS fisheries, when we use the terms "fish or catch" we are meaning QMS fish.
3. The matters being consulted on constitute the most significant amendments to New Zealand fisheries management and the QMS since 2001 when the ACE regime commenced, and cost recovery principles were introduced. A landings policy is a core component of a fisheries management regime. The associated offences and penalties settings are the enforcement tools for compliance with that policy and signal the integrity of the management regime. For all these reasons, the matters being considered in this consultation are inter-related and lie at the heart of fisheries management.
4. In addition, fisheries management is a dynamic process with differing environmental conditions leading to changes in abundance without changes in fishing effort and differing economic preferences leading to catch without changes in abundance. This will mean ongoing adjustments will be needed to manage our fisheries consistent with the purpose of the Fisheries Act 1996 (*Act*). Making appropriate adjustments to get the right combination of measures will need collaboration between quota owners, harvesters and MPI (including FNZ).
5. It has been apparent for some time that the landings policy, the enforcement regime and the stock settings need a substantive review. Industry has repeatedly requested that government address this policy and have willingly participated in earlier attempts to gain practical solutions that better achieve the purpose of the Act. We support MPI addressing this issue and seek to be involved in the development of the necessary detail to arrive at a sensible solution for all the inter-related issues.
6. These changes are being considered as we also start a revolution in the level of reporting that is commencing under electronic reporting. This has the possibility, if done well, of overcoming significant information limitations arising from a paper-based regime. We jointly need to ensure that, as part of the transition to a better long-term regime, we provide the right mix of incentives and penalties to get the best possible fisheries management framework and encourage innovation and best practice across the sector.
7. We note the consultation specifically states it does not include consideration of electronic monitoring on vessels which will be addressed at a later date when the substantive landings and return to the sea policy has been determined. The scope and extent of monitoring required for the future should reflect the policy environment and the associated compliance needs. We look forward to discussions on that matter.
8. This submission is presented on behalf of Fisheries Inshore New Zealand and the Deepwater Group Limited. The term "we" is used throughout the submission to denote a joint representation.

Fisheries Inshore NZ

9. Fisheries Inshore New Zealand Ltd is the Sector Representative Entity for inshore finfish, pelagic and tuna fisheries in New Zealand. Its role is to deal with national issues on behalf of the sector and to work directly with, and on behalf of, its quota owners, fishers and affiliated sector organisations.
10. Recent changes to inshore governance have seen Fisheries Inshore take responsibility as the Commercial Stakeholder Organisation (CSO) in FMAs 1, 2, 8 and 9 by establishing the Fisheries Inshore Area 2 Committee and the Fisheries Inshore Northern Committee; in addition, we are also now the CSO for HMS fisheries, operate under an MOU with Southern Inshore Fisheries Management Company Ltd and in partnership with the Federation of Commercial Fishermen. Our key outputs are:
    - developing appropriate policy frameworks, processes and tools to assist the sector to manage inshore, pelagic and tuna fishstocks more effectively
    - providing guidance to minimise fishing interactions with protected species and associated ecosystems
    - working positively with other users of marine space where we carry out our harvesting activities

[1] For clarity and consistency, we use MPI throughout this submission to refer to MPI and Fisheries New Zealand collectively, we make no distinction between the two.

11. Collectively, Fisheries Inshore members own more than 51% of the quota in 192 inshore fishstocks and between 40 and 51% in a further 13 fishstocks (of 239). This equates to about 76% of the sector by value and 84% by volume.

12. Fisheries Inshore has consulted its membership in the preparation of this submission and is presenting a consensus perspective. Fisheries Inshore recognises that some members may have differing views on some points and may present individual submissions. We respect their right to do so.

Deepwater Group Limited

13. Deepwater Group Limited is a non-profit organisation that represents the interests of owners of deepwater quota.

14. Deepwater Group's mandate extends to commercial participants in New Zealand's major deepwater fisheries, including hake, hoki, jack mackerel, ling, orange roughy, oreos, scampi, southern blue whiting and squid. Shareholders of Deepwater Group hold around 90% of the entire deepwater fish quota in New Zealand.

SUMMARY OF SUBMISSION AND RECOMMENDATIONS

15. We provide the following summary of our submission:

    a. Consultation Content and Process

        i. The consultation documents lack the specificity necessary to provide detailed feedback on these important and complex matters;

        ii. Further discussion and policy work will be needed to formulate a sound policy position that addresses these longstanding issues, while also being consistent with the purpose and principles of the Fisheries Act 1996 (Act) and the Crown's obligations to Maori.

    b. Landings and Return to the Sea

        i. We agree with the need to revise the landings and return to the sea provisions in the Act and allied regulations and welcome the opportunity to contribute to this work. However, given the lack of detail, we are unable to assess the impact of the proposals and consequently cannot support any of the options as presented.

        ii. We consider the following principles for a landings and return to the sea policy (and its subsequent implementation) should apply:

            - The policy needs to be consistent with the purpose of the Fisheries Act 1996 (section 8) in that it must provide for the utilisation of fisheries resources while ensuring sustainability
            - The policy must move fisheries management forward in a manner that furthers the agreements in the Deed of Settlement (section 5)
            - Catch must be reported, whether landed or returned to the sea
            - The TAC accounts for all mortalities for the fishstock, including "other sources of fishing-related mortality" (OSFM)
            - The TACC and allowances should include OSFM for that sector (with the exception of theft or poaching which should remain a generic allowance)
            - Fish that are likely to survive can be returned to the sea and not be subject to catch balancing
            - Fish with no or negative economic value can be returned to the sea
            - Where a fish is returned to the sea dead or unlikely to survive, the weight should be estimated and accounted for within the TAC either as a sector-specific allowance for OSFM or be balanced with ACE as appropriate
            - Fish with positive economic value that are dead must be landed and balanced with ACE
            - The principles should apply uniformly to all sectors—commercial, recreational and customary
            - The policy should not result in detrimental marine or terrestrial ecosystem effects

        iii. The introduction of any policy changes needs to be accompanied by a carefully-managed transition in which TACCs and catch balancing provisions (including deemed values) can be reviewed and amended. In the interim the status quo should remain. The over-riding emphasis needs to be directed at getting accurate information to work toward better outcomes.

        iv. Finally, we question why MPI has ignored the recreational sector and focussed solely on commercial fishing. Recreational fishers also discard fish, legally, and rules around landings and returns should apply to both sectors pursuant to agreed principles.

        v. We consider that further engagement is required to establish an appropriate, fully detailed landings and return to the sea policy including an appropriate transition process, based on the above principles. This extends to all aspects of the proposed changes.

c. Offences and Penalties

i. We agree that the existing offences and penalties regime needs to be reviewed and amended; this should extend to offences and penalties beyond those within the ambit of this consultation.

ii. In principle, we agree that infringement offences and fees are an appropriate initiative. However, the details are very dependent on the construct of the landings regime finally implemented and we cannot support this approach in practice until that detail is known.

iii. We recommend that further engagement and consultation are required to develop the details of an appropriate offences and penalties regime.

iv. We do not agree with removing the power for fisheries officers or observers to authorise returns to the sea before the landings and return to the sea provisions are finalised.

d. Agile Decision Making

i. We agree that there is scope for significant innovation in fisheries management processes.

ii. We support the move to develop and implement Harvest Control Rules that are consistent with the relevant provisions of the Act.

iii. We consider there are many other processes where innovative approaches would result in more responsive and more efficient management.

iv. We would like to work alongside MPI and other stakeholders to explore the ability to jointly trial some of those

e. Sundry Technical Changes

i. We support sector-specific estimates of OSFM (but with the exception of theft or poaching which should remain a generic allowance).

ii. We do not support, at this time, changes to expand the power to install equipment to observe fishing without further discussion on monitoring.

iii. In principle we support the removal of redundant provisions but those contemplated for repeal are not provided. We reserve our view.

iv. We consider there are many other unnecessary and inappropriate regulations that hinder the robust management of fisheries and which should be removed for the regulations.

The Consultation

16. Notwithstanding the Ministry's long exposure to these complex and often inter-related issues, we consider that the document and accompanying proposals are better characterised as an initial discussion paper where stakeholders are invited to provide their views, and MPI subsequently develops proposals to be consulted on at a later date. However, the process outlined on page 2 indicates this is the principal consultation and that the Ministry will take the submissions, confirm its approach and develop legislation by the end of this year before implementing decisions in 2020. We do not consider this to be an acceptable process.

17. What constitutes consultation is well-established and the following passage from the Court of Appeal is particularly germane:[2]

> *Implicit in the concept [of consultation] is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses.*

18. Given the importance of the matters being consulted on, we are concerned by the lack of detail and the lack of prior engagement with stakeholders.

19. As will be evident from our submission, the proposals are not definitive, they are at best suggestive and conceptual with no detail or impact statements being presented. Stakeholders are unable to determine from the documents what is actually proposed, what the impacts might be, or how MPI will weigh points covered in submissions. A Regulatory Impact Statement (*RIS*) has also not been provided. While that is understandable given the current proposals are more akin to preliminary thoughts, a RIS will be needed before any proposed legislation. Officials will need much more information and industry will need to provide some of that in order to set out a realistic picture to Ministers.

20. We consider that had MPI discussed these matters with stakeholders more broadly, the public would have been provided with the opportunity to understand the subject matter better and to provide a more informed and useful response. In addition to the *Air New Zealand* case above we also refer you other State Sector guidelines.[3] We do not consider this consultation meets the standards set down by the Courts or the State sector.

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2 *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671, 675.

3 https://www.dia.govt.nz/Engagement-and-consultation

LANDING OR RETURNING FISH TO THE SEA

21. A policy on landings and returns to the sea has been an unresolved issue since the introduction of the fisheries management system and the QMS. It has been the "elephant in the room", particularly for inshore stocks, with concerns expressed since the setting of TACs from 1983. We agree that improvements can and should be made.

22. In the inshore finfish sector, the introduction of the QMS was not without problems. The introduction of species into the QMS was poorly handled with catch limits often based on landings (not catches) and with some catch limits reduced without due consideration of the consequences. This was exacerbated by the lack of subsequent management to correct the imbalance.

23. We mention this primarily to draw attention to the interrelation of the various components of fisheries management that must be considered in order to arrive at a regime that provides the outcomes we all seek. It is not realistic to set rules for landings and returns and expect the system to progress efficiently and effectively without ongoing care and thoughtful intervention. This means establishing Fisheries Plans, implementing appropriate monitoring of the fishstock, and making changes to TACCs and deemed values to reflect the fluctuations in fish biomass. Without all these components working together, changes to the landings and returns policy is simply kicking the can down the road.

24. There have been numerous attempts to resolve some of these issues over the decades. Most recently, the joint MPI/Industry Discards Working Group ran from 2012-15 to address the issue. While agreement was reached on ways to quantify the level of discards, understand the drivers of behaviour and provide for lasting remedies, MPI did not implement that process.

25. It is encouraging to see the matter now being addressed and we remain committed to assisting.

Incentivising Good Practice

26. The consultation paper has been pitched as incentivising good fishing practice by commercial fishers. It appears predicated on an assumption that fishers have not innovated or moved to adopt better fishing practices aimed at improving selectivity of catch. On the contrary, fishers are innovators and significant development has occurred.

Gear changes

27. While there are high profile innovations such as the Precision Seafood Harvesting initiative, many fishers have continued to innovate to achieve more selective, more efficient but often undocumented innovation in harvesting of seafood. While there has been some recognition of the small Hawkes Bay community of fishers as examples of innovators, in reality innovators and adopters of new practices are more widespread than might be expected. Unfortunately, there has been no formal documentation of the shifts and innovations to demonstrate changes but we are progressing work to collect that information.

28. Discussions with net makers indicate there have been significant shifts in trawl net design over the past decade. Netmakers indicate that while acceptance of T90, T45 ("cut on the square") and larger size cod-ends were being considered from 2004 onwards, uptake of different configurations was slow. In 2007, probably 95% of trawl nets manufactured were of the historic regulatory minimum 4-inch diamond pattern. Today only 5% of nets manufactured are of that historic configuration. Most are 5-inch, with T90 and "cut on the square" nets constituting over half the business.

29. These newer net configurations aid the escapement of juvenile and unwanted fish. Trials in Hawkes Bay have demonstrated that when compared to a "standard 4-inch diamond" mesh, the experimental net caught between 55 and 85% fewer juvenile gurnard.[4]

30. In addition, changes have been made to the height and shape of the net to enhance selectivity. Whereas nets have traditionally included a veranda at the top of the net to deter fish swimming over it, more nets are being manufactured without verandas, have scallops or are designed with lower headlines to be more selective. While we would benefit from far more research into fish behaviour, advantage is being made of research into the behaviour of different species in front of a net—some species will swim high, some will dive low, some will break away, some will swim ahead.[5] Nets are being designed with the target species in mind. Many fishers now carry a range of nets and change them to match the target species. Contrary to popular belief, trawling can certainly be quite a selective fishing method.

31. Many fishers have moved to braid rope (*Dyneema* or *Dynice* to use their trade names) for their nets and warps. Using lighter materials has led to cost savings, longer net life, decreased benthic impacts and decreased risk to protected species while not compromising catch quality.

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4 Trials of net modifications aboard the Nancy Glen2 prepared by Oliver Wade for Te Ohu Kaimoana 2013.

5 Novel Escape Panel Trials Nancy Glen 2, prepared by NIWA for Te Ohu Kaimoana.

32. In the setnet sector, fishers have moved to different mesh sizes, net heights and placement of nets to more selectively target their fish.

33. In the longline sector, some fishers have moved from Spanish-weighting systems to integrated weight lines. Wider gear changes have focused on minimising impacts on protected species through industry-developed gear innovations, use of mitigation devices and utilisation of innovative devices developed overseas to determine their applicability in New Zealand.[6]

Activity changes

34. Tow and soak times have reduced to preserve the quality of fish caught. Many fishers have fitted catch sensors to indicate the volume of fish caught and thus limit the amount of fish caught and preserve the quality of catch.

35. More attention is being paid to the level of juveniles captured, with some fishers adopting move-on rules and others actively avoiding such areas. Many fishers have analysed their catch from a spatial perspective and become more selective about where they fish for selected species.

36. In other areas, fishers have applied industry initiated and agreed closures to protect juvenile and spawning grounds, to protect pupping sharks and to provide enhanced opportunities for recreational harvest.

37. Licensed Fish Receivers have introduced graded prices, including zero prices where they have no market for the fish, to disincentivise the catching of small or unmarketable fish. Some have set minimum gear limits before they will contract fishers to catch their fish. Some have assisted fishers to transition to new gear by providing it to them at no cost.

38. In addition to these individual activities or across a small fleet operating into one LFR, there has been more sustained effort where information on the comparative catch of small unwanted fish is shared across the whole fleet. The old maxim “what gets measured, gets managed” has applied resulting in progressive improvements across the fleet through individual adoption of measures that suit the circumstances for that fisher. The far greater possibility of timely provision of key information arising from the coming improvements in reporting offer a key opportunity for significant progress.

Management changes

39. Fishers have been active in managing stocks under pressure such as orange roughy, bluenose and tarakihi, with programmes of shelving ACE, commissioning additional research, developing operational procedures, splitting catch across QMAs and other such initiatives.

40. In the Coromandel scallop fishery, fishers have acted collectively to farm the scallop beds, fishing only beds that contain a high abundance of adult fish, moving on when fishing performance drops to pre-defined levels. This is a management approach the scallop fishery has been pushing to be acknowledged through a formalised fisheries plan such as that recently approved by the Minister in PAU4.

Environmental stewardship

41. In 2005, industry initiated an environmental liaison programme in the deepwater fisheries, which included training crews on how to minimise and manage interactions with protected species and developing vessel-specific mitigation plans.

42. The success of this programme in deepwater fisheries encouraged the inshore sector to publicly commit to implementing vessel-specific risk management plans on all inshore finfish vessels to reduce risks to protected species. With the assistance of MPI and DOC, this initiative is progressing well. Industry continually works with scientists and other stakeholders to lessen its impact on protected species.

43. Around half of New Zealand’s wild-caught seafood (by volume) is now certified as meeting the highest international standard for sustainability, the Marine Stewardship Council Fisheries Standard. This includes catches for hoki, hake, ling, southern blue whiting, orange roughy, albacore tuna and skip-jack tuna. This is an achievement that has been made possible by industry working collaboratively with government and often driving fisheries improvements.

44. We provide this summary of recent practice to illustrate the changes in mindset and practice that have occurred in the seafood industry. Reform to the landings and returns policy should encourage these to progress further, rather than be characterised as the impetus for driving a change that is well underway. As such, very careful thought is required about precisely what change is being suggested, and how that will align and reinforce the current positive initiatives.

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6 https://www.hookpod.com/

https://www.doc.govt.nz/globalassets/documents/conservation/marine-and-coastal/marine-conservation-services/reports/mit2013-01-kellian-line-setter-finalreport.pdf

www.underwaterbaitsetter.com.au/

THE OPTIONS

45. Three options for a landings policy are been presented for consideration from page 10 of the consultation document. These are described by MPI as:
    a. Option 1 – Tighten the rules for returning fish to the sea;
    b. Option 2 – Increase the flexibility around fish being returned to the sea; and
    c. Option 3 – Status quo.

46. We noted earlier the absence of detail about what exactly is proposed in each of the options. That lack of detail leaves us unable to assess the merits or otherwise what is proposed and thus unable to support any specific Option.

47. We consider the principles that underpin a sound landings and returns to the sea policy should be:
    a. The policy needs to be consistent with the purpose of the Fisheries Act 1996 (section 8) in that it must provide for the utilisation of fisheries resources while ensuring sustainability.
    b. The policy must move fisheries management forward in a manner that furthers the agreements in the Deed of Settlement (section 5).
    c. Catch should be reported, whether landed or returned to the sea.
    d. The TAC accounts for all mortalities for the fishstock, including "other sources of fishing-related mortality" (OSFM).
    e. The TACC and sector allowances should include OSFM for that sector (with the exception of theft or poaching which should remain a generic allowance).
    f. Fish that are likely to survive can be returned to the sea and should not be subject to catch balancing.
    g. Fish with no or negative economic value can be returned to the sea.
    h. Where a fish is returned to the sea dead or unlikely to survive, the weight should be estimated and accounted for within the TAC either as a sector-specific allowance for OSFM or be balanced with ACE as appropriate.
    i. Fish with positive economic value must be landed and balanced with ACE.
    j. The principles should apply uniformly to all sectors—commercial, recreational and customary.
    k. The policy should not result in detrimental marine or terrestrial ecosystem effects.

48. The policy needs to be accompanied by a supportive and effective monitoring and compliance regime.

Option 1

49. This Option includes:
    a. The removal of Minimum Legal Size for all commercial finfish;
    b. A review of Schedule 6 so that only fish with "no or negative economic value" are included;
    c. Allowing live fish to be returned to the sea when they have a good chance of survival;
    d. Reporting of all landings and returns;
    e. All landed or Schedule 6 fish would be subject to catch balancing provisions;[7]
    f. The transition to the new regime is a key consideration.

50. In principle, we could support all components of this Option, but in reality, we cannot do so without much more detail about how some vital aspects are to be interpreted. For example:
    a. What is proposed for the TACC of those fisheries that have an MLS that will be removed? Will they be adjusted up based on an estimate of the volume of dead MLS? What will be used as the basis for that estimate? Will this be part of the transition for these fisheries? What role will deemed values play in these fisheries as change occurs?
    b. What is meant by "no or negative economic value"? How is this determined? By whom? Subject to what process? Is it QMA- or intra-QMA-specific? Is it method-specific? …

[7] The document refers to *"covered by ACE"*. We have interpreted this as being subject to catch balancing provisions (ACE and deemed values) rather than a literal interpretation of covered only by ACE.

c. How will it be determined that a live fish has "a good chance of survival"? What process will be required? What level of certainty will be required? What happens when survival is variable, say 80% of individuals will survive, can fish be returned to the sea or not? And if so will that rule uniformly apply? What about 70%? Who will make these determinations? If fishing depth is a determinant, what happens when fishing occurs at various depths in the same event? How do you regulate or monitor "how fish have been handled"? …

d. What's the nature of the transition? What process will be employed? How will information be collected and used to inform the transition? What is the timing of switching to the new regime post-transition? …

e. What is the scope and extent of the monitoring and compliance regime considered appropriate to the effective operations of the policy option? How will that be enacted, enabled and delivered?

51. While these questions demonstrate the range of issues that need consideration and the complexity of the management regime, we are confident that through collaboration workable solutions can be developed.

Consistent with the purpose of the Act

52. As the paragraphs above illustrate, there will be a range of possible interpretations available for what MPI has suggested. We submit that whatever final form they take, the touchstone for arriving at that interpretation must be the purpose of the Act and the Crown's obligations to Maori.

53. Any changes made must provide for "conserving, using, enhancing and developing fisheries resources to enable people to provide for their social, economic and cultural well-being". Consequently, requiring people to land fish that have "no or negative economic value" would run counter to a key principle of the Act. How "no or negative economic value" is interpreted, and the ensuing legislative changes, must be a real construct as it applies to those exercising their right to utilise fisheries resources. It cannot be an artifice built for the convenience of the regulator.

54. Changes must also ensure sustainability, i.e. maintain "the potential of fisheries resources to meet the reasonably foreseeable needs of future generations". Requiring fishers to land fish that will result in economic loss is counter to the principle in the preceding paragraph, and this cannot be remedied by asserting that there is a greater countervailing benefit to sustainability that offsets the inconsistency; the fish in question is dead. In addition, requiring fishers to land such fish, rather than making it available to the marine environment is an inferior sustainability proposition.

55. Similarly, any requirement to kill live fish that have no or negative economic value and bring those fish to shore for disposal on land runs counter to both of the key concepts in the purpose of the Act; it does not provide for utilisation and it does not ensure sustainability. We highlight this to illustrate both our agreement that returning live fish must be allowed, but more importantly, to illustrate that how this is implemented is of paramount importance.

56. We defer to Te Ohu Kaimoana and other submitters on the extent to which the proposals will advance the Crown's obligations to Maori.

Option 2

57. This Option includes:

a. Reviewing and extending the use of Minimum Legal Sizes for commercial finfish;

b. A review of Schedule 6 and its likely extension to those fish that have "lower economic value relative to the other fish caught".

(Although not stated, we assume the other components of Option 1 would also apply to Option 2).

58. We are immediately drawn to the first comment under this Option that appears on the top of page 11. It states that: "Option 2 is intended to maximise the value of the catch through increased flexibility for commercial fishers to return fish to the sea." This seems entirely consistent with the purpose of the Act.

59. We question why MPI would not implement a policy to maximise the value of commercial catch within sustainability limits? Anything less is value-destroying and needs to be justified with reference to other key provisions of the Act, e.g. a greater sustainability gain. No such justification is provided.

60. Consider the following hypothetical. A fisher catches a small fish, it's dead, they know it has no economic value. Retaining the current MLS would allow that fish to be returned to the sea and be recycled into the marine ecosystem. There is both a positive economic outcome, and a better environmental outcome compared to landing that fish and disposing of it on land.

61. An obvious response is that the best outcome is not to catch that fish in the first place. We agree and the earlier section on *Incentivising good practice* illustrates our commitment to that. We question the extent to which the landings and returns proposals provide the right incentive or mechanism to achieve that outcome.

62. Noting that many of the same questions posed above for Option 1 are also relevant here, there is not the required specificity to make an informed comment on Option 2, or even to properly understand what's proposed. For example:
    a. What does "lower economic value relative to the other fish caught" mean? (this is one of the two factors that distinguish Option 1 and 2). Is economic value relative to the other fish caught in that fishing event? Relative to the target species caught? We simply don't know how to interpret this statement.
    b. The second factor that distinguishes Option 1 and 2 is allowing MLS to be applied to new finfish based on "both the biological and economic value of the fish catch". What is meant by the biological value of fish? How is this determined? Through what process? How does this compare to the economic value and how is that determined?
    c. In the very next paragraph of the consultation paper (page 11), the use of MLS is said to be available based on "biological evidence (health of the fish stock)". We question why this would be a relevant factor. If the fish is dead the health of the stock is not affected by either landing that fish or returning it to the sea. If the fish is alive, it should be able to be returned as per Option 1 (where no mention is made to this proposed criterion when discussing return of live fish to the sea).
    d. What's the relationship between those fish that can be returned to the sea based on "lower economic value relative to the other fish caught" and those with MLS based on "both the biological and economic value of the fish catch"?

63. In addition to these fundamental questions, we have associated questions and comments:
    a. Would Option 2 provide the fisher with total discretion as to what she chooses to land, or would that discretion would be constrained at some other level?
    b. What fish would be subject to the catch balancing provisions?
    c. Would a fisher be required to return a sub-MLS fish to the sea, or would they have discretion to land it?
    d. Would the existing species on Schedule 6 remain unless there were clear grounds for their removal?

Option 3

64. We have stated above that we consider that improvements can be made and so do not view the status quo as a viable option; we make no further comment on it.

A complex issue

65. The questions above illustrate that this matter is complex and needs to accommodate a huge variety of circumstances; it is a good example of a "wicked" problem.[8] To add a degree of realism to what has been a policy discussion thus far, we include some hypothetical examples of situations that a policy on landings and returns to the sea may need to accommodate. These are but a sample and demonstrate the need for a wider and more detailed conversation before progressing the matter further.

    a. While targeting other species, a fisher catches a large bag of spiny dogfish, say 10 tonnes. This was unintended and unavoidable. There is only a small market for spiny dogfish as they are difficult to process, not all processors have the appropriate equipment, and there is no local demand for the fish. The LFR cannot use the fish and doesn't want the fish. The meal rendering plant doesn't want spiny dogfish as the tough skins stall the cutters. Does the fisher retain the catch and possibly incur the costs of transferring the waste to a landfill? Does the fisher return the fish to the sea at some later date? Does the fisher need to cover the catch with ACE, irrespective of whether the catch is alive or dead?

    b. A surface long liner catches a marlin while targeting tuna and swordfish. Marlin is a premium fish that is highly valued by recreational sports fishers for their fighting qualities. Under current provisions, the fisher has to return all marlin to the sea, dead or alive – the majority are alive. Will the fisher be required to kill and land the fish to the detriment of the enjoyment of the sports fishing community?

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8 A wicked problem is a problem that is difficult or impossible to solve because of incomplete, contradictory, and changing requirements that are often difficult to recognise. Because of complex interdependencies, the effort to solve one aspect of a wicked problem may reveal or create other problems.

Simplistic approaches to managing landings and discards in other jurisdictions have provided useful examples of how to fail; New Zealand should learn from these mistakes. For example, see *Fisheries: Implementation and Enforcement of the EU Landing Obligation*, Report of House of Lords EU Energy and Environment Sub-committee. 8 February 2019. https://publications.parliament.uk/pa/ld201719/ldselect/ldeucom/276/27602.htm

c. A trawler accidentally passes through a large patch of Giant Spider Crab. Several tonnes are pulled on board – the crabs are damaged with legs missing and broken but are alive. The crabs will go off before they can be landed. There are few purchasers for deepwater crab and those that there are only want high quality crab for the restaurant trade. What does the factory vessel designed to process finfish do with the crab? Spider crab is considered a premium price seafood if it's in good condition. The deemed value for spider crab is set over 10 times above the price for damaged crab. Is the fisher to land the crab and incur a substantial loss on the catch?

d. A trawl fisher pulls aboard some damaged sea cucumber – they turn to mush under pressure and they can't be avoided. There is no market for those cucumbers. But if you dive for them, handpick them off the bottom and handle them appropriately, they're worth $40 a kilo to the export market. The trawl caught cucumber are worth nothing. The TACCs are set low, but that means the price for ACE is set high by the diver-retrieved catch. Unable to obtain ACE, the trawl fisher has to pay deemed values. But they're set high to reflect the ACE price for hand-gathered cucumbers. How should fish that have different markets and different value be treated when the Act only sees them as one stock?

e. A fisher pulls his longline on board. Sharks, orca and other marine mammals have feasted on the catch and all the fisher is left with are heads or partially consumed fish not fit for human consumption. The new 2017 Fisheries Reporting Regulations require the fisher to land and report the catch and balance the remains with ACE. This new regulation is in direct contrast to the suggestions in the consultation that fish on no economic value can be discarded. Why?

f. A trawl net is hauled on board. Inevitably fish will fall out of the net and particularly when nets with larger meshes are being used to avoid juveniles and increase selectivity; the net is designed to let fish escape. Most are alive, some are dead. Is the fisher expected to retrieve the dead fish and land them? How would he estimate the number and weight of the lost fish; particularly at night. Would the fisher have to balance the lost fish with ACE or are they accounted for as OSFM?

g. On a factory vessel, a meal plant that converts otherwise unwanted fish to meal breaks down. The fish will be reported but does the vessel have to retain and land the fish, or can they be returned to the sea?

h. A fisher berths at a fish processor's dock. New regulations have limited the capacity to return fish to the sea so the fisher has these fish onboard, but the fish processor or Licensed Fish Receiver decides he doesn't want some of the catch, because there is no demand. The LFR is within his rights to refuse to accept the fish—he's not obligated under the Fisheries Act to take them. The fisher has to land his fish to an LFR—what does he do?

66. All of these are situations that could occur in the commercial fishing sector and need to be accommodated with a considered and informed approach. If the policy cannot deal with each of the above circumstances, and others that may be proffered in submissions, in a rational and appropriate manner, it will fail.

A comment on delegation

67. The current legislation requires that decisions on changes to Schedule 6 or to MLS are enacted by regulation. We submit that these are decisions of a detailed operational nature and should not require such an elaborate, long and resource-intensive process.

68. A more nuanced regime needs to adapt to biological, operational and market changes, and as such, while the assessments of each stock needs to be robust, these decisions should be made either by the Minister or delegated further.

Summary

69. While both Options offer a number of principles upon which to base a robust landings policy, the lack of clarity, detail and definition of terms precludes us from being able to endorse either Option. As the Court of Appeal stated, "The party consulted will be … adequately informed so as to be able to make intelligent and useful responses." On the basis of what is included in the paper, we cannot.

70. We submit that this consultation should not be about Option 1, Option 2 or Option 3. It should be aimed at identifying some sound principles, which we consider MPI has done, and considering how to apply those principles in a way that meets the purpose of the Act. This latter consideration is not something that can be done by officials reading submissions, it requires a detailed and thorough understanding of fisheries, a process to make those determinations that's informed by expertise, and a flexible and responsive mechanism to review those decisions as circumstances change.

71. To that end we seek to work with MPI in a constructive and purposeful manner to establish an effective, and lasting landings and return to the sea policy.

Transition to a new regime

72. We see a critical need for an effective transition to any new landings policy. We consider that there should be a carefully managed transition period during which a detailed change programme should be undertaken. We consider that during the transition programme the existing provisions should continue to apply while better information is obtained through directed investigations, research and analysis, e.g. sub-MLS should remain until the scale of it for each fishery is known. Similarly, we would expect all fish currently included on Schedule 6 to remain with that status until information is available to inform a change.

73. Once these are known, any change to the status quo in respect of the catch balancing provisions or the absorption of the allowance for OSFM will require an adjustment to the TAC and TACC for that stock before the new regime commences.

74. The new reporting regulations to be implemented this year will require fishers to report the level of sub-MLS fish returned to the sea. Contrary to what is implied in the paper, this is largely a new requirement for the majority of the fleet. Over time, that information will assist in resetting catch limits should there be changes to the MLS provisions. However, that is but part of an effective transitional programme.

75. We consider it appropriate that MPI implements a comprehensive transition including a substantive review of catch limits. Any transition programme must include a review of the wider catch balancing provisions in the Act and the role of deemed values in fisheries management. The Minister has agreed to a review of the deemed values policy and settings and we view deemed values as an integral component of the landings policy.

76. As alluded to earlier, the reasons for returning fish to the sea are many and varied. Where this is problematic, we need to understand both the drivers and quantum of discarding. Despite overcaught TACCs, high deemed values payments ($47 million in the past decade alone) and observed discarding, 86% of stocks have never had their TACs changed since entering the QMS.[9] Consequently, TACs in many stocks are out of balance with the catches and the fish in the water.

77. This requires a broader and more systematic response that includes several key components:

    a. Agreed problem definition

    b. Clearly articulated and appropriately pragmatic management objectives

    c. Associated stock monitoring where costs are commensurate with value

    d. Responsive decision-making that results in timely change in parallel with changes in stock size

    e. Intelligently set and adjusted deemed values

78. We expect MPI to engage with stakeholders and establish a transitional programme to review sustainability measures that will be appropriate to more transparent and more accountable management of fish stocks.

79. In addition to the fisheries management basics listed above, an initial first step is sizing the level of discarding. The new reporting requirements will assist but are not a solution in themselves; other mechanisms need to be used. For example, deemed values have been used in the past to allow potential discards to be landed and thus quantify the problem. This should be approached as the fisheries management issue that it is, not a compliance issue. As such, a research approach through special permits is also an option that could be used as part of a transition process.

80. We suggest a good starting place to identify stocks that may require TACC reviews, will be those where the TACC has been overcaught or has been near the TACC for many years. Our analysis indicates there are some 121 stocks in that situation with the over-catch levels in some being significant, e.g. KIN7, KIN8 and LIN6.

81. We are willing to work with MPI to establish a programme to review the need for TACC adjustments. We have no doubt that fishers will be willing to assist with the programme.

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[9] We acknowledge that many of these stocks have nominal TACs and that have yet to be proved up. If these development opportunities are removed (i.e. 10 t or less for the purpose of this rough analysis), the number of stocks that have never had TAC changes reduces to 62%. This is still too high.

EFFECTIVE AND FAIR OFFENCES AND PENALTIES

82. We concur with the MPI's view that the current offences and penalties regime needs a major review. The regime was constructed for a deterrent environment where the prospects of detecting an offence were low, so the penalties were consequently high.

83. With high potential costs in fines and forfeitures if found guilty, fishers faced with prosecution defend their position to their maximum ability. While the maximum fines as set out in the Fisheries Act may appear excessive, the courts determine a level of penalty that's proportionate to the severity of the offence. Those penalties are usually lower than the legislated maxima. However, the costs of obtaining a successful prosecution are often disproportionate to the severity of the offence.

84. We agree that the legislated provisions need to be amended to provide for lower level offending to be addressed with infringements and infringement fees. These would enable enforcement measures to be delivered in a timely and cost-effective manner, reduce the propensity for potential offenders to take a costly and aggressive stance when faced with prosecutions, reduce the costs of court processes for all parties and lead to a more responsive and responsible attitude to compliance by fishers.

85. We would recommend MPI use the 2005 New Zealand Law Commission report on infringement offences to inform consideration of the infringements and the setting of infringement fees.[10] The report notes that:

> *There is no clear basis on which infringement penalties are currently set. Instead, it appears that they may have been determined in four different ways:*
>
> - *by reference to a percentage of the maximum penalty; or*
> - *by reference to court-imposed penalties for the relevant offence; or*
> - *by reference to the level of harm or risk involved in the offence; or*
> - *by reference to statutory criteria.*

86. The report concluded that:

> *… infringement penalty setting should be influenced by the sentencing purposes and principles that are appropriate to the particular regime. These purposes should reflect the policy objectives that the legislation creating the infringement offence aims to achieve.*

87. We agree with that recommendation. It is the impact of the unlawful action on the sustainability of a stock or on protected species that should determine the appropriate penalty. We can envisage an offence structure that has a relatively low fee baseline for a first offence where that has little to no impact on the sustainability of a stock or a protected species, but which would be graduated to reflect the frequency of the offence and the impact on sustainability. We would expect the structure to take into account the existing court penalties for offences and the greater prospects of offence detection under a different monitoring regime.

88. We envisage that such a structure should be established in conjunction with the quota-holders whose rights are compromised by offending. We would be most uncomfortable if MPI sought to unilaterally determine an offence structure without such engagement. Given the short time in which we have had to consider the proposals, we are unwilling to indicate how we consider the structure may be based but are willing and available to work with MPI on developing this structure in a more disciplined manner (e.g. a detailed discussion on what offences are deemed criminal and non-criminal, and the appropriate penalties and fees).

89. We cannot agree with the proposal to withdraw the defence where an observer or fishery officer authorises the return of fish to the sea. This matter needs to be considered in light of the final form of the landings and return to the sea policy and cannot be considered in the abstract. We see no reason why this power should be removed at this time.

90. We agree with the proposal to allow the return of fish to the sea to save a protected species. However, like other aspects of this consultation, there is no detail that would allow us to make a more informed comment. For example:
    a. Would this be method-specific? Or event-specific and require prior approval?
    b. If fish were dead would there still be no requirement to balance these fish?
    c. How would they be estimated and reported?
    d. Who makes this decision onboard the vessel? What verification would be required?

[10] The infringement system: a framework for reform. (Study paper 16, NZ Law Commission). ISBN 1-877316-05-9.

STREAMLINING THE DECISION-MAKING PROCESS FOR SETTING CATCH LIMITS

91. Having advocated for the use of Harvest Control Rules (*HCR*) or Evaluated Management Procedures for the past decade, we support further discussion on how these can best be utilised. However, this should not mean that management becomes formulaic. HCRs must still operate in a manner that is consistent with the Act, for example, HCRs should allow the rate of change for the biomass of a stock to vary according to social, cultural and economic factors (section 13(3)) and they may incorporate other Sustainability Measures.

92. We agree the need for development of a standard with protocols for establishing, implementing and evaluating these procedures and rules. The absence of such standards and protocols has hindered past development of such mechanisms and we will willingly contribute to Working Groups to establish such processes.

93. While we can understand the Ministry's preference to institute these mechanisms in commercial only fisheries, we see greater value if they were used for inshore species where TAC reviews are few and infrequent. We consider the shared nature of those fisheries can be accommodated in the process by preserving the relative allocations between stock assessments that set or review the HCRs, while reconsideration of allocation of the TAC would happen as part of the sustainability round that implements any changes arising from the stock assessment. That a stock is shared should not diminish the ability to develop a Harvest Control Rule to review the TAC.

94. We see no particular reason to advocate that HCRs should operate for a fixed term such as five years and then be reviewed. An effective and well-balanced HCR may run for longer periods if there are no concerns as to its effectiveness. It may also run for shorter terms, for example, to interpolate between trawl surveys where the survey results will better inform the performance of the HCR. The term and nature of an HCR needs to be relative to the nature of the stock and the pressure on that stock.

95. However, we submit that MPI has not properly embraced the extent of where innovative and streamlined processes could be implemented to improve decision-making. We have advocated for:

    a. The adoption of precisely this mechanism for BNS and Coromandel scallops (without success);

    b. Delegation of TAC setting to MPI, particularly where no material allocation decisions are involved;

    c. Developing portfolio models that would see a range of species caught in an associated portfolio be reviewed when the target stock is addressed;

    d. Developing processes to review the TACs for low information stocks;

    e. Using abridged sustainability proposals to ease the workload and increase productivity;

    f. Developing strategic, operational and research plans for fisheries and environmental matters which would set out management objectives, issues, targets and actions;

    g. Regular fora that would allow stakeholders and fisheries managers to exchange views and information on stocks and environmental conditions during the course of a fishing year;

    h. More focused working group meetings where papers are provided at least a week in advance so that meetings can focus on issues and the results rather than a presentation of the full science project.

96. We are also concerned that the Ministry has not recognised the detrimental impacts of Cabinet and Ministerial processes on the timing and processing of fisheries matters. We have seen the Ministerial approval processes for in-season TAC adjustments take longer than the scientific analyses on which the reviews are based to the point where the decisions are too late to be of value to the fishers (e.g. FLA3, RCO3). This administrative sclerosis nullifies the purpose and intent of these provisions.

97. We believe there is fertile ground here for significant improvement to fisheries management; both in terms of content and process. We remain willing to work with MPI to identify and review processes where more resource effective streamlined opportunities exist.

TECHNICAL FISHERIES MANAGEMENT CHANGES

98. We agree with the need to make technical fisheries management changes including with regard to sector-specific allowances for OSFM which we have discussed earlier in this submission. However, this should not include theft or poaching which should remain a generic allowance or be considered as additional mortality to be accounted for prior to setting a TAC.

Extension to Include Other Fishing Activities Within Scope of Digital Monitoring

99. We consider it is premature to amend any legislative provisions relating to electronic monitoring. Page 3 of the paper explicitly states that this consultation is not about on-board cameras. As such, MPI should not be advancing proposals that relate to electronic monitoring and should not characterise these as technical fisheries management changes.

100. These are substantive issues and are more appropriately dealt with as part of the subsequent process to consider that matter. The Minister has stated many times that this will be considered after the reforms that are the subject of this consultation process are resolved.

Repeal Redundant Provisions from the Fisheries Act 1983

101. We agree with the proposal to repeal redundant provisions from the Fisheries Act 1983. We consider it would be appropriate in a consultation paper to identify which provisions are proposed for repeal.

102. In addition to the proposed changes, we consider there could be significant benefits to a wider regulatory review.

103. In 2008, the Ministry of Fisheries as it then was, estimated that there were some 9,000 legislative and regulatory provisions impacting on fishing. Some of those date from the era when fisheries were managed with input controls, some where the reason and justification for the provision has been lost, and some are patently unnecessary today.

104. We recommend that MPI construct a programme to review the regulatory provisions and ensure they are appropriate for a forward-looking industry where innovation and the desire to improve fishing activity is not compromised by inappropriate or unnecessary regulatory provisions.