

6 June 2018

SUBMISSION ON DIGITAL MONITORING REGULATIONS

Introduction and mandate

Fisheries Inshore New Zealand Ltd (*Fisheries Inshore*) is the Sector Representative Entity (*SRE*) 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 behalf of, its quota owners, fishers and affiliated sector organisations.

Recent changes to inshore governance have seen Fisheries Inshore take responsibility as the Commercial Stakeholder Organisation (*CSO*) in FMAs 2, 8 and 9 by establishing the Fisheries Inshore Area 2 Committee and the Fisheries Inshore Northern Committee; we are also now the *CSO* for HMS fisheries. Our key outputs are:

- developing appropriate policy frameworks, processes and tools to assist the sector to manage inshore, pelagic and tuna fishstocks more effectively
- minimising fishing interactions with protected species and associated ecosystems
- working positively with other fishers and users of marine space where we carry out our harvesting activities

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.

Deepwater Group Limited

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

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.

The matters of relevance to Deepwater Group have been discussed with FINZ and we endorse and support all components of this submission which is also made on Deepwater Group's behalf.

General comment

We welcome the opportunity to comment on the changes proposed to the *Fisheries (Reporting) Regulations 2017* and the *Fisheries (Geospatial Position Reporting) Regulations 2017*. These remain complex regulations when read with the associated Circulars.

We have not looked at Circulars in detail, only on occasion to clarify or cross-reference selected points. It will be clear from this submission and that of 21 August 2017 that we consider further discussion and changes are required before the Regulations and Circulars come into force.

In most cases, we support the proposed changes. However, what is proposed is expressed in very general terms and there is little information about how these changes would be expressed in the current Regulations. As is evident from several of the amendments proposed, it is not a straightforward process to reflect changes in these Regulations and Circulars. We would welcome the opportunity to continue working with Fisheries New Zealand (*FNZ*) and other relevant components of the Ministry for Primary Industries (*MPI*) to ensure the policy intent is reflected accurately.¹

We also refer *MPI* to our substantive submission of 21 August 2017 (attached) that forms part of this submission and should be read in conjunction with our comments on the May 2018 consultation paper. In that earlier paper we set out a range of matters that needed to be addressed. While we are encouraged to see that *MPI* is now consulting on many of the matters raised, there remain others that require attention; this is particularly so when the Regulations and Circulars are considered as a whole.

¹ While Fisheries New Zealand is consulting on these changes, the matters contained in the consultation paper apply to other functions within *MPI* that sit outside Fisheries New Zealand; primarily Policy and Compliance. For consistency and simplicity, we refer to *MPI* in all cases.

Seemingly inconsequential changes to the law can have significant ramifications if careful thought is not given to the connected nature of the various components of the reporting system. It would be unfortunate if MPI did not take the opportunity to continue to work with those affected to ensure the Regulations were workable and delivered the policy intent. This was a key failing of the previous process and it is in no one's interest to repeat those mistakes.

The principal point that we make in this submission is that a process of written submissions is unlikely to result in an optimal set of Regulations and accompanying Circulars. We suggest that a formal process be commenced, with senior MPI staff, to work through the issues identified.

Contact

To discuss any matters raised herein, please contact:

Dr Jeremy Helson
Chief Executive
jeremy@inshore.co.nz

Protecting commercially-sensitive information

We agree with the intent of the proposal to ensure that valuable intellectual property and commercially-sensitive information is protected. While there are limited circumstances where fisheries management requires information to be provided to a precision of four decimal places, we support collecting information at this level if sufficient protection of those data is provided.

Of the three options proposed by MPI, Option 2 is the most appropriate; however, we consider that additional matters need to be considered as part of implementing this solution.

The proposals seek to protect fishers' information from the permit holder. This protection should apply generally, to all persons and the precision of any information made public should be no greater than that currently set out in the MPI *Guidelines for the Release of Information from Fisheries Databases*. The damage to the fisher can result from any number of parties having access to this sensitive information.

Given the proposed statutory recognition of the commercially-sensitive nature of the information, one would assume that this would form grounds for withholding data under the *Official Information Act 1982 (OIA)*. We see no reason why this would not be made explicit in law. As discussed in various fora, there is a need for more specificity about who will have access to these data, under what circumstances, and the precision that is available.

Given that the same information would be collected under the *Fisheries (Geospatial Position Reporting) Regulations 2017*, similar protection of information collected under those Regulations should also be provided.

We raised this matter with FINZ and received further advice as follows:² "Data release guidelines govern what is and isn't released by Fisheries New Zealand." We do not consider this adequately addresses the issue. MPI has accepted that there is good reason to protect position data obtained through electronic reporting yet are not willing to provide the same protection to the very same data if it's obtained through GPR. We consider this matter requires further consideration at a general level rather than a piecemeal response to a specific set of circumstances.

As part of the above response, MPI also advised that "An operator using a fixed frequency device may choose to have this data sent to themselves or another party in addition to Fisheries New Zealand." We consider this is an appropriate position for MPI to take and will provide several benefits including for safety at sea and cost savings by not requiring duplicate systems. We assume that C13(2) of the *Fisheries (Geospatial Position Reporting Devices) Circular 2018* is intended to allow this. If so, we consider that the fisher or permit holder (as appropriate) should make an application for those data to be shared rather than this being a decision solely made by MPI and the "principal communication provider of a device" (we are also unsure what the addition "of a device" means in this context).

Similar issues will arise regarding any imagery obtained from fishing vessels and we submit that that information should also be subject to protection for privacy reasons and those relating to commercial sensitivity.

Other matters

We do not support Option 1 for the reasons set out in Section 6.1 of the consultation paper. Similarly, we would not support Option 3 as proposed and suggest that a carve-out from R48 would be more appropriate than a defence provision—the generic matters raised above also apply to Option 3.

The highly precise nature of the required reporting raises an associated matter. It is likely that position reports from ER and GPR devices will differ at times. While it is preferable that the two systems are integrated, there is no requirement for this and the necessary hardware and software does not yet exist to ensure this will occur.

Position reports are required to be accurate to within 15m root mean square (RMS) 98% of the time; this raises several questions. First, how will MPI respond when position reports differ? Which will be considered correct?

Second, how is the permit holder to know whether a position report is accurate to within 15m RMS 98% of the time? What does the 98% refer to (positions per trip, per day, per month, per fishing year)? These are vague requirements that a permit holder has no control over and it is unreasonable that a fine not exceeding \$100,000 should apply to such "offences".

Further, the *Fisheries (E-logbook Users Instructions and Codes) Circular 2018* requires fishers to manually correct any automatic position data that is inaccurate by more than 0.001 degrees. First, how can a fisher possibly know the position provided by an electronic system is inaccurate by more than 0.001 degrees and how would they determine the correct position. Non-compliance is an offence.

² Discussions were had with MPI during the consultation period, we raised a number of issues and sought clarification which was received in writing on 5 June 2018.

We therefore have a situation where position data must be accurate in the GPR Circulars to 15m RMS (with 98% of the time) and accurate to 0.001 degrees in the ER Circulars without any buffer, yet it must be corrected manually somehow if outside that precision.

Similar requirements extend to recording time at sea that must be corrected manually if inaccurate by more than 1 minute. Both these issues were raised in our submission of 21 August 2017 at pages 29 and 30.³

One can only assume that MPI continues to think that these are sensible and workable requirements that should be subject to prosecution, or have not read our initial submission. If it is the former we request more information about how these requirements would work in practice and be enforced. If it is the latter, we suggest MPI read our initial submission and address this and the other significant issues raised.

Further information

During discussions with MPI held in the consultation period, we sought clarification on a range of issues. The relevant questions and responses are discussed below.

The issue raised was whether the permit holder would be accountable for the provision of position information to 1 decimal place, not four decimal places. MPI advised that the skipper would have responsibility for the accuracy of the reporting, the permit holder would remain accountable for ensuring data to four decimal places is provided.

This raises questions about liability. Under the Regulations the permit holder remains liable for the timeliness and accuracy of reporting. If, as MPI states, the skipper is responsible for the accuracy of reporting and the permit holder can only access data to 1 decimal place, we submit that it is unreasonable to hold the permit holder legally accountable for matters over which they have little knowledge or control and that are the responsibility of the fisher. Further comments on liability are provided below, we consider these need detailed discussion.

Similar issues about liability arise regarding the precision of data. Given that positions will be obtained from onboard equipment, and forms will be populated automatically, how is a permit holder or skipper to confirm that the electronic reporting platform is providing a report at the necessary degree of precision?

In response, MPI has stated that it has reservations about certifying that platforms meet requirements. MPI has also stated that "the purchaser needs to provide all necessary information to the supplier to ensure they have a reasonable likelihood that they will purchase something that is suitable for their fishing operations and operating environment. The circulars provide all technical data required to support vendors in developing compliant equipment. A supplier declaration would be considered in any prosecution but is not a defence."

Again, we are in a situation where a permit holder or fisher must assume that hardware and software will meet the various technical specifications in the Circulars. Yet they have no way of verifying that and remain liable for any technical failures of the provider. We submit that it is unlikely that suppliers will provide a declaration as doing so would open the possibility of liability and compensation claims.

General concerns about liability

These issues apply to many aspects of digital monitoring because MPI has created a regime whereby information must be completed and reported at vastly reduced intervals (e.g. several times each day rather than monthly). When it becomes an offence not to meet these new reporting timeframes, far more thought is required about who has responsibility for meeting these legal requirements, what control they can reasonably assert over agents, and the appropriateness of vicarious liability.

Ideally, the offence and penalty provisions would be amended to ensure those with control over reporting are liable for breaches. This is not a trivial matter as creating new offences applicable to an entirely new category of participants in the industry needs careful consideration. For example, the consultation paper refers to 15% of commercial fishing being carried out by fishers who are not permit holders, but that category includes a wide range of fishing operations and commercial operations. The term "fisher" is not currently defined in the Act or Regulations and a definition that catches all of the intended situations and none of the unintended ones would be difficult to craft.

This is exacerbated by the continuing uncertainty about the exact nature of the new legal requirements as discussed in this submission. It is essential that any new obligations are unambiguously defined, i.e. who is liable for what and when.

At the very least, this is any example of a point on which consultation should be conducted on the basis of the precise drafting that is proposed, not general principles.

³ For clarity, any references to page numbers in the 21 August 2017 submission refer to the pagination in this submission, not the original. This applies also to internal cross-referencing in the 21 August 2017 document which has been amended.

Amendments to support Electronic Reporting

Issue One: Clarification of definitions

We agree that any positive obligations and associated definitions should be contained in the Regulations, the content of the Circulars should be confined to technical specifications as is set out in R47.

Is it intended that the new definition of “product state” would be different to the current definition of “landed state” in the Regulations? These are currently the same.

The suggested definition of “product state” refers to processing since the fish was caught (rather than the current definition that refers to processing after fish is “taken”). Is there an intention to define “caught”?

We agree that the errors regarding the definition of Landing and the inconsistency with the landing code “QL” should be corrected.

Issue Two: Permit holder definition too wide

We agree that the definition of “permit holder” should be amended as proposed in Option 2.

The consultation paper also notes that the reporting obligations in Part 1 of the Regulations be amended to clarify the permit holder’s requirements to record, complete and provide information to MPI. No further information is provided about what changes MPI has in mind.

We assume the issue relates to making the permit holder liable for offences conducted by the fisher when they are not the same person. This would be inappropriate given there may be no capacity for the permit holder to ensure compliance with the Regulations given the daily reporting requirements.

This is a substantive issue that we consider requires more specific discussion and consultation rather than a vague reference. We do not feel we can comment without understanding better what MPI is referring to and the options that may be available.

Issue Three: Timing of fishing trips

This matter was identified as an error in the initial drafting and we agree that it is more consistent with powers conferred by R47 to require Trip Reports in Regulation.

Issue Four: Other timing requirements impractical

We support the policy intent of the proposed changes to align the timing of the various Reports, ensure provisions are practicable, remove any ambiguity and ensure safety at sea is not compromised.

All Reports—when are Reports completed and provided?

During further discussion with MPI on 29 May 2018, we were informed that a report is not “provided” until it has been Accepted by the Service Delivery Agency (SDA) in reference to the diagram on page 7 of the *Fisheries (E-logbook Technical Specifications) Circular 2018*. The following comments apply to all Reports.

This raises two issues. First, according to the diagram on page 7, a report must be submitted to the SDA for validation before it can be completed. If validation by the SDA rejects a report for any reason, there is no certainty that the report can be transmitted back to the vessel, the corrections made and then re-submitted in a timely fashion (the requirement being eight hours for a Catch Report and one hour for a Disposal Report). The timeframes for providing a report may be even shorter based on MPI’s interpretation. The permit holder has little control of the timing of validation processes by the SDA or the capacity for that report to be transmitted back to the vessel for correction, yet they remain liable for any late provision of a report. We consider this unreasonable.

Second, the *Fisheries (E-logbook Technical Specifications) Circular 2018* sets out eight states that a record or report may take; these include “Completed”, “Accepted”, “Amendment WIP” and “Amendment Completed”.

The Regulations require that various reports be completed and provided within specified timeframes. For the purpose of the Regulations, we seek clarity about the legal status of reports that are either “Amendment WIP” or “Amendment Completed”. These reports have previously been “Completed” as they have been Accepted by the SDA, so one would assume that any future amendments to these reports cannot be found in breach of a requirement to complete a report within a given timeframe. Why then is there such urgency to complete and provide Reports to MPI if they can later be amended by the user? Is there any timeframe by which reports must be Accepted by the SDA as Amendment Completed? If MPI takes the view that the report must move through the Amendment WIP, SDA validation, Amendment Completed, SDA validation and Accepted stages within the timeframe required for completing a report this is unrealistic. Similarly, it would be unrealistic to require that such phases are completed before a Report is considered to be provided.

Under the 2001 Regulations, administrative errors were simply treated as such and rectified. The proposed reporting regime appears to provide very limited time for errors to be corrected and treats these as offences if not remedied within timeframes that are likely to be impossible to meet in some circumstances.

All Reports—specificity vs. generality

We are of the view that high degree of specificity in the Regulations and Circulars cannot accommodate the variety of scenarios that will exist. The legal environment needs to accommodate all the activities that it governs. In some circumstances, the Regulations appear to have been crafted in response to an identified issue or sector. Whilst they may accommodate that sector well, they may not be well suited to the range of relevant activities.

For example, consider two operators using a single vessel under a notified user provision. Two guys set off from Bluff – one is a set-netter the other a cray fisher. The set-netter sets his shark nets under his permit and they set the cray pots under the other permit. They then return and pick up the set-net under the set-netter permit and then relocate and pick up the cray pots. How would this be reported? Do they both use the same Trip Report? If so, it is not apparent that the Trip Report will accept two client numbers, this is specified in the *Fisheries (E-logbook Technical Specifications) Circular 2018* as “must be a valid client number”. If a bird collides with the vessel who provides the NFPSC report?

Another example is provided below regarding Disposal Reports.

Fish catch reports—deploying and retrieving gear

It is proposed to amend R7(3)(a) and (b) to remove the word “after”. It is not clear how this improves the Regulations. We agree that clarification would be useful to ensure fishers are not compromising safety by attempting to enter information in dynamic environments. One could argue that removing “after” is worse as it implies the data cannot be entered *after* the gear has been safely deployed or retrieved.

The drafting in R7 requires reporting based on when “fishing” starts and ends. As the term is not defined in these Regulations, we must rely on the (broad) statutory definition in section 2 of the *Fisheries Act 1996*. This was a matter raised in our substantive submission of 21 August 2017 on pages 17, 18, 23 and 24 in relation to both ER and GPR. Clearly this is not the intent of R7.

This is one area of the consultation paper that provides specificity about the proposed solution. However, the paper is inconsistent as the example provided removes “after” and “the”, whereas it states the intent only to remove the word “after”. While this may seem minor, we raise it here because the addition of “the” has a particularising effect in the same way that a definite article does. The retention of “the” may be used to distinguish the particular fishing event in question from the statutory meaning of fishing.

We suggested in our 21 August 2017 submission that the language be changed from “immediately after fishing starts” to “as soon as practicable after fishing starts”. If this was not palatable to MPI, alternative suggestions that may reflect the policy intent better are to:

- a) specify that the necessary information must be recorded “immediately after the fishing gear has been deployed/retrieved” rather than “fishing” starting or ending; or
- b) specify that the necessary information must be recorded “immediately **before** the fishing gear has been deployed” and “immediately after the fishing gear has been retrieved”.

We consider that variations on these constructions would better meet the policy intent and better accommodate fishing practice and safety at sea.

Fish catch reports—timing for recording information

We support the proposed change of timing for completion of the information in R7(3)(c) from four hours to eight hours.

However, we question whether it will always be possible to provide that information before the close of the day on which the information must be recorded as required by R7(3)(d). In most cases this will be possible, but given the changes proposed to R9 for Processing Reports, R10 for some Disposal Reports, and the exemption provided on 26 March 2018 regarding R8, we suggest that providing Report by the close of the following day would be far preferable.

There has been no specific justification provided that demonstrates any value in MPI receiving these data by the close of the day. At present, MPI receives this information on the 15th of the following month, and it may be 45 days old. What we propose would provide MPI with catch data daily and would be no more than 48 hours old which constitutes a vast improvement on data availability. This additional day would provide little if any impact on MPI’s activities but would ensure that fishers are not under undue pressure to complete Reports and avoid legal action and fines.

There would also be fewer instances of offences caused by technical failures that result in triggering what are currently unclear requirements about how to proceed at sea, prosecutions, and the requirement for fishers to

prove the failure was due to an accident, or a mechanical or technical failure. Also worthy of consideration is the additional pressure that will be placed on crew if they are rushing to meet deadlines, this may result in health and safety risks that are difficult to justify given the lack of any management value in such frequent reporting.

It is also likely that the data provided will be of better quality if more time is available to provide Reports. We suggest that all Reports under R7, 8, 9 and 10 be required to be provided at the close of the following day.

Non-fish species or protected species catch reports—clarity on terminology

We support the proposed change to remove the requirement to provide a Report “each time” a catch occurs.

However, it is not clear when the Report must be provided. The consultation paper states that these must be provided for all captures between fishing starting and ending (page 12). Yet below on the same page it states that Reports must be provided when the Fish Catch Report is due. There needs to be a clear distinction between the content of the Report and the timing for its provision.

We assume you mean “record” or “complete” rather than “provide” in the first reference mentioned above. We submit that “record” is most appropriate but question when Reports must be “completed” and “provided”.

The text in the consultation paper also talks of linking the various reporting requirements to “fishing” which raises the definition issue here that is discussed above for Fish Catch Reports.

Non-fish species or protected species catch reports—clarity on timing

If MPI is going to receive the Reports daily, it should not be necessary to receive more than one Report for that day. A single Report received for the day should be sufficient. The data required to be recorded is comprehensive and will allow captures to be linked to specific fishing activities.

As alluded to above, there will be circumstances where the permit holder is not onboard the vessel so will not be aware of the capture. When would the permit holder be deemed to be aware of the capture?

We also question the timing for providing these Reports. The *Limited Exemption from Compliance with the Fisheries (Reporting) Regulations 2017* dated 26 March 2018, allows trawl vessels over 28 m to report under R8(3) before the close of the day following the day on which the permit holder becomes aware of the catch. We question why MPI now considers this information should be reported at the same time as the Fish Catch Report.

As with other Reports, we consider that the NFPS Report should be provided by the end of the following day.

Non-fish species or protected species catch reports—other reporting requirements fulfilled?

We assume that this reporting would satisfy the requirements in s 16 of the *Marine Mammals Protection Act 1978* and s 63B of the *Wildlife Act 1953*. If that is the case, we suggest that this be made explicit and any legislative amendments required to those Acts be made.

Processing Reports

We support the proposed change to R9 that would ensure there is sufficient time to process catch and provide accurate data.

Disposal Reports—necessity for multiple Reports

We agree that changes to R10 are necessary as the current requirements are unworkable. However, we consider further thought and discussion are required to clarify requirements and how these will be reflected in the Regulations.

As for NFPS Reports above, it is not clear why multiple Reports should be provided at the end of the day. Except for vessels required to provide Processing Reports, all Disposal Reports must record the fish catch event ID that links the catch and disposal events. Providing a single Report of disposals for the previous day should suffice.

A second exemption applies for disposals into a holding container in the water if “... you have several holding containers in close proximity to each other...” It is unclear what this means in practice and why a single Report could not also be provided in all circumstances.

Disposal Reports—when to record disposals

A related matter concerns the requirements on page 39 of the *Fisheries (E-logbook Users Instructions and Codes) Circular 2018*. The Circular requires that the time and date are recorded when the catch to be retained is separated from catch that is going to be disposed of (i.e. sorting is completed). This makes sense for some fishing methods such as trawling (although not always) but no sense for other such as longlining where discarding is a continuous process that may occur over many hours during the haul. If fishers are required to hold discards until the end of the fishing event this would require that fish are unnecessarily killed (a very poor fisheries management outcome) or would make the Sixth Schedule to the Fisheries Act, that allows discarding

under specified circumstances, largely redundant. The Circulars simply make no sense. Given the Fish catch event ID must be recorded in the Disposal Report when question the value of the additional data regarding the date and time of disposal.

The Regulations require that Disposal Reports are completed one hour after the disposal is finished. Unless it is clear when the disposal is deemed to have occurred, this requirement will be difficult to meet or enforce. When is fish used for bait deemed to have been disposed of? When is fish eaten onboard deemed to be disposed of? When are fish taken on a longline and returned to the sea as under MLS deemed to be disposed of?

Such disposal events may take place days after the catch has been brought onboard which raises other timing issues. For example, when non-QMS has been stored in the hold but is later discarded to make room for more valuable QMS fish. In that circumstance, the disposal will occur after the associated Catch Report has been completed and submitted so that disposal cannot be completed and provided at the same time as the Catch Event Report which has been provided days before. It is not possible to comply.

Landing Reports

We support providing more clarity about when Landing Reports must be completed and provided. However, we do not support the proposed changes and can't provide a definitive view on the proposed amendments without seeing the form of the proposed regulatory changes.

The consultation paper sets out three proposals (all of which must be met):

1. Record and complete landing information (except LFR information) as soon as the landing is finished, and;
2. Provide the information referred to above before the end of the day on which it is recorded, and;
3. Provide the LFR information no later than five days after the close of the day on which landing was finished.

We consider that for finfish, the first requirement is probably reasonable in most circumstances. However, we question whether there will be instances when this will not be practicable. Consider a set-netter who removes her vessel from the water at a ramp (Landing Code R), puts her fish in the chiller unit on her ute (Landing Code QL), drives to the Otara market where she sells some fish from the vessel or the ute (Landing Code W), then clears the rest to an LFR (Landing Code LR). Must she complete four different Landing Reports? If so, must those four reports each be provided immediately after the landing?

The second requirement to provide that information before midnight may be impractical in circumstances where landings are undertaken late in the day. Rushing to meet the deadline may curtail checking and verification processes that ensure accurate data are provided. As with other Reports, we consider that this information should be provided by the close of the following day.

Third, we do not support the proposed five-day period for LFR information. While we understand the problem identified on page 12 of the consultation paper, this is the result of creating an offence under R48. It is not clear why MPI need the information referred to in R11(2)(d) within such a short period as fishers must already provide basic landing information immediately after landing is finished. MPI will be receiving several hundred Reports each day, why are these needed and why should providing these late be an offence?

A five-day cut-off is also not feasible. It may be that information is not received from the LFR within five days and it should not be the responsibility of the fisher to pester an LFR to avoid liability. Some LFRs would have to employ someone in a fulltime roll to be continuously providing LFR data every day on a rolling five-day timeframe. In many cases these data are provided in conjunction with LFRRs on the 15th of the following month. It is no sensible answer to this problem to require LFRRs to be provided on a 5-day timeframe too.

We sought comment from LFRs about the feasibility of this requirement and were told: "Can't be done."

Several examples were provided to illustrate why a five-day requirement, for either R11 or R20, is not feasible:

1. Unloads often occur at remote locations that are some distance from processing facilities. To achieve viable volumes for road transport, multiple days landings are held in the chiller at the point of landing and delivery to the factory could be several days after the unload.
2. Fish can be held back from export packing in order to meet certain export markets. This scenario could result in a three-day processing time in the factory, not sufficient time to meet a 5-day timeframe.
3. Large vessels could take three days to unload. On most occasions it is better to leave the fish on the vessel in ice with the hatches closed until it is ready to be processed. For example, Moana recently had 45mt of ORH on a vessel, which was processed over three days. Rather than unloading the entire vessel, taking up all of chiller space, and compromising fish quality. Moana took two trucks per day over three days, leaving the fish on the boat until required for processing.
4. Similarly for inshore vessels, unloads occur over a couple of days. Sometimes Moana will have too much SNA or TAR in the chiller, but they need other species (GUR/JDO/TRE/SCH/SPO/MDO) to sell a mix of product to customers. The mix will help move SNA/TAR to customers, and/or, make minimum weights for chilled export orders.

5. For some vessels, large unloads could take 3-4 days of factory processing; particularly if some of product is frozen.
6. Checking and correcting errors can take several days to ensure accuracy.

As can be seen from the above examples, there are various reasons why LFRs cannot provide information or LFRRs five days after landing; these include logistics, domestic market demand, international export requirements and volume limitations for processing. For a larger LFR like Moana, this would require information to be provided daily.

Further, a fisher may receive the information from the LFR so close to the five-day cut-off that it is not practicable to provide the data with the five-day period.

We would welcome the opportunity to discuss how this matter can be resolved.

Issue Five: Electronic MHRs

We support the proposal to transition to electronic MHRs.

Our only reservation is to ensure that the technology and training is available to allow an orderly migration to electronic reporting. This includes considering the accuracy of data being generated automatically by software and how this will be certified and audited. Also requiring specification are what offences would apply and the liability for any errors that were generated automatically as part of electronic reporting.

Issue Six: Fish not to be recorded on an MHR

We agree that R14(3)(a) should be amended to reflect the stated intent. We would be interested to see the guidance and education material referred to on page 14 of the consultation paper.

When considering what information should be on an MHR, it is necessary to address one specific matter that illustrates the need to ensure that the new regime is consistent with past practice in advance of potential policy and legislative changes regarding landings and discards. MPI has consistently stated that no changes to landings and discards policy are required before implementing ER and GPR, we disagree with that view. The following example is a material change and illustrates that further work on this is needed as a priority, or that the current reporting should reflect past practice until associated amendments can be made.

The *Fisheries (E-logbook Users Instructions and Codes) Circular 2018* introduces a new landing code for predated fish (PF). These are fish damaged by other organisms and unfit for human consumption.

It is proposed that predated fish should now be landed, the actual weight recorded by the LFR, reported on an MHR and balanced with ACE. This poses three issues.

First, it is a policy change whereby predated fish are now double counted. It has been past practice that predated fish were included in the TAC as part of the allowance for other sources of fishing-related mortality as the example below for yellow fin tuna demonstrates.⁴ Six additional examples from MPI documents were provided on page 37 of our 21 August 2017 submission.

Other sources of mortality

The estimated overall incidental mortality rate from observed longline effort is 0.22% of the catch. Discard rates are 0.92% on average from observer data of which approximately 25% are discarded dead (usually because of shark damage).

MPI cannot ignore seven examples from its own papers that confirm the policy of accounting for predation in the allowance for "other sources of mortality". MPI has included predated fish in the TAC already and this change accounts for it a second time by requiring fishers to balance that catch with ACE; it is illogical and unreasonable to double-count this fishing mortality. If the policy intent is to ensure balancing occurs, the tonnages of predated fish must be moved from the "other sources" allowance to the TACC.

Second, good fisheries management should strive to estimate total mortality as accurately as practicable. While only recording actual weights from an LFR may be pragmatic, it necessarily under-estimates total mortality. We are not suggesting that total pre-predation weights should be estimated and balanced, that would produce an even worse fisheries management outcome. But rather, a sensible landings and discards policy would account for predation mortality within the TAC under the other sources allowance. A more sophisticated approach would allocate the other sources allowance among sectors to provide appropriate incentives to reduce mortality and consequently increase available catch for that sector. What is proposed is the worst possible scenario.

Third, predated fish may be iced, rotten or diseased, by definition they are unfit for human consumption. Who would determine whether a fish is fit for human consumption or simply unsaleable? We question the value of

⁴ Ministry for Primary Industries (2015). Fisheries Assessment Plenary, November 2015: Stock Assessments and Stock Status. Compiled by the Fisheries Science Group, Ministry for Primary Industries, Wellington, New Zealand. 535p.

requiring these fish to be stored onboard and landed; particularly if there is a risk of contaminating other fish. What is an LFR to do with fish that are unfit for human consumption? this simply introduces an unnecessary cost. In some circumstances this may also pose concerns around food safety.

Issue Seven: Report retention

We support the proposal to remove R39. Given the proposed change we question why R40, which requires Reports to be produced upon request, is necessary. MPI will have copies of all Reports previously provided so we submit that R40 should be deleted. If this is to be confined to Reports completed but not yet submitted, then the Regulation should be amended to reflect that intent.

Issue Eight: Accidents and Failures

This is a complex matter and requires further discussion. The proposed solution does nothing to increase certainty, reduce costs, or ensure continuity of data collection.

Unless there is a default position that the fisher can keep operating there is no certainty provided. C18 of the *Fisheries (E-logbook Technical Specifications) Circular 2018* requires a business continuity plan (BCP), yet there is no reference to a BCP in the Regulations. There is a legal requirement to have a BCP, yet their existence seems entirely pointless if they cannot be used as a default to ensure data continuity when malfunctions occur.

MPI seeks to justify its position based on questionable rationale, it states that MPI's preferred option:

1. Enables MPI to respond to and manage risk associated with technical failure.
2. Provides certainty to fishers as to what MPI requires.
3. Is consistent with existing operational practices under the Fisheries (Satellite Vessel Monitoring) Regulations 1993.

Managing risk

We submit that the risks associated with technical failure are very minor and can be overcome with a specific procedure to act consistently with a BCP. There is no compelling information to suggest that the risks are so great as to not provide that certainty for fishers.

Providing certainty

We submit that the proposed solution does not provide certainty to fishers. The consultation paper states that the impact on fishers will depend on how MPI addresses an equipment failure and then lists a range of factors that would be considered on a case by case basis.

This also raises questions about timing and efficiency of response. What is a fisher to do in the time between reporting a technical malfunction and receiving instructions from MPI? To properly address the criteria listed could take several days. Fishing is a 24/7 operation, will MPI have 24/7 teams with the capacity to undertake the assessment suggested (e.g. consider any sustainability or other risks associated with the fishery and/or location) and the authority to provide instructions? How will consistency of decisions be maintained?

We also questioned MPI about how any instructions from MPI would be communicated to the vessel. There is no requirement for ER systems to be able to receive written correspondence, it is primarily a system designed for one-way data transfer from the vessel to MPI. Email on vessels is not in widespread use in the fleet so cannot be relied upon as a mechanism for correspondence. Vessels are fitted with VHF but this is not well suited for communicating instructions and is often manned by volunteers who should not be intermediaries inserted into a statutory process.

Consistent with former requirements

The *Fisheries (Satellite Vessel Monitoring) Regulations 1993* simply required fishers to report a malfunction; this is consistent with the current *Fisheries (Reporting) Regulations 2017*. It is illogical to state that the proposed amendments are consistent with the *Fisheries (Satellite Vessel Monitoring) Regulations 1993* which are in fact essentially identical to the current Regulations that MPI is seeking to change.

Further, we note the justification on page 16 states that vessels have never had to stop fishing under the *Fisheries (Satellite Vessel Monitoring) Regulations 1993*. It is disingenuous to justify the new regime for all vessels based on the past performance of a limited subset of the fleet that is materially different from the remaining commercial fishing vessels. The large, primarily deepwater vessels that were subject to the 1993 regime are vastly more capable of operating complex electronic equipment and carrying backup systems in case of failure.

In summary, the proposed changes do not remedy the issue. Upon resolution, further changes may be required to align the offences, penalties and defence provisions in the Regulations.

Substantive issues remain unresolved

The matters raised in our substantive submission of 21 August 2017 in relation to ER and GPR remain unresolved and we refer you to that earlier submission. The proposed changes provide no more certainty than the current Regulations. Without sufficient certainty:

- Issues of liability will almost certainly arise for costs incurred due to technical malfunctions
- Providers are unlikely to indemnify clients or if they do will pass on the costs of insurances
- The source of malfunctions may be difficult to trace given their technical nature and the existence of intermediaries in data transmission (some of which are likely to be non-New Zealand entities)
- Fishers remain liable *unless they can prove* the offence was an accident or technical or mechanical failure and acted reasonably

Fishers will have no way of knowing if the technology they purchase will comply with the myriad of technical requirements specified in the Regulations and Circulars, yet they remain liable for those third-party failures.

We consider that specific and pragmatic solutions to these problems exist, for example, technical providers should submit products to MPI for certification that they are consistent with the technical requirements. Any fisher using a certified product would not be liable for any failure of that product. Or, when a failure does occur, the fisher should notify MPI pursuant to R43 and fish consistent with an approved BCP for the remainder of the trip.

In a related aside, we note the *Fisheries (E-logbook Technical Specifications) Circular 2018* retain some peculiar requirements. For example, C16(1) requires that the e-logbook (which may comprise a number of components) must be designed and put together so that it operates reliably in the particular fishing environment in which it is intended to operate. Similarly, C17 states that the e-logbook must be suitable for use in the particular fishing environment in which it is intended to operate. Any e-logbook, or component thereof, that breaks could be deemed unsuitable for use and/or not reliable and therefore in breach of C16 or 17. In that case, the permit holder commits an offence under R48(f) and is liable for a fine not exceeding \$20,000.

The audience for this Circular would appear to be those providing services in the market given they set out a range of technical specifications. It is unreasonable that permit holders should be liable for the errors of third-party providers when they have no way to ensure those products comply and MPI has declined to certify compliance with the legal requirements.

Issue Nine: Added criteria for Processing Reports

We support the proposal to provide more specificity about the obligation to provide Processing Reports.

Issue Ten: Changes to Offences and Penalties

We support the need to make consequential amendments to offences and penalties. However, as will be apparent from this submission and that of 21 August 2017, we consider that more work is required to ensure the Regulations and Circulars are fit for their purpose, reasonable and sensible before making these adjustments.

Amendments to support Geospatial Position Reporting

Issue One: Ambiguity as to when GPR must be operated

We agree this matter requires amendments to the *Fisheries (Geospatial Position Reporting) Regulations 2017* and the associated Circular. There are two separate issues. First, providing certainty about when a GPR device must be operating. Second, the most appropriate legal instrument to accommodate that requirement.

Clarity about when GPR must be used

MPI has stated that the issue is the ambiguity in the Regulations about when a GPR device must be used. The solution however does not provide guidance on that issue but rather states that the matter will be addressed in the Circular rather than the Regulations. This purports to address the first issue above but is a proposed resolution of the second matter.

Is it MPI's intent that R5 is operative except in the circumstances that are described in C8 of the *Fisheries (Geospatial Position Reporting Devices) Circular 2018*? If so, this raises several concerns.

First, it is only partially correct that the operating requirements are tailored to different kinds of vessels in the Circular, e.g. trailer vessels or tenders. The other primary distinction is whether there is road access and whether the engine is turned on. The extent to which road access is available seems an unusual criterion to distinguish whether a vessel is fishing or not. This also raises questions about the nature of a qualifying mooring, or how far from the termination of the access road a vessel must be to not be deemed fishing.

The requirement regarding the engine being turned off is also be problematic. This would reasonably imply that a GPR device would be powered by the engine (which is unlikely) or that the fisher must manually turn the GPR device on and off if it is powered by battery or solar.

Further over-specificity can be seen in the requirement in C6(2) that makes it an offence not to turn the GPR device off when it is not required to be operating. The Regulations have therefore set up a legal construct where it is an offence not to use a GPR device when required, and also an offence to use a GPR device when it is not required. Yet the certainty about when a device is required to be used remains so uncertain and is so vaguely expressed that the regime cannot be complied with on a consistent basis.

Second, the deeming provision in C8 is expressed in the negative. This attempts to define both fishing and transportation by excluding selected circumstances from those statutory definitions. That leaves open to interpretation what is deemed to be fishing or transportation and we must fall back to the definitions used in section 2 of the *Fisheries Act*. MPI has accepted that these are broader than the intended reach of the Regulation, we submit that it is better to define clearly when a GPR device must be used, rather than to leave extant two very broad definitions and attempt to define these through selected exclusions.

The requirement in R5 is currently to ensure a GPR device is operating while the vessel is used for fishing or transportation. If that requirement is too broad, MPI should use different terminology in R5. An alternative would be to require that GPR devices must be used during a Fishing Trip.

We can see no purpose for creating an offence for using a GPR device when not fishing, this may be desirable in some circumstances and therefore submit that C6(2), (3) and (4) should be deleted.

Where the requirement is best specified

We do not agree with the proposal to specify in the Circular when a GPR device should be used.

It is not appropriate to define specific legal requirements in Circular, these are not "technical operating requirements" as suggested on page 18 of the consultation paper. When there is a positive legal requirement to undertake some action, particularly when the penalty for breach is a fine of up to \$100,000 and \$1,000 for every day the offence continues, that should be set out in the Regulation. As is evident from R6, the Circulars are reserved for the specification of "technical details".

MPI stated it was "best practice" to specify that Trip Reports are required in regulation rather than circular (see page 11 on consultation paper). This is the same issue and we suggest that best practice would also require that the specific legal requirement is set out in Regulations, with the Circulars being reserved for technical details.

Somewhat ironically, MPI dismisses the current state because "*This option is not preferred as it relies on a circular, which is a tertiary legislative instrument, affecting the interpretation of a term defined in regulation (i.e. secondary legislation).*" The solution proposed by MPI is to do exactly that, to allow the circular to specify when GPR devices must be used. As currently drafted in R5, that is when a vessel is used for fishing or transportation, MPI is attempting to provide themselves with the power in the Regulation to do the very thing it suggests should not be done.

We also note that the terms "fishing" and "transportation" are not defined in the Regulations as suggested by MPI in the excerpt above, but rather in the Act itself which makes the proposed action even more objectionable.

Issue Two: Accidents and Failures

We consider this is not adequately addressed and refer you to our comments above regarding electronic reporting and our submission of 21 August 2017.

The current regime sets up several offences that appear nonsensical. For example, it is an offence to fail to provide a GPR Report to MPI within the required timeframe, even though the provision of those data is governed by a contractual arrangement between MPI and the principal communication provider (e.g. see C6 and C11(2)(c)). As a matter of law, the permit holder cannot provide the data directly to MPI so should not be liable for those data reaching MPI within the prescribed timeframe. This and similar issues were raised with MPI during the last consultation process and we question why MPI continue to consider these to be appropriate legal requirements.

We question the need for any such offences (via non-compliance with the Circulars) are necessary given the requirement established by R5.

Issue Three: Offences and Penalties

Regarding offences and penalties, whenever a GPR device is removed from a vessel, the chief executive must be notified and failure to do so results in a fine of up to \$100,000. It is unlikely to be the intent of these Regulations that notification must be given daily if removal of the GPR device is required to avoid theft and/or charge the device. Yet R8 and 9 appear to require just that.

If it is an offence not to operate a GPR device when required to do so, why then should it also be an offence to remove that device from a vessel? It would also be preferable to cross reference the specific provisions that would trigger a breach of R9(1)(a), 9(1)(b) and 9(1)(d), as currently drafted is it unclear what is required.

We support the need to make consequential amendments to offences and penalties. However, as will be apparent from this submission, we consider that more work is required to ensure the Regulations and Circulars are fit for their purpose, reasonable and sensible before making these adjustments.

We refer you also to our more detailed comments in the submission of 21 August 2017.

21 August 2017

INTEGRATED ELECTRONIC MONITORING AND REPORTING SYSTEM MPI CONSULTATION ON DRAFT CIRCULARS

Introduction and mandate

Fisheries Inshore New Zealand Ltd (*Fisheries Inshore*) is the Sector Representative Entity (SRE) 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 behalf of, its quota owners, fishers and affiliated sector organisations.

Recent changes to inshore governance have seen Fisheries Inshore take responsibility as the Commercial Stakeholder Organisation (CSO) in Area 2 by establishing the Fisheries Inshore Area 2 Committee, we are also now the CSO for HMS fisheries. Our key outputs are:

- developing appropriate policy frameworks, processes and tools to assist the sector to manage inshore, pelagic and tuna fishstocks more effectively
- minimising fishing interactions with protected species and the associated ecosystems
- working positively with other fishers and users of marine space where we carry out our harvesting activities

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.

Background

An Integrated Electronic Monitoring and Reporting System (IEMRS) or digital reporting will be implemented through a series of regulations and circulars.

- The regulations generally contain the legal obligations to carry and operate a Geospatial Position Reporting (GPR) device and provide reports by electronically. The nature of the reporting requirements has been changed significantly by the new reporting regulations. The regulations also contain offences and penalties
- The draft Circulars contain the technical details including the content of reports, the timing for provision of reports and the codes to be used, they also specify technical requirements for Geospatial Positional Reporting

General position on IEMRS

Fisheries Inshore has previously set out its view about IEMRS in the joint industry submission on *The Future of Our Fisheries* dated 23 December 2016. An excerpt from that submission is reproduced below:

Robust information underpins good decision-making and the industry supports any initiative that seeks to improve decision quality. Consequently, the industry supports acquisition of robust information. However, this support is qualified by the information collected improving management by being relevant, appropriate, cost-effective, and aligned with well-specified management settings and objectives. It is also premised on developing an operating framework where decisions are considered and taken based on that information in a timely and consistent manner.

As such, while we can see some potential value in individual components of IEMRS, industry considers that the implementation of each component, severally and jointly, must be expressly targeted to improve management outcomes. We consider that more information and analysis is required to determine where and how the various components of IEMRS can deliver better fisheries management outcomes for the Crown, the seafood industry and the public. This analysis must necessarily include:

- a) specific information needs, i.e. a clear definition of the management issues that require additional information—fishstock by fishstock, sector by sector, for the different catching methods and regions;*
- b) an assessment of the costs and benefits of using each of the three individual components of IEMRS to address the aforementioned management issues—either individually or in combination;*
- c) careful integration with—and adjustment of—wider fisheries management settings.*

Therefore, while we agree with the general concept of IEMRS, that being the acquisition of better information to improve fisheries management, we consider the following matters first need to be addressed to focus better the development and efficacy of IEMRS:

- a) more specific objectives for the deployment of IEMRS, linked to management objectives;*
- b) a clear definition of the information deficiencies, fishstock by fishstock;*
- c) consideration of wider fisheries management and policy settings that will influence information requirements and direct subsequent management based on better information;*
- d) the particular outputs sought and the feasibility of obtaining those in various fisheries;*
- e) an evaluation of the options available to obtain the required information;*
- f) a detailed cost-benefit analyses of the options available to collect the required data; and*
- g) an analysis of risks.*

Summary view on the consultation

The view of Fisheries Inshore remains the same; one of qualified support for the concept of IEMRS. Unfortunately, having now read the regulations and circulars, we oppose MPI's interpretation and implementation of IEMRS as represented in the regulations and circulars.

The regulations, within which the entire programme must operate, are vague, internally inconsistent, and have significant omissions. The circulars are unrealistic, inconsistent with the regulations, and in some instances impossible to comply with. As a whole, this proposal that conceptualises and implements IEMRS is confused, unrealistic, onerous, unnecessary and costly.

This submission highlights some specific aspects of the IEMRS package that supports this view. However, given the detail, length and complexity of the regulations and circulars, and the relatively short time to respond, we will not have identified all the issues that are likely to arise. Similarly, we accept that we may have made errors in our interpretation of the various legal requirements (illustrating both our fallibility and the complexity of the proposals). Either way, we consider it appropriate to resolve any errors to ensure the law is sensible and understood by MPI and the industry. To that end we request that MPI provide a written response to the matters raised herein.

Other SREs have submitted with a focus on specific concerns for their fisheries, we support those submissions and those of member companies.

Overall, we are disappointed as the industry has clearly signalled our support for this concept and repeatedly sought to work with MPI to implement a practicable solution. MPI, through its mode of working on this project, have squandered an opportunity to implement a significant and valuable improvement to fisheries management in New Zealand.

We consider this can be salvaged and request the opportunity to do so as follows:

1. MPI convenes a working group to address the various issues raised in this and other submissions. The group would form a view about the best approach to implementing IEMRS for various fisheries. The working group would expert-based, but would also contain senior MPI staff with a mandate to form an MPI view based on the working group's discussions.
2. MPI suspends the implementation of IEMRS until the working group has resolved the issues that arise.
3. The regulations and circulars would then be amended as required.
4. The working group would also develop an implementation plan. Implementation would follow on a reasonable timeframe that would allow for the necessary software to be developed and tested; hardware to be sourced and installed; system testing to be conducted, bugs ironed out, and training to occur.

To press on with the current version of IEMRS runs a high risk of failure, the consequences of which are most likely to be felt by fishers and their families, not MPI. We consider that MPI has a duty to ensure that the regulations (and subsidiary circulars) it produces are sensible, reasonable, fit-for-purpose and can be complied with. To date, MPI's position has been that it will specify the various requirements and it is up to the market and fishers to meet those requirements. In some circumstances that may be a reasonable approach, but not in this case.

Even if the legal requirements were well-specified and realistic, the technology to comply does not yet exist, has not been tested at sea, is very unlikely to be installed on more than 1,000 vessels and crew trained within the next six months.

Our strong preference is to get this right, not muddle through to meet MPI's self-imposed and unrealistic timeframes. We seek the opportunity to do so and are willing to commit significant resources to working in a focused manner to agree and specify a detailed resolution for all the fisheries we represent.

Content and format of submission

This submission comprises three parts; the first addresses Geospatial Position Reporting, the second addresses Electronic Reporting and the third provides comment on the adequacy of the consultation undertaken by MPI.

While we acknowledge that MPI is not formally consulting on the regulations, we have provided views. The relationship the empowering provisions and the circulars is clearly important; for example, the nature of the circulars has a bearing on the reasonableness of the offences and penalties in the regulations, and the circulars must be consistent with and *intra vires* the regulations. The circulars cannot be considered in isolation.

Further, given the MPI did not consult on the regulations before they were promulgated, we consider it is important to provide our views on their content.

Contact

To discuss any matter raised herein, please contact:

Dr Jeremy Helson
Chief Executive
jeremy@inshore.co.nz

PART 1: GEOSPATIAL POSITION REPORTING

Fisheries (Geospatial Positional Reporting) Regulations 2017

The general requirements under the Regulations are that specified vessels must register, carry and continuously operate a GPR device while the vessel is used for fishing or transportation. Also contained in the Regulations are requirements for those fishing without a vessel.

GPR devices must meet the standards and requirements specified in circular.

We have identified issues to be addressed regarding the Regulations as follows:

- R5(1)(d) requires that all vessels except for tenders deployed from any vessel using any purse seining net must have a GPR device. There are over 300 vessels with tenders not associated with purse seining. These may be dories for set-netting, beach seining or potting but also include tenders on trawlers and other fishing methods; many are small, unpowered row boats. It is unclear why those other tenders should be required to carry GPR. The tenders used in set-netting or beach seining undertake the same function as in purse seining by setting out the nets for the principal vessel. Some tenders may be used as transport between the shore and the vessel.

Requiring small tenders to carry and operate a GPR device imposes needless cost and duplication given the principal vessel would carry a GPR device. If these vessels are required to carry and operate a GPR device, when is the tender GPR to be turned on—when the principal vessel leaves port or when the tender is used for fishing?

Regulation 11 provides for the CEO to give exemptions from the obligation to carry and operate a GPR device where it is unreasonable or impracticable for a person or vessel to comply with the Regulations. While we recognise that the exemption provision can be used to obviate the need for tenders to carry a GPR device, individual exemptions would be required. This is administratively burdensome and unnecessary; our preference would be to amend R5(1)(d) to provide an exemption for all tenders as per the exemption given to purse seine tenders.

- R5(3) requires that a GPR device must operate while a vessel is used for “fishing” or “transportation”. Both terms are defined in section 2 of the *Fisheries Act 1996* as follows:

fishing—

(a) means the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(b) includes—

(i) any activity that may reasonably be expected to result in the catching, taking, or harvesting of fish, aquatic life, or seaweed; and

(ii) any operation in support of or in preparation for any activities described in this definition

transportation means—

(a) the receiving and carriage of fish, aquatic life, or seaweed by any vessel; or

(b) the storage and refrigeration of fish, aquatic life, or seaweed by any vessel for the purpose of carriage

Based on these definitions, there is an inconsistency between Regulations and the explanatory material that was provided by MPI for the purposes of understanding the significant detail of the Regulations and associated Circular.

Pages 6 and 7 of the explanatory material state: “GPR is powered on when vessel is powered on” and that “This includes for example when you get fuel or move around in the port”.

As outlined above, R5(3) states that GPR must be operate when the vessel is being used for “fishing or transportation”, not any time the vessel is powered on. A vessel owner may power up a vessel for maintenance, or to move the vessel around for purposes other than fishing. In those circumstances, there is no requirement to operate GPR.

On page 9 of the same material, an example is provided for trailered vessels – it states that GPR must remain on after fish is landed and the trailer/vessel is returned home and stored. It's an unnatural extension of "fishing" to include travelling to one's residence after a day's work. A commute home is not an operation in support of or in preparation for catching fish.

We consider it is unsatisfactory for MPI to issue explanatory material that appears inconsistent with the Regulations. When asked to provide clarification during the consultation period, MPI simply asserted it was right without further elaboration.

MPI's explanatory material is even more inconsistent with the Regulations if one considers vessel activity that is not related to fishing at all. MPI's guidance says GPR must operate any time the vessel is powered on and gives examples of moving around a port or obtaining fuel. What happens in the case of a vessel that is used for recreation, transporting goods, steaming to a dock for survey, or other purposes unrelated to fishing? The vessel in that case is not being used for fishing or transportation so we see no possible reason for MPI to insist on maintaining its position. The meaning of the Regulations must be clarified.

- R8(e)(i) states a requirement to notify the chief executive if a GPR device is removed from a vessel. Why is this required given the obligation in R5(3) to carry and operate a GPR device when using the vessels for fishing or transportation (as defined in the *Fisheries Act 1996*)? If the vessel is not being used for "fishing or transportation" then there is no requirement under R5(3) to carry and operate a GPR device. As such, there should be no offence for removing a GPR device when it's not required to be there in the first place (see R9(1)(a)).

We also raise a practical question regarding GPR devices on small vessels with no, or limited, power sources. We are aware of GPR devices that are battery-operated and must be removed from vessels to be re-charged. Must the vessel operator advise the chief executive on a daily basis if recharging a GPR device is required?

- R8(e)(ii) requires the chief executive to be notified if a GPR device fails to work properly. Does that operator then commit an offence under R9(1)(b) if they continue to fish? There is a carveout in R9(2) and a defence available in R10 which are addressed in turn.

First, R9(2) provides an exception to an offence against R9(1)(a) only if a GPR device is removed and after giving notification under R8(e)(i) or (ii). This makes no sense as a notification under R8(e)(ii) does not concern removal of a GPR device but rather notification of malfunction (the device may be malfunctioning but not removed). Is the exception under R9(2) also supposed to be available for an offence against R9(1)(b) if notification is provided under R8(e)(ii)? Either way the Regulations are internally inconsistent and must be clarified.

Further, R9(1)(a) and (b) both mention "an exemption from the chief executive". Is this an exemption as specified in R11 on the basis that it would be "unreasonable or impracticable"? Alternatively, is the notification required in R8(e) sufficient to avoid an offence?

Second, R10 provides a general defence for accidents and instances where a malfunction occurs. If a GPR device malfunctions at sea, and the fisher continues to fish, must they later avoid prosecution by relying on the defence? If so, does one act "reasonably" as required by R10(b) by continuing to fish?

When seeking clarification from MPI during the consultation period, we were not provided with any definitive response.⁵ When pressed, officials suggested the exemption provisions in R11 would be used. If that was the intent, we would envisage an explicit reference to malfunctions rather than only instances where it was "unreasonable or impracticable" to comply. We would also expect some reference to the reporting requirement in R8(e)(ii). Further, R11(2) requires that an exemption under R11(1) must be in writing. This is hardly reasonable or practicable for someone at sea that may be 100 nm miles from shore. We also question the timeframe that could apply to the chief executive processing and considering any exemption while a fisher waits at sea for a decision.

As part of the aforementioned discussion with officials, it was unequivocally stated that it was not MPI's intent that a vessel should return to port in the event of malfunction. This is a welcomed and sensible

⁵ Meeting in Christchurch between MPI and the Deepwater Group, 15 August 2017.

position and is also consistent with an MPI source that was reported as saying “However, MPI said yesterday if systems broke down while at sea, fishermen could ask for permission to keep fishing.”⁶

To give effect to MPI’s stated intent, the Regulations should be amended to make this explicit and to provide a clear, fast and practicable mechanism. It is not reasonable to expect operators to work with such uncertain legal requirements and rely on MPI’s discretion or case-by-case determinations to interpret the law.

If MPI’s stated intent changes, this would essentially require fishers to carry back-up units in case on malfunction and hence double all capital costs. As the costs of returning to port could be tens of thousands of dollars, it would also raise difficult contractual issues regarding liability and indemnity between fishers and hardware/software suppliers.

- Should the “and” between R8(e)(i) and (ii) be an “or”?
- R9(1)(a) creates an offence for removing a GPR device from a vessel unless you have notified the chief executive. We question why removal is an offence that is subject to a \$100,000 fine (particularly removing a GPR device when it is not required to be carried as discussed above in relation to R5(3)). Surely the requirement under R5(3) to carry and operate a GPR device while fishing, and the corresponding offence under R9(1)(b) is sufficient. The offence in R9(1)(a) should be removed.
- R9(3) sets a fine of up to \$100,000 as a penalty for all offences. This is severe, but particularly so for owners of small vessels. Such operators may turn over less than that in annual revenue and will have vessels worth considerably less. A more graduated scale of penalties should apply depending on the offence. For example, failure to notify the CEO before removing a GPR device, or failure to register a GPR device may not infringe on the purpose of the Regulations at all, yet both are subject to the same fine as wilful avoidance. The penalties should be revised.
- R10 requires that to defend a charge, the vessel operator must prove an offence occurred as part of an accident, mechanical or technical malfunction. We have some concern about the reverse onus in this defence. This is exacerbated by the difficulty in proving the cause of a malfunction when complex electronics and satellite communications via third parties could be the source of a technical failure. The failure could be by one of many intermediaries in a data chain over which the fisher has no influence or capacity to investigate fault. It is unreasonable for fishers to bear the cost and time of proving this.

We make further comment on this matter below at page 20 with reference to the specific clauses in the Circulars.

- R10 specifies a relatively narrow defence. We question the rationale and legal authority for a more tightly-constrained defence in the Regulations than that in section 241 of the *Fisheries Act 1996*.

⁶ *Fishermen want system ‘done right’* Otago Daily Times, 12 August 2017.

Fisheries (Geospatial Positional Reporting Devices) Circular 2017

- C7(1) states that an automatic identification system (AIS) is exempt from providing rate of turn data, but not those vessels using other GPR devices. We question the reason for this distinction. If no rate of turn data are required for larger vessels using AIS, why require this information for smaller vessels?
- C8 seeks to specify when a GPR device is required to operate. It is not clear why this clause is needed. R5 specifies that vessels must carry and operate a GPR device when being used for fishing or transportation. It is not appropriate in Circular to attempt to redefine (enlarge) the statutory definition of “fishing” or “transportation” by dint of an exception clause. The requirement is stated in the Regulations.

The issuing authority is R6 of the *Fisheries (Geospatial Position Reporting Devices) Regulations 2017*. R6 allows the chief executive to issue circulars only for the purpose of specifying “technical details relating to geospatial position reporting devices”. Any attempt to expand on R5 or the statutory definitions in the *Fisheries Act 1996* under C8 is *ultra vires*.

- C10(1)(b): “principle” should be “principal”.
- C10(1)(b) purports to specify the frequency of GPR transmissions. Yet the transmission frequency is not specified for “fixed frequency” GPR devices. How are fishers to know if they meet MPI’s requirements regarding frequency of transmission if these are not stated? One would assume that this should be not more than every 10 minutes given that is the minimum for a moderated frequency GPR device. Once set this should not be reduced to a shorter timeframe if GPR devices would need to be replaced to meet the new more frequent reporting requirement.
- C10(3)(a) requires MPI to be able to moderate the transmission frequency of GPR reporting. Further, only MPI can be aware of the change in reporting frequency (see C10(3)(c)). In order to undertake this action, MPI must have a contractual arrangement with the communication provider.

This implies that MPI will hold contracts with all transmission providers being used. This was confirmed in a meeting with MPI on 26 July 2017 when officials stated that MPI would contract the transmission, bear the associated costs and recover those costs from industry. This raises several very fundamental questions.

First, why have specific requirements in Circular regarding data transmission if only MPI is responsible for complying with these requirements? In this instance, clauses 10-14 would only apply to MPI as the party responsible for the data transmission.

Second, failure to comply with the requirements in Circular is an offence under R9 of the *Fisheries (Geospatial Position Reporting Devices) Regulations 2017*. If the operator has no control over the transmission and MPI has the contractual relationship with the “communication provider” how can this be an offence for which the operator is liable?

Third, if MPI does provide this service as stated by officials, what mechanism would be used to recover the costs? Which of the Cost Recovery Principles in section 262 of the *Fisheries Act 1996* would apply? Which of the *Fisheries (Cost Recovery) Rules 2001* would be used? Is it not clear how MPI is characterising this “fisheries service” with reference to the definition in section 2 of the *Fisheries Act 1996*. Consequently, it is also not clear that a legal mechanism currently exists to recover these cost equitably and in conformance with the principles in s 262.

If, contrary to the advice given by MPI on 26 July 2017, operators are responsible for transmission of GPR data to the communication provider, how can MPI change the frequency of that transmission without the knowledge on any other party? We assume MPI would need some sort of contractual relationship with the communication provider and/or the provider of GPR hardware. This matter requires clarification.

- C11 requires all vessels to be able to transmit position reports from anywhere at sea (anywhere on earth) and from anywhere in New Zealand. This makes satellite GPR compulsory. A 5m dory fishing in the Firth of Thames (Figure 1a) must be capable of transmitting GPR reports from the Ross Sea in Antarctica and from Hawaii, notwithstanding such a vessel would not and could not fish in those areas. This illustrates the flawed one-size-fits-all approach that makes no distinction between such a vessel and a 104.5m LOA BATM (Figure 1b). Both vessels must comply with the same requirements.



Figure 1a: New Zealand fishing vessel requiring satellite transmission capability anywhere at sea on the earth.



Figure 1b: New Zealand fishing vessel requiring satellite transmission capability anywhere at sea on the earth.

- C11 describes the specific requirements for the transmission of data. C11(1)(c) states that position reports must reach MPI within 10 min of being sent. However, the operator has no control over what happens to data passing through a communication provider and/or a principal communication provider. Failure to meet this requirement could be due to satellite or server issues in another country. If MPI is responsible for data transmission as queried above in relation to C10, why have this requirement in Circular?
- C12 specifies requirements in the event of transmission failure. If AIS is exempt from the necessity to store data, why impose that obligation on other that are not using AIS? We also query what happens are the 24hrs elapses?
- C12 allows for storage and later transmission of reports if there is a transmission failure. C6 requires GPR reports to be transmitted at intervals required by C10. It is assumed that C12 acts as a “defence” of sorts such that the requirements in C10 are subject to C12? We remain unclear as to the actual legal requirements.
- C13(2)(a) seems to be drafted with the intent of allowing data sharing. We support this intent but question the drafting and operation of the clause. It is unclear what “principal communication provider of a device” means. Why must the vessel operator be unable to share data they have collected about their fishing operation without the specified agreement? If the information provider agrees that the data can be shared with any third party, the principal communication provider should forward those data as agreed.

A more fundamental issue arises in respect of C13(2)(b), this imposes requirements on the “communication provider” (i.e. “any person who receives and on-sends position reports transmitted from a GPR device that are intended to be provided to MPI”). How do MPI envisage extending jurisdiction to third party providers (e.g. satellite communications providers) that may be domiciled in other countries? Who is liable for a communication provider breaching conditions imposed under C13(2)(b)? Clearly it is unreasonable for the operator to be liable for these failures as is drafted in the Regulations. If MPI assert ownership of data and will pay for and cost recover this service, why have these requirements in Circular rather than MPI requiring this under contract?

- C14 asserts that MPI have ownership of data from the point sent from a vessel if they are not using AIS. For AIS, ownership is asserted from the point it is forwarded to MPI from the principal communication provider. Why does this distinction exist?

Second, and allied to points raised above regarding C10(3), if MPI own the data from the point of leaving the vessel, this also implies MPI are responsible for the transmission and costs and any failure. Under C11, responsibility rests with the operator for actions beyond their control and for providing MPI with the property they assert they own.

- C16 states that a GPR devices must alert someone on the vessel if the device is not creating or transmitting reports. Is it feasible for a broken electronic device to tell those onboard the vessel it is broken? Does such technology exist?

Other matters

We have raised the issues of personal privacy, intellectual property and access to data in previous correspondence. We remain of the view that MPI must provide further protection of personal rights and property.

No details have yet been provided about the various notification process required under these Regulations and Circulars; we anticipate these will be made available as part of a comprehensive implementation programme.

We have previously provided our view that the cost estimates and purported benefits of IEMRS in the Cabinet Paper and RIS are wildly inaccurate. We consider that costs will be materially higher than MPI has stated and the financial benefits to industry almost non-existent. That aside, no information has been provided that specifies what costs MPI will meet, what costs will be recovered, and how that recovery would be undertaken.

Operating electrical equipment at sea, particularly on small open vessels, is very challenging and prone to failure. This is exacerbated by the novel and untested nature of the technology. This raises basic issues of fairness in that the Regulations and Circulars create a high likelihood of unintentional non-compliance. This is particularly so when the onus rests with the operator to prove technical malfunctions as a defence to a charge that carries a fine of \$100,000 plus \$1,000 per day for continued non-compliance. Further, the defence provisions and essential guidance around the continuation of fishing after a technical malfunction are vague or non-existent. It is not appropriate to rely on MPI’s discretion or MPI not enforcing the law as written to avoid prosecution.

PART 2: ELECTRONIC REPORTING

Fisheries (Reporting) Regulations 2017

These Regulations repeal and replace the *Fisheries (Reporting) Regulations 2001*. The 2001 Regulations are complex, detailed and have proved suitable for the operation of the Quota Management System for 16 years; they run to 161 pages. Replacing the 2001 Regulations is far from trivial, yet this has been done without input or consultation.

In some respects, the changes made have the potential to streamline and improve reporting. The industry has been seeking the ability to provide various reports in electronic form for several years, and some sectors have taken the lead on developing and implementing such electronic reporting tools. Given that commitment, we are disappointed that MPI has seen fit to rush through these changes without considering the various data needs of specific fisheries, or the currently-existing electronic reporting tools.

The key changes made that Fisheries Inshore will focus on is the requirement for permit holders to provide a series of five Event Reports in electronic format, these being:

- Fish Catch Reports
- Non-fish Species or Protected Fish Species Catch Reports (NFPS)
- Processing Reports
- Disposal Reports
- Landing Reports

The Regulations also detail requirements for MHRs, LFRRs and Annual Reports by LFRs. These are generally requirements of quota owners and LFRs so are not addressed in this submission.

Issues to be addressed regarding the *Fisheries (Reporting) Regulations 2017* are as follows:

- We can see no requirement or process in the Regulations to register an e-logbook. We consider R42(1)(b) is too vague if the intent is to use that provision, this requires the permit holder to “notify the chief executive” of the “identifier of any device”. There is also no specificity in either the Regulations or Circulars about what a device “identifier” is or how that is generated, c.f. R7 of the *Fisheries (Geospatial Position Reporting Devices) Regulations 2017*.

Despite there being no specified registration requirement or process, C6(1)(b) of the *Fisheries (Event Reporting) Circular 2017* states that an e-logbook must be registered with the SDA.

Further, R41 states that reporting must be in accordance with the circulars and R48(f) makes it an offence not to comply with anything specified in Circular. We also question what components of the logbook must be registered and whether the registration must be renewed if one or more components is changed.

We consider that if registration is required, it must be clearly specified in Regulation, as is the case for a GPR device, and not implied in Circular.

- R3 defines Fishing Trip. There may be instances when there is more than one permit holder on a vessel and/or the vessel may be fishing for more than one permit holder during a trip. In that case, which of the permit holders is required to complete a Trip Record?
- R7(3)(a) and (b) require the information as to the date and time of when and location of fishing activity must be entered immediately; this is feasible for many operators. However, there are 230 vessels that fish with a sole crew member. The vessels include trawlers, set-netters, liners, potters and hand gatherers. The requirement to enter details immediately may interfere with the safe handling of the vessels and safe handling of the catch. In fishing activity such as ring-netting, the sole crew member needs to control the vessel, manage the setting of the net, maintain sight of the target catch, remain a safe distance from rocks and other shallow-water obstructions and complete catch records. We see no reason to compromise safety and fishing performance for the completion of catch records and consider that “immediately” be amended to “as soon as practicable”.

- R7(3)(c) requires recording catch estimates within 4 hours after the fishing ends, we question what is meant by “after fishing ends”?

We note that a GPR device is required to be operating under R5(3) when a vessel is “fishing” and MPI provided guidance in its explanatory material regarding its interpretation of that term in relation to when a GPR device must be powered on and off. In that case, MPI state that GPR must remain on until a trailer vessel returns home, hence that is when fishing ends for the purposes of requiring an operating GPR device under MPI’s interpretation (with which we disagree).

As such, using the same interpretation of the same statutory definition, a fisher would have 4 hrs after returning home to record the necessary information in a Fish Catch Report. Clearly, we consider that both R5(3) of the *Fisheries (Geospatial Position Reporting Devices) Regulations 2017* and R7(3)(c) *Fisheries (Reporting) Regulations 2017* need to be re-drafted to clarify the legal requirements.

The interpretation of the 4-hour requirement will dictate whether this requirement is feasible. This will also vary among fisheries and will also depend on what is specified in Circular regarding the species and detail to be recorded.

- R7(3)(d) and R8(3) require the provision of these Fish Catch Reports by the end of the day. We have yet to see any rationale or justification for the requirement to report daily as opposed to the current requirement of the 15th of the following month. The Cabinet directive was to provide information “in a timely manner”. Daily reporting serves no useful purpose and imposes unnecessary costs.
- R8(1) requires the permit holder to “provide” a NFPS Report “each time” a NFPS is caught i.e. provide a Report for each individual animal. We assume this is not the intent of the R8(1) as R8(3) requires provision of NFPS Reports daily. In R8(1) we assume “provide” should say “complete”? The words are unambiguous but there is a conflict between R8(1) and (3), this should be addressed.
- R8(1)(b) allows for fish species to be declared as protected in Circular. Such a declaration needs more substance and process, there is legal provision to declare a fish species as protected by its addition to Schedule 7A to the *Wildlife Act 1953*. This is the appropriate mechanism and the reference in R8(1)(b) should be deleted.
- R10(1) requires the permit holder to “provide” a Disposal Report “each time” a disposal occurs i.e. provide a Report to the chief executive each time the permit holder returns fish to the sea. We assume this is not the intent of the R10(1) as R10(3)(a) requires provision of Disposal Reports daily. As for R8, the words are clear but assumedly do not reflect the policy intent, consequently there is an internal conflict in the Regulation that needs to be resolved.

The conflict is carried into the circulars. On page 36 of the *Fisheries (Codes and Instructions) Circular* it is stated that “Generally, a disposal report must be completed in conjunction with a fishing event report [fish catch report] ...” This general statement is in conflict with R10(1); the Regulation must prevail. Importantly, R10(2)(c) states that the Report must include any additional information specified in circular. As such, the circular cannot be used to circumscribe the requirements that are clearly specified in the Regulations.

- R8 and R10 require reporting of NFPS and Disposals respectively. As a result of R8(1)(b), there are now two classes of protected fish species. Those declared to be protected in circular, and those legally protected under the *Wildlife Act 1953*. If the species is protected under the *Wildlife Act 1953* it must be returned to the sea by law and this capture is reported under R8. Must that disposal also be recorded on a Disposal Report under R10?

Further, for any protected fish species simply declared to be so in circular (that is not also on Schedule 7A to the *Wildlife Act 1953*), we assume they could be recorded on both a NFPS Report under R8 and a Landing Report under R11?

- R10(2)(a)(i) requires that Disposal Reports must record the types of fish disposed of and quantities to be estimated. R47(1)(a) provides for circulars to specify units of measurement and limits to the number of species that must be recorded. In some fisheries, there may be many small non-QMS species that would require considerable taxonomic expertise to identify. It is assumed the intent of R47(1)(a) is to provide the capacity for pragmatic decisions about reporting to be implemented, yet this opportunity appears not to have been taken in the circulars that require everything to be identified and reported. We consider that some *de minimis* thresholds should be put in place to balance information needs and practicality.

A similar view is provided for R8(2)(a) with regard to weights of invertebrates.

- R10(2)(a)(iii) and elsewhere refers to “destination type codes”. It is not clear why this terminology has been retained. R3 defines a destination type code as a code in circular that identifies a particular type of landing or disposal. Landing and disposal codes are then defined in the *Fisheries (Codes and Instructions) Circular* (“landing code” should be defined as that set out in Part 6, not Part 5). Would it not be clearer to specify landing or disposal codes directly as required?
- R10(3)(a) requires the permit holder to complete a disposal report “within 1 hour after the disposal is finished”. When is the disposal deemed to have occurred? It would make sense for all disposals that occur as part of a Fish Catch Report to be deemed one disposal. Yet as discussed above, R10(1) requires a report to be provided “each time”.

Some examples are instructive. A BLL fisher starts hauling a line at 6am, the first hook contains a TAR under minimum legal size (MLS), the fisher is required by law to return that fish to the sea⁷—that is a disposal and a report must be completed (setting aside when the Report must be provided). The fisher then catches more sub-MLS TAR at 0715, 0830, 1020 and 1100. Must the fisher complete four Disposal Reports during that haul i.e. after each TAR is disposed of, or one disposal report when the haul has been completed?

The former interpretation is most consistent with the wording of R10, but is an onerous requirement that serves no sensible purpose. Common sense would dictate that the disposals from that haul would be recorded and reported as a single Disposal Event for that Fish Catch Event.

If that is the case, some fishing events using BLL and SLL will take place over several hours and will result in many live fish being returned to the sea. A pragmatic approach to recording estimates of discarded species and weights over an extended period is required that is not onerous and does not put undue pressure on crew. In some cases where discards are not required to be returned to the sea immediately, they could be binned to allow more accurate estimates of weight; however, this would result in those fish being unnecessarily killed—an outcome not consistent with good fisheries management.

Consider also if during the haul, several fish are caught that are later used for bait and/or eaten. In those circumstances, the disposals would be singular events that would need to be recorded 1 hour after lunch or after the fish had been used for bait. The 1-hour time limit seems to serve little useful purpose and greatly confuses the reporting requirements. We consider this should be removed.

- R12 states that reports must be provided electronically. Malfunctions at sea will occur and paper should be available to be used as a contingency measure in the case loss of capability to report. This would allow for data to be recorded and sent to FishServe; there could be an administration fee for those submitting on paper in these circumstances.

Further, the Regulations provide no reasonable contingency. R43 requires the permit holder to inform the chief executive of the failure to provide the report, but having done so the permit holder remains liable for a \$20,000 fine under R48(b) and R49(b) for submitting a late report. Under R50, the permit holder must then prove that an accident, mechanical or technical malfunction was the cause of the breach. This is unreasonable and places liability on the permit holder for the failure of third parties such as e-logbook providers and national and international telecommunications companies (also discussed further at pages 26–28 below).

- R(14)(3)(a) requires an MHR to be completed and provided, but states that it need not include fish that is recorded in another report under these regulations and for which the appropriate destination type code is specified in a circular—does this exclude all fish reported in Landing or Disposal Reports and would therefore necessarily result in a null return? We seek guidance on the proper interpretation of this clause.
- R19(2) allows the chief executive to direct that MHRs are to be filed electronically electronic for class of person, yet there is no obligation to advise each person in that class of the new requirement; just to publish the requirement on MPI’s website (which may be difficult to find). There should be a positive requirement to advise each person in that class given that providing a late return makes the permit holder liable for a \$20,000 fine under R48(c).

⁷ Section 72(3) of the *Fisheries Act 1996* requires sub-MLS fish to be returned to the sea “immediately ... whether dead or alive”

- R15-17 retain the current paper-based MHR reporting. We question why the MHR is paper-based when all information included in the MHR has already been provided electronically to MPI?
- R39(1) requires all reports to be kept by a fisher for 7 years—we question the need for this given MPI has received all reports electronically. Given MPI will have all these reports this serves no useful purpose, is unreasonable, and should not be subject to a \$10,000 fine.
- Further R40(a) requires reports for the last 7 years to be provided “immediately” on request. This requirement applies to permit holders. The definition of Permit Holder in R3 has been expanded from that in the *Fisheries (Reporting) Regulations 2001* to include all those who act “as an employee or agent of a [permit holder]”. We assume it is not the intent that every employee of a permit holder (be they a fish filleter or forklift driver) must be able to provide 7 years’ worth of reports on request, but that is clearly what R40(a) requires. It is not acceptable for Regulations to put permit holders in breach by default and rely on MPI not enforcing the law as written to avoid penalties. The Regulations must be written to operate as intended. Such errors, assuming they are errors, must be changed to ensure the Regulations have integrity.
- R48 specifies offences, this includes a failure to comply with R37 that requires reports to meet manner and form requirements in circular. Given the complexity of the material in circular this should be subject to the opportunity to correct any departures rather than the imposition of a \$10,000 fine.

We also question whether fines of \$20,000 or \$100,000 for not providing Reports on time is reasonable given the current requirement to furnish most Reports on the 15th of the following month (e.g. see R48(b) and R48(g) and R49(b) and R49(c)). There is no rationale provided for provision of reports daily which makes imposition of large fines hard to justify.

- R50 specifies defences. As with R10 of the *Fisheries (Geospatial Position Reporting Devices) Regulations 2017*, we make similar comments. R50 requires that to defend a charge, the permit holder must prove an offence occurred as part of an accident, mechanical or technical malfunction. We have some concern about the reverse onus in this defence. This is exacerbated by the difficulty in proving the cause of a malfunction when complex electronics and satellite communications via third parties could be the source of a technical failure. The failure could be by one of many intermediaries in a data chain over which the permit holder has no influence or capacity to investigate fault. It is unreasonable for fishers to bear the cost and time of proving this.
- Further, R50 specifies a relatively narrow defence. We question the rationale and legal authority for a more tightly-constrained defence in the Regulations than that in section 241 of the *Fisheries Act 1996*.

Other matters

- The *Fisheries Act 1996*, and its attendant suite of regulations, do not define when a fish is caught. The interpretation of “catch” has only been addressed in court judgments. Most fishers will be unaware of those interpretations and may have different interpretations to MPI. The interpretation of catch or caught within MPI is not consistent and different interpretations have been provided by MPI staff. For fishers to report their catch, they require a more certain legal definition of what constitutes catch. This is a long-standing matter that needs to be resolved.
- The definition of landing in R4(1)(a)(ii) states that placing fish in a holding container does not constitute landing. However, the codes “Q” and “QL” on page 66 of the *Fisheries (Codes and Instructions) Circular* designate these as Landing Codes (although these are not deemed as landing). Further, different terminology is used by reference to a “holding receptacle” rather than “holding container”. There is no reference to holding receptacle in the *Fisheries (Reporting) Regulations 2017*.

Does this problem stem from the definition of landing that states fish placed into a holding container does not constitute “landing”?

Many small ports have only a chiller unit placed on the wharf (such facilities are operated at some 18 ports around New Zealand). Fishers place their fish in the unit and a delivery firm will at some later time uplift the fish and deliver it to the LFR for weighing and processing. The chiller is a holding container as defined in R3. This situation is the same as the question raised above with the additional complication of a third party be involved. Who completes the reports in this situation?

Fisheries (Event Reporting) Circular 2017

- C6(1)(b) states that an e-logbook must be registered with the SDA. We see no requirement to register an e-logbook in the Regulations? What process or information must be provided for that registration? We also question what components of the logbook must be registered and whether the registration must be renewed if one or more components is changed. We have elaborated on this matter in our introductory remarks regarding the *Fisheries (Reporting) Regulations 2017* with reference to R42.

We also make the same comment in relation to C5(1) that defines authorised user. We can see no requirement, specific information to be provided, or process in the Regulations to register with the SDA as an authorised user. The definition in C5(1) implies that authorised users must be linked to specific permit holders and specific e-logbooks, but what other details are required? R42 is totally insufficient for this purpose.

It would appear the same applies to registration of a relevant authorised user. We see no requirement for registration in the Regulations, and no process, specific information to be provided, or any process for doing so.

- C8(3): The diagram should be changed to be consistent with the C8.
- C10(2) and 10(4) could refer to C10(1) and C10(3) respectively for clarity. Should “authorised” be added to C10(4)(b)?
- C11 requires Summary Reports, yet the purpose and content of summary reports is not stated. Summary reports must be accessible on the vessel, but given the requirements in R39 and R40 to produce 7 years of reports on request, Summary Reports seem unnecessary.

Further, we see no legal authority for Summary Reports. R6 specifies the 11 Reports required which does not include Summary Reports. The issuing authority for the *Fisheries (Event Reporting) Circular* is R47 of the *Fisheries (Reporting) Regulations 2017*. R47 allows the chief executive to issue circulars for the purpose of:

- (a) “specifying the manner and form in which a report must be completed”
- (b) “specifying additional information that relates to the subject matter of a report under Part 1 ...”
- (c) “specifying technical requirements for electronic reporting...”
- (d) “specifying non-fish species or declaring protected fish species ...”
- (e) “specifying kinds of fishing operations for the purpose of ...”
- (f) “specifying destination type codes ...”

It is clear that R47 does not allow the chief executive to require the provision of reports in addition to those specified in R6. Any attempt to require additional reports in circular is *ultra vires*.

Vague technical jargon such as “drilling down” should also be avoided.

The circulars also mention Trip Records in C20 and in Schedule 1. We can see no reference to Trip Records in the *Fisheries (Reporting) Regulations 2017*. As such, we see no legal authority for the requirement to provide Trip Records. The rationale is the same for that discussed above with reference to Summary Reports and the incapacity of R47 to require Trip Records in circular. Any requirement to provide a Trip Record in circular is therefore *ultra vires*.

- C12–C16 and C18 define the capability of the e-logbook rather than reporting. We question where the liability lies in the event of non-performance? If an e-logbook provider’s service does not meet the various requirements under C12-C16 and 18, the permit holder may be in breach of R48(b) or (g) and is potentially subject to a fine not exceeding \$100,000. This is remarkable given the failing may be that of a service provider over which the permit holder has no control. The defence provided in R50(a) would not apply if the breach was due to the negligence of a service provider rather than an “accident, or mechanical or technical failure”. We have raised the issue of reverse onus and the difficulty of proving the cause of a technical failure above.

Given the permit holder is liable for failings of a service provider, they would likely seek indemnity and the capacity to pass liability on to the e-logbook and/or telecommunications provider—given that an e-logbook “may comprise any number of components” (C6(2)), terms would need to be negotiated with each provider.

This sets up a liability structure that would likely result in a reluctance to provide services or large costs being passed on to permit holders to protect services providers. Some kind of business continuity insurance may be required that would likely be costly given the operating environment and untested nature of the system.

Given MPI is specifying these requirements, MPI should also audit and approve e-logbook providers. Any permit holder using an approved e-logbook provider would be assured that service meets the various legal requirements and would be protected from any offence for contraventions related to technical failings such as those set out in C12-16.

This again raises the issue discussed above regarding the provision of any service to transmit GPR data. If MPI plans to hold various contracts for transmission of GPR data, as has been stated, then why shouldn't permit holders have an option of also transmitting ER data through the same mechanism without liability for any failure?

- C15 sets a requirement that data must be held on an e-logbook for at least 90 days. This requirement would seem redundant given R39 and R40 require reports to be retained for 7 years and to be produced on request.
- R16(2)(a) requires a system to operate in a "poor connectivity environment". This seems redundant given the various requirements of the Regulations and Circulars. If an environment is genuinely one of "poor connectivity" how is one able to comply? If satellite service is patchy or intermittent what is a permit holder reasonably expected to do? Perhaps the Regulations need to accommodate such instances rather than insisting on unrealistic or technically-impossible solutions (see also liability comments above).
- C17 requires that "each physical component of a device on which an e-logbook is operating must be suitable for use in the particular commercial fishing environment". Again, this raises issues of liability for hardware providers. As discussed above regarding the ramifications of software or transmission failure, few hardware providers are likely to indemnify permit holders in the case of failure. This will require permit holders to seek business continuity insurance or invest in multiple systems as backups.
- C18 requires a business continuity plan—what is the content and purpose of such a plan? Its existence implies a process for the continuation of fishing in the event of failure. Would MPI approve business continuity plans? Must a fisher act in conformance with their business continuity plan to enable them to remain at sea? Given it is an offence not to provide an electronic report under R48(f), does the existence of a business continuity plan have any material influence on whether one can use the defence in R50?

We also question whether R47 is sufficient to require a business continuity plan in circular. The same rationale applies as set out above for Summary Reports and Trip Records. This requirement would be better set out in the *Fisheries (Reporting) Regulations 2017* and the precise relationship with the various reporting requirements, offences and penalties specified. As drafted, it resembles an after-thought with no specific purpose.

- C23 requires location data to "exactly" 4dp. Does inclusion of "exactly" imply this degree of precision is necessary? Is this in deliberate contrast to requirements to report catch data to 2 dp (10 grams) in other parts of the circulars? (e.g. Schedule 2 of the *Fisheries (Event Reporting) Circular*). If so why? Some existing units will not be capable of reporting to the level of precision.

Fisheries (Codes and Instructions) Circular 2017

- C5(1) defines species codes. However, these are not provided for non-QMS fish in C5 or the definition and in Part 1C of Schedule 2. If the list is to be the existing list contained in Part 2 of the *Fisheries (Reporting) Amendment Regulations (No 2) 2003*, there are a possible 281 species codes. However, upon enquiry we were provided with an unreferenced excel spreadsheet from MPI that contained some 447 codes. Each of those codes would have an FMA code attached to define the area in which the species was caught, giving a potential total of 4,470 species codes.
- We have been unable to locate any reference guide that would enable fishers to accurately identify their disposal species, some species we know can only be identified by DNA analyses.

Furthermore, we know of no practical fisheries management application that would benefit from such detailed information on species that are neither targeted nor wanted nor under risk from commercial fishing.

Among the species that would be required to be reported would be items such as sea lettuce, seaweed, whelks, watercress, jellyfish and 15 species of crabs. It is neither reasonable nor appropriate to impose such a level of catch reporting on fishers when there are no foreseeable benefits to fisheries management. It is also technically impossible.

We suggest that MPI first specify the required reporting list, re-assess the list and provide an abridged version that contains species of interest that can reasonably be identified by fishers, and allow for aggregated reporting for all other species.

- C7(1)(a) states that weights must be provided in greenweight using the appropriate conversion factors—while most weights will be greenweights, there are occasions when fish will not be caught in a greenweight state, e.g. damaged or predated fish. What are fishers to use when there are no conversion factors e.g. lips of predated fish? It is unreasonable to require fishers to estimate the weight of fish predated from lines and balance this with ACE.

Where a fish has been predated, the fisher has received no value from the catch. The problem needs to be resolved in line with any definition of a catch—the fact that the fish is on a hook or caught in a net when predated should not define it as a caught and require it to be balanced with ACE. This mortality does however need to be recorded and accounted for to ensure stocks are fished at sustainable levels. The correct mechanism is for that catch to be included in the allowance for other sources of fishing-related mortality as part of the total allowable catch.

MPI has accepted this as the appropriate measure such that predation forms part of the allowance for other sources of fishing-related mortality as the example below for yellow fin tuna demonstrates.⁸ Annex 1 provides an additional six examples to illustrate the point.

Yellow Fin Tuna

Other sources of mortality

The estimated overall incidental mortality rate from observed longline effort is 0.22% of the catch. Discard rates are 0.92% on average from observer data of which approximately 25% are discarded dead (usually because of shark damage).

It is not appropriate for MPI to amend the definition and use of the allowance for other sources of fishing-related mortality that is set under section 21 of the *Fisheries Act 1996*. These matters need to be considered in the context of the landings/return to sea policy and then be given effect in the circulars.

If MPI was to require predated fish to be estimated and balanced, this would require moving that mortality currently in the allowance for other sources to the TACC. Not doing so is to count the fish twice and is nonsensical. Further, we question whether requiring ACE balancing provides the best incentives for accurate data recording, this is particularly problematic when estimates of whole fish weight must be guessed from half a head.

This example illustrates that IEMRS is being implemented pre-maturely and in advance of current work by MPI of other aspects of the *Fisheries Act 1996*. It is accepted practice that one should determine the strategic intent, and the legislation to give effect to that intent, prior to implementing operational tools such as IEMRS. The process is completely back-to-front.

- C8(2) requires that if the time recorded automatically the system is inaccurate by more than 1 minute, the operator must manually enter the correct time. How is an operator at sea supposed to know the “real” time or whether the on-board systems populating the various fields are correct? This is nonsensical.

⁸ Ministry for Primary Industries (2015). Fisheries Assessment Plenary, November 2015: Stock Assessments and Stock Status. Compiled by the Fisheries Science Group, Ministry for Primary Industries, Wellington, New Zealand. 535p.

- C9(2) requires that if the latitude and longitude recorded automatically by the system is inaccurate by more than 0.001 degrees, the operator must manually enter the correct position to 0.0001 degrees. How is an operator at sea supposed to know their precise position at sea other than in reliance on the very system providing that information? Again, this is nonsensical.
- C14: should read Part 4 of Schedule 1, not Part 3.

Comments on specific Reports and fishing methods are discussed below with reference to both the *Fisheries (Event Reporting) Circular* and the *Fisheries (Codes and Instructions) Circular*.

Trip Records

- Client Number—vessels are registered in the name of an Operator under section 103 of the *Fisheries Act 1996*. A Permit holder is a person holding a permit to fish issued under section 91 of the *Fisheries Act 1996*. An operator may or may not be a Permit Holder. A permit holder may or may not be an operator. A vessel belonging to an operator may be used to fish on a trip for one or more permit holders. MPI need to use the appropriate terminology.
- Person In Charge—does this mean the skipper in charge of the vessel or the fishing master if they have one? It would be better to know the purpose of the field and then we could determine the appropriate description.

As discussed above, we see no legal authority for providing Trip Records.

Fish Catch Reports—General comments

- False precision: Various parameters are required to 2dp—headline height to the centimetre, speed to 0.01 knots and total estimated catch to 10 grams. Catches are eye-ball estimates or based on scaled bin counts, there is no reason to require such precision. The same is true for estimated weights of NFPS catch of corals, etc. Where an LFR provides landing weights to 2 decimal points, the information should be entered to ensure it reconciles with LFR data but the catch data will be rounded to the kg when the catches are used in any catch balancing.

We trust MPI has no intent to require this degree of precision? We also trust that MPI has no intention to compare the eye-ball total estimate with a subsequent estimates of the catch obtained from the Top 10 species catch records or the landing and disposal records. Any comparison would be pointless.

Allied to the above, the requirement for some methods to estimate the top 10 species caught will be difficult or impossible for some fisheries. In larger volume fisheries, the catch may be tipped directly into a fish pound which means there is no reasonable chance to identify the 10 most prevalent species, let alone estimate the weights of each of those species.

- The various Fish Catch Reports have inconsistencies in the reporting of the total catch, e.g. trawling and seining have total catch inclusive of top 10 species; netting and lining have total catch exclusive of top 10 species; potting, dredging and tuna-lining have no total catch. While these structures are the current format of catch reporting forms, we would expect that consistency between future catch reports would be more beneficial than retaining the current formats. We would want to be sure that the proposed reports have a mapping to existing data-fields in existing catch databases. For that purpose, we have request that the MPI Data Working Group be convened to consider the nature of MPI's changes and to ensure that any changes to the reporting requirements do not undermine historical data series and the sustainability of fisheries.
- Mitigation device codes listed in Part 8 of Schedule 2 include only a selection of devices, some are mandatory some are voluntary and most are not defined. The list does not include all mitigation practices and includes only those that might be seen through electronic monitoring. The purpose of the information seems more related to compliance than to mitigation practice and performance. This may be appropriate for well-specified regulatory requirements but the purpose and value of this information is unclear.

Trawling

- Mesh size is requested but not orientation—any difference from conventional diamond should be noted as this may be useful for more detailed CPUE analyses, e.g. T90 and on the square cut.

Netting

- More clarity is required about the 1nm rule for set netting. How is one to interpret “more than 1 nm from the other nets”? Is this the closest net, the furthest net, the first net, an estimate of the mean distance of the other nets? Similarly, how does one interpret “you set multiple nets within 1nm with the intention of hauling the nets at different times (e.g. on different trips)”?

These requirements must be better specified. These concerns also apply to other methods such as ring netting, dahn lining, potting and dredging (see examples below).

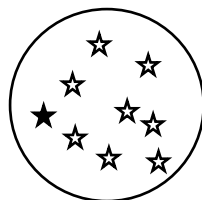
- Ring-netting needs to be clustered at 1nm (or some other sensible scale) as for set netting and several other methods—it is impractical to record each set given dynamic nature of fishing and with sole crewing. Sets that are often very short (e.g. 5-10 min) and sometimes result in no catch.
- For shallow water fishing, often conducted in 1-2 metres of water, requiring two entries for setting and hauling gear is impractical. This type of fishing is dynamic, often conducted at high speed (c. 20kts) and usually conducted by a sole crew. This is often conducted in the dark using a spot light (hands being required to steer, throttle, spot-light and deploy gear). A single start and end point is sufficient for this type of fishing and allows for operational practicality and maintenance of safety at sea.

Lining

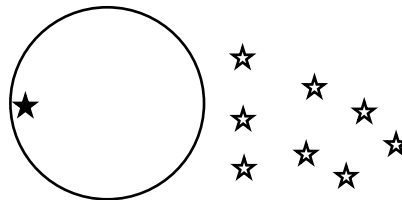
- Dahn lining—the note on page 15 requires a separate report for any line if that line is set more than 1 nm from first line. This may allow, say, five lines to be reported on a single form if they are all within 1nm of the first, but five separate reports for a subsequent five lines set more than 1nm from the first (see the diagram in the potting example below). The rationale for this is not apparent.

Potting

- As currently drafted, each pot that is more than 1nm from the first pot requires a separate Fish Catch Report. If this is not the intent, the guidance should be revised to represent what is intended. Assuming the circle below has a 1nm diameter, if the solid star is the first pot deployed and the open stars are the remainder, one report would be required in the first scenario, yet nine required in the second. This needs to be resolved for all methods.



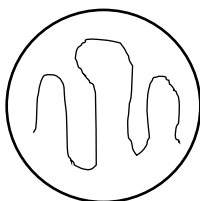
Nine pots, one Report?



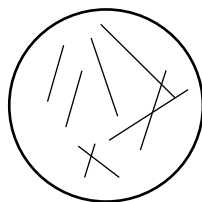
Nine pots, nine Reports?

Dredging

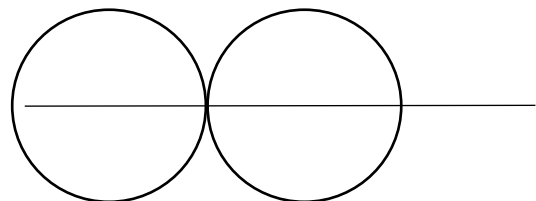
- Again, there needs to be clarity about when new Fish Catch Reports are required. As drafted, fishers need to provide a new catch report every 1nm even if continuously towing greater than 1nm (based on the definition of “fishing”). Clearly a fisher cannot complete a Fish Catch Report without retrieving the gear and that cannot be the intent of the Circulars, MPI need to discuss what is required with dredge fishers and provide workable guidance.



One tow, one Report?



Eight tows, one Report?



One tow, three Reports?

Diving

- Visibility “height” should be “distance” or removed entirely.

Tuna Lining

- Why is percentage of bait required? Are the data used? It is unnecessary and unreasonable to require the percentage of bait to be recorded to 2dp. Surely the nearest whole number is sufficient if necessary at all. This will necessarily be an estimate as bait use may change during a set.
- How are broken lines to be reported? If there is one set, and a line is buoyed off and hauled later, can the Circulars accommodate two hauls and one set?
- Why is the structure of the Tuna Lining Report different from all others? The Fish Catch Report includes Disposal Records and details of product state as part of the event report. If Disposal Records are provided here, where is the exemption from the fisher also having to complete a Disposal Report under R10 of the *Fisheries (Reporting) Regulations 2017*? Must the permit holder provide duplicate reporting? If there is a sensible rationale it is not apparent, can this or should this be applied to other methods?
- Is the inclusion of sundry items such as light sticks necessary?
- We see no requirement CDS reporting for CCSBT. Is this an omission or is it intended that this information is captured elsewhere?

NFPS Reports

- As discussed in relation to R8 of the *Fisheries (Reporting) Regulations 2017*, there is an inconsistency between regulation and circular on timing of catch reporting, i.e. each catch or catch taken as part of a specific Fish Catch Report.
- Page 32 specifies the meaning of “catch” and “deckstrike”. If warp strikes are excluded from the definition of catch, how are these intended to be recorded, as a deckstrike?

Processing Reports

In most instances, inshore vessels will not need to provide Processing Reports. C14 of the *Fisheries (Codes and Instructions) Circular* only requires these Reports for vessels over 19m, or those that are registered as Limited Processing Fishing Vessels or operating under a Registered Risk Management Programme pursuant to the *Animal Products Act 1999*.

When a request for clarity was sought, MPI stated that the “or” between C14(1)(b)(i) and (ii) should be an “and”.

If that is not the case and the definition remains the same, there are 10 inshore vessels that have a Registered Risk Management Programme in place to enable them to fillet fish on board for the domestic market. These operators would need to complete a daily processing report. Notwithstanding whether they must provide these reports, we make the follow observations about the Circular:

- Estimated Container Weight needs clarification—while the attribute name is Estimated Container Weight, Part 4 of the *Fisheries (Codes and Instructions) Circular* states that to determine the weight, “weigh the fish in the container and deducting legitimate allowances for packaging.” Does this mean deducting the weight of the bin itself? (see comment on the examples provided on page 38 [of the consultation paper] below).
- Most vessels will not have motion-compensating scales to weigh the container and only estimates are required. This also implies precision to 10 grams which is unreasonable and unnecessary; we have addressed this elsewhere.
- Part Container—is a container that is part-filled to have a separate product record?

- It is unclear how the examples on page 38 of the *Fisheries (Event Reporting) Circular* have been generated; some clarity would be appreciated. The first column shows 3 x 20 kg bins of DRE SNA using a CF of 1.8 resulting in GWE of 106.5 kg. If the Estimated Container Weight is just the fish and excludes the bin, the GWE would be 108 kg (60 kg x 1.8). However, the example states a GWE that is 1.5 kg lighter at 106.5 kg. Does this imply the Estimated Container Weight includes the bin weight too, that being 280 grams in the example?

The second column shows 3 x 20 kg bins of GRE SNA. The total GWE being 65.5 kg. This implies the weight of the bin only is 1.83 kg and is excluded in the Estimated Container Weight. Clarification would be useful.

- As discussed in more detail above, there is no information regarding the codes for non-QMS species.

Disposal Reports

- An inconsistency exists between the Regulations and Circulars, this has been discussed above with reference to the *Fisheries (Reporting) Regulations 2017*.
- There is a lack of pragmatism in requiring reporting of estimated weights. The requirement to report to 2 dp implies a precision of 10 grams which is unnecessary and unreasonable. Similarly, requiring all species is appropriate for QMS species but identifying non-QMS species is also unnecessary and unreasonable. As discussed above with reference to R10, a *de minimis* approach should apply—we would expect MPI to provide a species list that includes species which on current knowledge are perceived to have risks from commercial fishing and then provide for an estimate of the volume of unidentified catch to be provided. Our discussions with fisheries managers indicate that their use of such data in the past has been extremely limited and they have effectively no interest in the catch of all species.

Landing Reports

- Client Number—does this mean the permit holder to whom the landing is to be attributed?
- Is the proposed new “PF” to be included in the MHR and be balanced with ACE? If so, this is unreasonable and unrealistic. This mortality should be accounted for in other sources of fishing-related mortality.

As we set out above in our comments regarding C7, this mortality is accommodated in the allowance made for other sources of fishing-related mortality (as the seven examples provided show). If MPI want to amend how this mortality is characterised, that component of the established allowances made under s 21 of the *Fisheries Act 1996* must be moved into the TACC.

PART 3: CONSULTATION

Legal guidance

What constitutes consultation is well-established and the following passage sets out a summary of the Court of Appeal's view (emphases added):⁹

Consultation must allow sufficient time, and a genuine effort must be made. It is a reality not a charade. The concept is grasped most clearly by an approach in principle. To "consult" is not merely to tell or present. Nor, at the other extreme is it to agree. Consultation does not necessarily involve negotiation toward an agreement, although the latter not uncommonly can follow, as the tendency in consultation is to seek at least consensus. Consultation is an intermediate situation involving meaningful discussion ...

Implicit in the concept 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. It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh. Beyond that, there are no universal requirements as to form. Any manner of oral or written interchange which allows adequate expression and consideration of views will suffice. Nor is there any universal requirement as to duration. In some situations adequate consultation could take place in one telephone call. In other contexts it might require years of formal meetings. Generalities are not helpful.

Several observations are made based on the passage above. First, there must be sufficient time. The proposed changes are significant and amend long-standing, technical and well-understood reporting requirements. The proposals would significantly revise these in form and function. The changes directly affect thousands of individuals from quota owners, LFRs and permit holders. These people are located through New Zealand, many residing in regional communities. Given the scope of what is proposed, we consider a four-week consultation is inadequate, this is particularly so when the empowering Regulations were not subject to any public consultation with those affected and were only made available shortly before the consultation on the Circulars.

Second, the short timeframe is exacerbated by the lack of clarity in what is proposed (the material was released on 21 July 2017 and submissions due 21 August 2017). The Court of Appeal notes that "the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses." It was pointed out to MPI early on that the Regulations and Circulars are opaque, technical and difficult to navigate. The material on Reporting alone runs to 150 pages, within three documents that must constantly be cross-referenced to understand the consequences of what MPI propose.

To provide clarity, MPI undertook to provide some explanatory material to assist fishers. This material was not provided until 4 August 2017 and when provided was incomplete in that it provided guidance for only one of 11 fishing methods and did not provide specifics for the various other Reports that fishers are required to provide (NFPS Reports, Processing Reports, Disposal Reports and Landing Reports). As will be apparent from this submission, and those of other industry bodies, there remains considerable uncertainty about what MPI propose. The existence of which makes it very hard for the party consulted to make intelligent and useful responses.

MPI was ill-prepared for the consultation having neither the necessary explanatory material available nor staff available to respond to requests for clarity. Aspects of the explanatory material relating to GPR were also inconsistent with the Regulations and requests made to MPI for clarity often went unanswered.

Third, unlike some previous consultations where MPI undertook an extensive roadshow-based communication programme, the approach to this consultation was *ad hoc* and not focussed on those most affected. While meetings were sought with sector representative entities like Fisheries Inshore New Zealand, these organisations largely represent quota owners. It is vessel operators that bear the cost and liability of *Fisheries (Geospatial Position Reporting) Regulations 2017*, they also have responsibility for completing the various reports required by MPI under the *Fisheries (Reporting) Regulations 2017*. Appropriate consultation would have identified those most affected and made some attempt to ensure they understood what was proposed and had the opportunity to respond, that did not occur. It would appear that consultation responses were driven by "squeaky wheels" and many fishers have had no opportunity to have the proposals explained to them or to discuss them with MPI.

Specific requests to meet fishers in major ports were also declined.

⁹ *Wellington International Airport Ltd v Air NZ* [1993] 1 NZLR 671, 675.

Fourth, we expect that MPI will give effect to the requirements of good consultation by keeping an open mind and being ready to change what is proposed to provide for a better outcome, or even start afresh. It is unfortunate that no consultation was conducted on the Regulations themselves as it is clear that they could be materially improved.

Ministry Policy on Consultation

The Ministry of Fisheries prepared detailed information on its consultation processes. These included Policy Guidance regarding the operation of section 12 of the *Fisheries Act 1996* and a formal Stakeholder Consultation Process Standard. Notwithstanding the requirements in section 12 do not apply in this circumstance, the guidance remains instructive.

The key components that need to be incorporated into statutory consultation required by the Fisheries Act have been identified as follows:

- *A well-defined proposal to be consulted on.*
- *Provision of appropriate information to those being consulted to enable them to effectively participate in the consultation process (this should include the particular proposals up for discussion as well as the consultation process to be followed).*
- *Adequate time allowed for those consulted to:*
 - *Consider information provided.*
 - *Request further information or clarification.*
 - *Consult with those they represent.*
 - *Formulate their ideas and responses.*
- *Appropriate opportunity must be provided for those consulted to convey their views and due notice must be taken of those views.*
- *Responses must be received with an open mind and due respect accorded those views before the decision is made.*

Similarly, the Ministry's consultation Standard set out the fundamental elements of good consultation as follows:

- *A statement of a proposal not yet decided upon*
- *Listening to what others have to say and considering responses*
- *Reasonable time allowed for consideration and response*
- *Sufficient information provided to those consulted to enable their effective participation.*
- *The decision-maker keeps an open mind about the outcome and the decision to be made throughout the consultation process.*

Also adopted in the Consultation Standard was a performance measure of allowing a minimum of 30 working days for stakeholder consultation.

Implementation

Although outside the scope of the current consultation on the Circulars, we have repeatedly raised concerns about the timeframe and process for any subsequent implementation of IEMRS. As stated, there are not yet decisions made about key aspects of GPR and ER which precludes the development of software or sourcing of hardware that would be required to implement the proposals.

Even if the necessary detail was available now, a significant work programme would be required to develop and obtain software, enter contractual arrangements, agree on liability and indemnity, distribute software, train crew, test and de-bug software, source hardware, install hardware, integrate software and hardware systems, test hardware etc. At present the specifications are not complete and while solution providers may be some way down the track, progress will be limited by the quality and accuracy of the specifications provided by MPI.

We have sought an Implementation Plan from MPI but to date this has not been made available.

It is unclear what role MPI see themselves undertaking in the implementation; we have received mixed signals. While there are no explicit statements from MPI, we have received assurances that they are developing implementation plans. In contrast, we have also been told that once the Circulars setting out the various

requirements have been finalised, it is up to the industry and the market to comply. We consider that for MPI to abrogate responsibility and assume a market that does not yet exist, for untested and poorly-specified requirements is untenable.

We can agree that solution providers will need to train the fishing sector in the operational use of their product, but there remains a need for MPI to explain the obligations and requirements of the GPR and ER framework to operators and permit holders and provide clarity about the detail of the framework. That is not a role for industry or solution providers to undertake. MPI has shown no inclination to collaborate on implementation planning or provide industry with any indication that it is preparing an implementation plan.

ANNEX ONE—REFERENCES TO PREDATION AS A COMPONENT OF OTHER SOURCES OF FISHING-RELATED MORTALITY IN MPI DOCUMENTS

MPI references to predation being included in the allowance for other sources of fishing-related mortality are found in papers on several fisheries, some examples are provided as follows.¹⁰

Southern Bluefin Tuna

35. The current allowance of 4t for other sources of fishing related mortality was set based on observer data for what was at the time a low level of predation and discards within the southern bluefin tuna fishery.¹¹

Albacore

Other sources of mortality

Discarding of albacore has not been reported in the albacore troll fishery (based on limited observer coverage in the 1980s). Low discard rates (average 2.9%) have been observed in the longline fishery over the period 2006-07 to 2009-10. Of those albacore discarded, the main reason recorded by observers was shark damage. Similarly, the loss of albacore at the side of the vessel was low (0.6%). Mortality in the longline fishery associated with discarding and loss while landing is estimated at 1.8% of the albacore catch by longline.

Bigeye tuna

Other sources of mortality

The estimated overall incidental mortality rate from observed longline effort is 0.23% of the catch. Discard rates are 0.34% on average (from observer data), of which approximately 70% are discarded dead (usually because of shark damage).

Moonfish

Other sources of mortality

There is no information on other sources of mortality although moonfish are occasional prey of blue and mako sharks in New Zealand waters, suggesting there may be some unobserved shark depredation of longline caught moonfish.

Pacific Bluefin

Other sources of mortality

There is likely to be a low level of shark damage and discard mortality of Pacific bluefin caught on tuna longlines that may be on the order of 1–2% assuming that all tuna species are subject to equivalent levels of incidental mortality.

Bluenose

Other sources of mortality

There have been reports of depredation by Orca on bluenose caught by line fisheries.

¹⁰ Ministry for Primary Industries (2015). Fisheries Assessment Plenary, November 2015: Stock Assessments and Stock Status. Compiled by the Fisheries Science Group, Ministry for Primary Industries, Wellington, New Zealand. 535p.

¹¹ Review of Sustainability and Management Measures for Southern Bluefin Tuna, Initial Position Paper. MPI Discussion Paper No: 2013/41.